Recent Improvements in Protections for Sarbanes-Oxley Whistleblowers in the Workplace

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Changing Currents in Employment Law 2011: Recent Trends and Developments

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by
David J. Marshall [1]
and
Julie I. Zibulsky

Katz, Marshall & Banks, LLP
1718 Connecticut Ave. NW
Sixth Floor
Washington, D.C. 20009
(202) 299-1140
www.kmblegal.com
marshall@kmblegal.com

[1] David J. Marshall is a founding partner with Katz, Marshall & Banks, LLP, an employment and whistleblower law firm in Washington, D.C., that specializes in the representation of whistleblowers in cases arising under anti-retaliation statutes, the False Claims Act, Internal Revenue Service whistleblower program and new SEC whistleblower program and the law. Julie Zibulsky is an associate with the firm.

I. Introduction

In the nearly ten years since the enactment of the Sarbanes-Oxley Act of 2002 ("SOX"), the Act's whistleblower-protection provisions have generated a considerable body of case law. Section 806 of the Act, 18 U.S.C.A. § 1514A, provides a cause of action for employees of publicly traded companies and certain of their subsidiaries who allege that they were retaliated against because they provided information about, or participated in an investigation relating to, what they:

> reasonably believe[d] constitute[d] a violation of section 1341 [mail fraud], 1343 [wire fraud], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

Despite this clear language, for most of the past decade the Administrative Review Board ("ARB") of the U.S. Department of Labor ("DOL") and courts hearing appeals from the ARB have maintained a very narrow view of what constitutes "protected activity" under the statute. Most decisions prior to 2010, for example, afforded Section 806 protections only to employees who complained about fraud against shareholders, while fewer recognized that the plain language of the statute covered complaints about violations of any of the laws or regulations enumerated in that section. Courts also generally found that Section 806 applied only to publicly traded companies and not to their subsidiaries, a misinterpretation that Congress clarified by passage of Section 929A of the Dodd-Frank Act in July 2010. A string of cases originating with the ARB and followed by several circuit court decisions also required the complainant to establish that the activity for which protection was claimed "definitively and specifically" related to one or more of the laws listed under § 1514A(a)(1), even though the statute contained no such requirement.

This overly restrictive approach made it nearly impossible for SOX whistleblowers to win their cases before the ARB and the courts even where the facts appeared to state strong claims under the language of the statute. Whistleblowing employees faced very unfavorable odds long before their cases ever made it to the ARB or the courts because the U.S. Occupational Safety and Health Administration ("OSHA"), which was tasked with investigating SOX claims and issuing initial determination letters, issued findings for whistleblowers in only a tiny percentage of cases.[1] As of April 15, 2009, some 1,400 Sarbanes-Oxley claims had been filed with OSHA since the law's enactment in 2002. Of these, whistleblowing employees prevailed in only 20 of the 1,200 or so that were not settled or voluntarily withdrawn. See Laurence S. Moy, et al., "Understanding the

[1] Employees who believe they have claims under SOX 806 must file their claims with the OSHA, which investigates charges of retaliation under the whistleblower-protection provisions of SOX and 20 other federal statutes. These include the Energy Reorganization Act, 42 U.S.C. § 5851 (nuclear safety); the FDA Food Safety Modernization Act, 21 U.S.C. § 399d (food safety); the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087; and a number of other laws regulating transportation, aviation, consumer credit and the environment. The DOL's Office of Administrative Law Judges maintains a very useful law library with a comprehensive collection of statutory, administrative and judicial resources regarding these laws and adjudication of claims arising under them. See "OALJ Whistleblower Collection" at http://www.oalj.dol.gov/LIBWHIST.HTM.

Securities Laws 2010: Whistleblower Claims Under the Sarbanes-Oxley Act of 2002," 1843 PLI/Corp149, 152 (2010).

This pattern is rapidly changing. In the past two years, the ARB and federal courts have begun issuing important decisions that have favored employees far more than in the past. The Dodd-Frank Act of 2010 amended SOX's whistleblower provisions in a number of ways that allow employees to pursue SOX claims on a more level playing field. And OSHA has begun a complete overhaul of its operations, issuing a new investigations manual, increasing funding and its number of investigators, and ordering reinstatement of whistleblowers where it previously had not.

This article reviews some of the more important, recent decisions by the ARB and federal courts that have expanded whistleblower protections for employees under the Sarbanes-Oxley Act, and also looks at some of the efforts that OSHA is currently making to revitalize its whistleblower-protection function.

II. The ARB and the Courts

a. Expanding Protected Activity

Over the course of the last decade, the ARB and some courts had radically restricted what the concept of protected activity as described in the language of the Sarbanes-Oxley Act. In a series of decisions beginning with Sylvester v. Parexel Int'l LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042 (ARB May 23, 2011), the ARB began what has become a steady trend in the direction of strengthening protections for whistleblowers under Sarbanes-Oxley.

i. Sylvester v. Parexel

Kathy Sylvester and Theresa Neuschafer were employees of Paraxel International LLC, a company that conducted clinical evaluations for pharmaceutical companies. In 2006, Sylvester and Neuschafer filed separate whistleblower complaints with OSHA, alleging that Parexel had discharged them in violation of SOX's anti-retaliation provisions. Between March and May of 2006, they complained to multiple supervisors that clinicians were violating the FDA's Good Clinical Practice standards by falsifying data during clinical trials of drugs for major clients. Parexel did not investigate their concerns or take any corrective action. In fact, after one of the employees Neuschafer accused of falsifying data physically and verbally attacked her, Parexel issued Neuschafter and Sylvestor letters of warning for provoking the attack and did not discipline the attacker. Following their complaints, both women were also subjected to retaliation from co-workers, including expressions of hostility and vandalism of their belongings. Ultimately, Parexel terminated Sylvester and Neuschafer on the grounds that they were not "team players."

After OSHA dismissed their complaints, Neuschafer and Sylvester appealed to an Administrative Law Judge, who also dismissed their claims. The ALJ held that the charges they filed with OSHA failed to allege protected activity within the meaning of SOX because their complaints to Parexel management: (1) did not relate "definitively and specifically" to a violation of any of the laws enumerated in SOX 806; (2) did not involve an actual violation by Parexel of any of

the laws enumerated in SOX 806; (3) did not involve shareholder fraud, fraud generally, or conduct otherwise adverse to shareholders; and (4) did not constitute reasonable concerns about SOX violations. Sylvester, ARB No. 07-123, slip op. at 7. The ALJ dismissed the case for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Sylvester, at 11.

The ARB reversed, first determining that subject matter jurisdiction "clearly existed" and that the ALJ erred when he dismissed the case pursuant to Fed. R. Civ. P. 12(b)(1). Id. at 10–12. While the ARB could have stopped here and remanded the case to the ALJ, it began its opinion by stating that "a remand on that basis alone would not move this case forward because, as discussed below, we disagree with a number of the ALJ's conclusions regarding a complainant's burden to establish protected activity under SOX Section 806." Id. at 8. The ARB thus took the opportunity to issue a comprehensive opinion, correcting a number of the recently applied, overly restrictive applications of SOX.

As an initial matter, the ARB ruled that the heightened pleading standard that the Supreme Court established in Twombly and Iqbal[2] for cases filed in federal district court was inapplicable to SOX whistleblower claims initiated with OSHA. Id. at 12. Unlike the Federal Rules of Civil Procedure, DOL regulations require "no particular form of complaint," except that the complaint must be in writing and should contain a full statement of the acts and omissions believed to constitute violations, and their relevant dates. 29 C.F.R. § 1980.103(b).[3] Thus, a heightened pleading requirement would impermissibly force SOX complainants to file the equivalent of a federal court complaint when they first initiated contact with OSHA.

The ARB pointed out that the DOL had expressly rejected such a heightened standard at the complaint stage when it promulgated SOX's regulations, and that this standard would contravene OSHA's explicit duty to interview the complainant, obtain additional evidence and otherwise supplement the complaint through its investigation. Further, the ARB explained:

> SOX claims are rarely suited for Rule 12 dismissals. They involve inherently factual issues such as "reasonable belief" and issues of "motive." . . . ALJs should freely grant parties the opportunity to amend their initial filings to provide more information about their complaint before the complaint is dismissed, and dismissals should be a last resort. Dismissal is even less appropriate when the parties submit additional documents that justify an amendment or further evidentiary analysis.

[2] See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. --, 129 S. Ct. 1937 (2009).

[3] Since the ARB's decision in Sylvester, OSHA has issued a revised investigations manual that clarifies that employees may file oral complaints under all 21 whistleblower statues, including SOX. See Department of Labor, Occupational Safety and Health Administration, Whistleblower Investigations Manual (Aug. 20, 2011), Chap. 2, Sec. II ("Although the implementing regulations for a few of the whistleblower statutes indicate that complaints must be filed 'in writing,' [including SOX] that requirement is satisfied by OSHA's longstanding practice of reducing all orally-filed complaints to writing.") (footnotes omitted).

Sylvester, ARB No. 07-123, slip op. at 13. The ARB stressed that Rule 12 motions are "highly disfavored" and "impractical" in the DOL process, in part because the regulations governing the handling of whistleblower complaints by the DOL's administrative law judges do not contain a rule analogous to Rule 12. Id. at 13.

The Sylvester ARB also held that a SOX whistleblower does not need to show that an actual violation of one of the laws or regulations enumerated in Section 806 has already occurred, and instead is protected as long as she had a subjectively and objectively "reasonable belief" that the conduct she complained about amounted to a violation that was likely to occur. Id. at 14–16. In other words, a complainant does not need to wait until a violation has been committed as long as the employee reasonably believes, based on facts know to her, that the violation is likely to happen. Id. at 16. The ARB in Sylvester made two additional key points: (1) the employee does not need to explain the reasonableness of her belief internally or to proper outside authorities; and (2) "objective reasonableness" is a factual question generally not suitable for dismissal as a matter of law, in part because it "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." Id. at 15 (quoting Harp v. Charter Communications, 558 F.3d 722, 723 (7th Cir. 2009).

In what will likely be viewed as the most far-reaching part of its decision, the ARB held that requiring a SOX whistleblower to show that her complaints "definitively and specifically relate[d]" to one of Section 806's enumerated laws or regulations ignored the plain language of the Act, which protects good-faith, reasonable reports of fraud and securities violations. Id. at 17–19. The requirement than an employee complain of conduct that "definitively and specifically" relates to a violation of one of the categories of fraud or securities violations named in SOX 806 had been the basis for dismissing a great many whistleblower complaints. The ARB noted that its earlier decision in Platone v. FLYi, Inc. ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006), had borrowed this restrictive concept from case law interpreting a specific provision of the Energy Reorganization Act that had no parallel in the SOX anti-retaliation provisions. Beyond being inappropriate for this reason, the ARB found, the importation of the "definitive and specific" standard conflicted with Section 1514A's express prohibition of discriminating against any employee for providing information about conduct the employee "reasonably believes" to be a SOX violation. Sylvester, ARB No. 07-123, slip op. at 18–19.

The Sylvester ARB noted that a "definitively and specifically" test had "been followed in a number of ARB decisions, and deferred to on appeal in several circuit court decisions with neither reflection nor further analysis of the term's origin or correct application," and that it had "evolved into an inappropriate test . . . often applied too strictly." Id. at 18 (footnote omitted). It also noted, however, that a number of other circuit court decisions had made no such reference to that language or test. Rather than delve further into these divergent interpretations, the ARB reemphasized the language of the legislation itself—which requires only that the employee report conduct she reasonably believes to be a violation of federal law—and held that "[i]t was therefore error for the ALJ to dismiss the complaints in this case for failure to meet a heightened evidentiary standard espoused in case law but absent from the SOX itself." Id. at 19.

Next the ARB agreed with a line of cases holding that a SOX whistleblower need not complain about fraud on shareholders. Id. at 19–21. Looking to the language of Section 806, the ARB explained that the first five enumerated categories of illegality would be rendered meaningless if each also required a specific complaint of fraud on shareholders. Id. at 20. Further, the language of SOX 806 indicates that mail fraud, wire fraud, securities fraud, and bank fraud, or a violation of an SEC or securities regulation, while not immediately affecting investors, may be a critical step in what would ultimately result in shareholder fraud. Id. at 21.

Finally, Sylvester corrected what had become an increasingly common misapplication of SOX – requiring whistleblowers to allege all the elements of a securities fraud claim. Id. at 21–22. In its decision, the ARB explained that requiring an employee to allege or prove all the elements of fraud would be in conflict the statute's reasonable belief requirement and undermine the fundamental purpose of Section 806, which is to protect and encourage disclosures not only of existing fraud, but also potential fraud in its earliest stages. Id. at 21.

ii. Funke v. Federal Express

Shortly after Sylvester, the ARB again increased the scope of protected SOX activity in Funke v. Federal Express Corp., ARB No. 09-004, ALJ No. 2007-SOX-043 (ARB July 8, 2011). At issue on appeal before the ARB was whether the complainant, a FedEx courier, had engaged in protected activity under SOX when she alerted local law enforcement authorities that a FedEx customer was using FedEx as a conduit for what she suspected was mail fraud. The complainant, Heidi Funke, alleged that FedEx had violated the whistleblower-protection provisions of SOX by suspending her in retaliation for her disclosures to local law enforcement. Prior to her whistleblowing activity, Funke, who had worked at FedEx for over 15 years, had maintained an exemplary employment record.

In her complaint, Funke alleged that she made a series of reports to her dispatcher about suspicious packages in accordance with her training. When the dispatcher refused to relay her concerns to the fraud or security department of FedEx, she went to the local sheriff's office and informed them of her suspicions. FedEx chastised Ms. Funke for reporting to law enforcement and placed her on suspension. Her supervisor said that "FedEx's policy, written or not, prohibited her from notifying law enforcement regarding suspected illegalities encountered in the course of her duties." Id. at 5. Subsequently, FedEx officials told Funke that informing law enforcement about FedEx's operations "opened FedEx up to civil and criminal liability" and that the issue was being addressed at the "highest levels of security, human resources, and legal," which all "wanted to fire her for going to law enforcement." Id.

Both OSHA and the ALJ dismissed Funke's complaint, reasoning that reports of mail fraud allegedly perpetrated by a third party were not protected under SOX, and that Ms. Funke had therefore failed to prove she was engaged in protected activity. Referring back to the plain language of the statute, which contains no requirement that the reported conduct be committed by the complainant's employer, the ARB concluded that the reporting of third-party conduct, if reasonably believed to constitute a violation of a law listed in SOX 806, is protected activity. The ARB noted that two recent federal district court cases, Feldman v. Law Enforcement Assocs. Corp., No. 5:10-

CV-08-BR, 2011 WL 891447, at *12 (E.D.N.C. Mar. 10, 2011) and Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026, at *5-6 (S.D.N.Y. Jan. 14, 2011) had reached the same conclusion. Id. at 8.

The Funke decision not only expanded the range of entities about whose fraudulent conduct a whistleblower could make a protected disclosure, but it also expanded the scope of parties to whom a whistleblower could report her concerns and receive protection under SOX 806. FedEx argued that Funke's reports to the company's dispatchers were not protected by SOX because the dispatchers had no supervisory authority over her, and that her reports to the Sheriff's Department were likewise unprotected because they were not to "federal law enforcement" as required by the statute.

The ARB rejected the former defense, finding that SOX protects employees who report misconduct not only to supervisors but also to "such other person working for the employer who has the authority to investigate, discover, or terminate misconduct." Id. at 15; 18 U.S.C.A. § 1514A (a)(1)(c). The ARB rejected the latter defense on grounds that Section 1514A was unclear as to whether it covered only reports to federal authorities. Despite its language, the ARB reasoned, it was the clear intent of the statute to protect all such reports and not to exclude reports to local officials. Id. at 16. The ARB also reasoned that Funke's awareness of a prior investigation of a similar matter by local officials in which federal officials became involved made it reasonable for her to believe local officials would bring federal law enforcement authorities into the current investigation. Funke, ARB No. 09-004, slip op. at 15.

The ARB refuted the reasoning of Administrative Law Judge that Funke's complaint was not protected because SOX requires the misconduct complained of to be ongoing rather than forthcoming, and that it must relate to fraud against shareholders. Pointing to its recent Sylvester decision, delivered *en banc*, the ARB reaffirmed that "disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen. Such a belief must be grounded in facts known to an employee, but an employee need not wait until a law has actually been broken to register a concern." Id. at 11. It likewise reaffirmed the holding in Sylvester that disclosures do not need to relate to fraud against shareholders in order to be considered protected activity under SOX. Id.

iii. Sharkey v. J.P. Morgan Chase & Co.

In Sharkey v. J.P. Morgan Chase & Co., No. 10 Civ. 3824, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011), the court, citing Allen v. Admin. Review Bd., 514 F.3d 468, 477 (5th Cir. 2008), held that the plaintiff did not sufficiently state "specific violations" when she informed her superior that she "believed their client was engaged in illegal activities." J.P. Morgan's compliance and risk management team contacted Sharkey to express concern that one of her employer's clients might be involved in illegal activities, including mail fraud, bank fraud, and money laundering. In response to this allegation, Sharkey conducted independent research into the client's activities and determined that the client was violating federal securities laws. Sharkey communicated this to her superior. Despite evidence that the J.P. Morgan knew that the illegal activities likely involved mail fraud, bank fraud and securities violations, the court dismissed the plaintiff's SOX claim for lack of specificity on the grounds that Sharkey had not sufficiently identifed "the allegedly illegal conduct."

Although the court dismissed on these grounds, the Sharkey decision is more significant for its finding that the plaintiff engaged in protected activity when she complained not about the conduct of her employer, J.P. Morgan, but of a client of the employer. Id. at *6; see also Feldman v. Law Enforcement Assocs. Corp., 779 F. Supp. 2d 472 (E.D.N.C. Mar. 10, 2011) (citing and following Sharkey's holding that SOX does not require that the complainant reports fraudulent conduct of his employer in order to be entitled to protection). "In light of the language of the statute and the legislative history," the court wrote, "Plaintiff has properly pled that she engaged in conduct protected by 18 U.S.C. § 1514A when she repeatedly reported her concerns regarding the Client's illegal activity to the Individual Defendants and JPMC's risk and compliance team." Id. To the extent that courts adopt the view that SOX prohibits a covered employer from retaliating against an employee for her reports of unlawful conduct by someone other than the employer, this case will have initiated a significant broadening in the coverage of the statute. The ARB cited this decision for support when it issued Funke v. FedEx, discussed above, also holding that reports of third-party conduct qualifies as protected activity.

iv. Inman v. Fannie Mae

Thomas Inman filed a complaint alleging that Fannie Mae violated SOX when it discharged him after he reported multiple accounting inaccuracies. After he first reported a $52.4 million expense overstatement to management in a memorandum and presentation, he was told to stop analyzing unreconciled balances. Fannie Mae recorded the $52.4 million in its general ledger without any reflection of the error. Two months later, Inman reported another large accounting error and was chastised by a supervisor. Although Fannie Mae was required by its policies to provide Inman with a review of his performance halfway through his 180-day probationary period, he did not receive a review until he had worked 129 days. This review was unfavorable and Inman was then terminated in May without a termination letter or explanation for his firing. The ALJ dismissed Inman's case on the basis that he had not engaged in protected activity. The ARB reversed.

The ARB held that the ALJ had erred in concluding that Inman did not engage in SOX-protected activity for three reasons. Citing Sylvester, the ARB reiterated that a complainant's reports do not have to "definitively and specifically" relate to an one of 18 U.S.C. 1514A's enumerated categories because such a requirement would conflict with the reasonable belief requirement. Inman, ARB No. 08-060, slip op. at 7. Likewise, the ARB followed Sylvester's holding that a SOX complainant is protected for complaining about violations that do not relate to shareholder fraud. Id. Finally, in another expansion of protected-SOX activity, Inman held that an employee's reports of misconduct already known to the employer are protected from retaliation under SOX. "[N]either the SOX nor its implementing regulations," the ARB reasoned, "indicate that an employee does not engage in protected activity when he informs his employer about violations of which the employer is already aware."). Id.

b. Expanding the Scope of Adverse Action: Menendez v. Halliburton

In a similar vein to the more expansive holdings regarding protected activity under SOX, a very recent ARB decision gave a broad reading to what qualifies as an adverse action for purposes of SOX. Menendez v. Halliburton, Inc., ARB Nos. 09-002, -003, ALJ No. 2007-SOX-005 (ARB Sept. 13, 2011). In Menendez, the ARB rejected the respondent's argument that an adverse action had to be a "tangible" or "ultimate" employment action, and instead held that an adverse employment action was appropriately defined as any unfavorable employment action that was more than trivial, including a purposeful breach of the complainant's confidentiality, as was at issue in the case.

Anthony Menendez filed a complaint alleging that his employer, Halliburton, Inc. had retaliated against him in violation of SOX's employee-protection provisions after he alerted the SEC and Halliburton's Audit Committee about potential violations of Generally Accepted Accounting Principles ("GAAP"). After OSHA dismissed the complaint, the ALJ determined that Menendez had engaged in SOX-protected activity, but dismissed his complaint on the basis that he had failed to prove that Halliburton had subjected him to retaliatory, adverse action. The ARB reversed, holding that Halliburton's breach of Menendez's confidentiality with regard to the complaint he filed with the audit committee qualified as an adverse action, and remanded for a determination of whether his protected activity was a contributing factor to that adverse action.

As the Director of Technical Accounting Research & Training, Menendez was responsible for monitoring and researching technical accounting issues, and advising and training field accountants. Mendendez raised concerns to a vice president and the controller for Halliburton's Energy Services Group about their revenue-recognition practices. In response to these concerns, in a taped meeting, the VP told Menendez that he was not a team player, not sensitive to Halliburton politics, and should collaborate more with colleagues on accounting issues. Subsequently, Halliburton studied the issues Menendez raised and disagreed with his concerns. The VP then refused to meet with Menendez to further to discuss his concerns for the remainder of the year. Menendez instead met with the VP of Financial Controls, who told him if he felt strongly he should contact the Audit Committee. After this, Menendez filed a confidential complaint with the SEC reporting that Halliburton, with the knowledge of its external auditor, was engaging in "questionable" accounting practices.

After learning that the SEC had contacted Halliburton in response to his confidential complaint, Menendez sent what he thought would be a confidential email to Halliburton's Audit Committee raising the same concerns he had raised to the SEC. Despite Halliburton's stated policy assuring confidentiality of such complaints, the company's general counsel, in an email instructing that documents be preserved, identified Menendez as the party responsible for the SEC investigation to a number of company management officials, including those implicated by Menendez's allegations. One of those implicated forwarded the email to fifteen members of the Finance & Accounting team, including Menendez.

Upon receiving the email, Menendez immediately left the office and stayed out the rest of the week on prescheduled leave. When he returned, his co-workers and the auditors he generally worked closely with refused to interact with him. Menendez, at the request of his legal counsel, was granted six months paid administrative leave because of the "current environment and circumstances involving the SEC investigation." Id. at 7 (footnote omitted). Shortly after this, the company shifted the courses Menendez was supposed to teach at a company Accounting Summit to someone else. When Menendez's leave of absence was about to expire, the SEC formally notified him that no enforcement action was being recommended. Halliburton contacted Menendez and told he must return to the same position but that he would now report to the Director of External Reporting for the Finance & Accounting group. Menendez resigned his employment because he thought the new reporting requirement constituted a demotion and that he believed Halliburton intended to continue violating securities laws and filing misleading financial information.

The ARB reversed the ALJ's holding that Menedez did not prove he had suffered any adverse action as a result of his protected activity. The ARB first held that while Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), which establishes the standard for adverse action in Title VII cases, is a helpful interpretive tool in whistleblower cases, the plain language of Section 806's adverse action provision controls. Menendez, ARB Nos. 09-002, -003, slip op. at 15. Contrasting the language of Section 806 with that of Title VII provisions, the ARB explained that Section 806 "language explicitly proscribes non-tangible activity, which evinces a congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers. This difference in statutory construction convinces us that adverse action under SOX Section 806 must be more expansively construed than that under Title VII." Id. at 17.

Noting the similarity between the anti-retaliation language in SOX and the AIR 21 law protecting whistleblowers in the aviation industry, the ARB adopted for SOX cases the standard of actionable adverse action it had established for AIR 21 cases in Williams v. American Airlines, Inc., ARB No. 09-018, slip op. at 12–15(ARB Dec. 29, 2010). Id. at 17. Pursuant to this standard, adverse actions are "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." Id. (quoting Williams, ARB No. 09-018, slip op. at 10–11 n.51) (quotations omitted). The ARB rejected the respondent's argument that because Section 806 parallels Title VII's anti-discrimination provision language, including the "terms and conditions" of employment clause, more closely than its anti-retaliation provision language, adverse action under Section 806 should be interpreted to require an "ultimate employment decision." Instead the ARB considered the remedial purpose of SOX and found that, "[r]ather than a limitation on what is to be considered adverse action under Section 806, we are of

the opinion that 'terms and conditions of employment' are not significant limiting words and should be construed broadly within the remedial context of Section 806." Id. at 18.

The ARB noted that before 2000, whistleblower law had consistently prohibited a wide range of employment actions, not limited to tangible consequences, monetary loss or ultimate employment decisions, but that, in the course of about a decade, these DOL precedents had been eroded by the adoption of adverse-action standard from Title VII cases. "This reliance on Title VII adverse action precedent," the ARB noted, "had the effect of narrowing the scope of actionable activity in direct contravention of earlier DOL precedent, which more faithfully reflected the congressional intent to provide broad protection for employees who engage in behavior Congress sought to encourage." Id. at 20 (footnote omitted). Because Burlington Northern had reinstated a broader definition of "adverse action" under Title VII as any action that would dissuade a reasonable employee from engaging in protected activity, the ARB noted that this case could be a useful starting place but that the ALJ had ignored the plain language of SOX and had also misapplied Burlington Northern. Id. at 20.

In his complaint, Menendez argued that the company's disclosure of his identity to various managers had breached his right to confidentiality, in violation of SOX Section 301, which requires that publicly-traded companies establish procedures for receipt of confidential complaints by employees regarding questionable accounting or auditing matters. 15 U.S.C. § 78j-1(m)(4). Because the purpose of the confidentiality provision is to encourage internal reporting, permitting employers to expose the identity of the reporter would "undermine SOX's overall purpose and objectives." Id. at 24. The right to confidentiality in Section 301 establishes a term and condition of employment within the meaning of Section 806's whistleblower protection provision, and a breach of confidentiality constitutes a violation of that term or condition and thus an adverse action. Id. at 24.

c. Procedural Improvements

The recent emphasis on encouraging protected disclosures has generated a number of decisions that lower procedural bars for whistleblowers. As discussed above, for example, Sylvester v. Parexel held that the heightened pleading standard applicable to complaints filed in federal court is not appropriate and does not apply to SOX complaints. Sylvester, ARB No. 07-123, slip op. at 12. The ARB and at least one federal court have also shown a willingness to exercise their discretion to reach equitable results in recent cases where they might not have in the past. Three cases – one involving the issue of waiver of an argument first raised on appeal and two involving the retroactive application of parts of the Dodd-Frank amendments to SOX 806 – are discussed below.

i. Avlon v. American Express Co.

In Avlon v. American Express Co., ARB No. 09-089, ALJ 2008-SOX-051 (ARB Sept. 14, 2011), the ARB exercised its discretionary power to consider issues not raised by the petitioner below. Christine Avlon filed two complaints with OSHA, *pro se*, against American Express ("AMEX") after it terminated her employment. OSHA and the ALJ both dismissed her

consolidated complaint as untimely because she had not filed within 90 days of a September 6, 2007, email from the director of human resources. The ARB reversed, finding that the September 6 email was equivocal and did not set a firm date for Avalon's termination. Subsequent email exchanges indicated that the date was uncertain and that Avlon might return to work. The ARB thus held that the ALJ's ruling that the first email had triggered SOX's statute of limitations was error as a matter of law, and that a later email had in fact triggered the statute of limitations.

AMEX petitioned for reconsideration, arguing that the ARB ruled on an issue—timeliness—for which Avlon did not petition for review and that she had therefore waived. The ARB acknowledged that issues not raised in the briefs may be considered waived, but it noted that courts have discretion to consider waived arguments when "necessary to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding." Id. at 5 (quotations and citations omitted). The ARB held that it had authority to review the claim because to do otherwise would be a manifest injustice, as it would likely result in the dismissal of Avlon's entire case and because no additional fact-finding was required.

ii. Johnson v. Siemens Building Technologies, Inc.

Recent decisions from the ARB and a federal district court have interpreted provisions of the Dodd-Frank Act as either applying retroactively or not requiring retroactivity in order to be applicable, thereby increasing the number whistleblowers the Act will ultimately protect. Section 929A of the Dodd-Frank Act expanded the scope of SOX coverage to include subsidiary entities of publicly traded corporations "whose financial information is included in the consolidated financial statements of [publicly traded companies]." 18 U.S.C.A. § 1514A(a) (West 2011). Prior to enactment of the Dodd-Frank Act, employers frequently avoided the application of SOX's employee protection provisions by arguing that they were not a covered entity under SOX. With the exception of certain limited circumstances, the Department of Labor consistently interpreted SOX's whistleblower protection provisions to apply solely to publicly traded companies subject to the registration and reporting requirements of the Securities Exchange Act of 1934. Because of this restrictive interpretation that arguably contravened the plain language of SOX, wholly-owned subsidiaries of publicly traded companies – entities that are not subject to the registration and reporting requirements of the Securities Exchange Act – frequently avoided the application of SOX in instances of unlawful retaliation.

Section 929A of the Dodd-Frank Act corrected this restrictive interpretation of SOX coverage by ensuring that the anti-retaliation provisions of Section 806 of SOX applied to employees of publicly traded companies and to employees of subsidiaries of publicly traded companies whose financial information are incorporated into the consolidated financial statements of publicly traded companies. Accordingly, employers falling under this latter category can no longer avoid coverage of SOX merely because they do not file directly with the SEC.

In the recent case of Johnson v. Siemens Building Technologies, Inc., ARB NO. 08-032, ALJ No. 2005-SOX-15 (ARB Mar. 31, 2011) (*en banc*), the ARB found that this amendment was simply a "clarification" of existing law and need not be given retroactive effect in order for Section 806 to apply to subsidiaries in pre-amendment cases. This interpretation of the amendment was

consistent with the Senate Committee Report on the Dodd-Frank Act, which indicated that the new law:

> … amends Section 806 of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This **clarification** would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.

Senate Report 111–176 at 114 (emphasis added).

Previously, the Act's retaliation provisions had only sometimes been applied to private subsidiaries of publicly traded companies. See, e.g., Collins v. Beazer Homes USA, Inc., 334 F. Supp.2d 1365 (N.D. Ga. 2004), ("covered employee" where the officers of a publicly traded parent company had the authority to affect the employment of the employees of the subsidiary); Platone v. Atlantic Coast Airlines Holdings Inc., 2003-SOX-27 (ALJ Apr. 30, 2004) (employee of a non-publicly traded subsidiary was a covered "employee" where the company's parent was the alter ego of the subsidiary and the ability to affect the complainant's employment).[4] As noted above, however, the DOL and courts often dismissed SOX complaints because the whistleblower worked for a subsidiary. See Savastano v. WPP Group, PLC., 2007-SOX-34 (ALJ July 18, 2007) (employee not covered where complaint did not allege facts supporting a finding that the non-publicly traded employer and its non-publicly traded holding company were acting as agents of a publicly traded parent company).

The pre-Dodd-Frank period produced a number of interesting cases addressing the applicability of Section 806 to subsidiaries of publicly traded companies. See, e.g., Klopfenstein v. PCC Flow Technologies, Inc., ARB No. 04-149, 2004-SOX-11 (ARB May, 31, 2006) (applying agency theory to find application to subsidiary would be likely on remand to ALJ); Walters v. Deutsche Bank, et al., 2008-SOX-70, slip op. at 23 (ALJ Mar. 23, 2009) (structure and purpose of SOX requires application to "all employees of every constituent part of the publicly traded company, including subsidiaries and subsidiaries of subsidiaries which are consolidated on its balance sheets, contribute information to its financial reports, are covered by its internal controls and the oversight of its audit committee, and subject to other Sarbanes-Oxley reforms imposed upon the publicly traded company"). With the Dodd-Frank Act's "clarification" of this issue, it is now clear that Section 806 applies to subsidiaries without resort to arguments based on theories of agency, integrated employer, intertwined entities and the like.

[4] A subsequent ARB decision did not reach the corporate identity issue and instead dismissed the complaint on a finding that Platone did not engage in protected activity. Platone v. FLYi, Inc., ARB No. 04-154, ALJ No. 2003-SOX-27 (ARB Sept. 29, 2006).

iii. Pezza v. Investors Capital Corp.

Section 922 of the Dodd-Frank Act also contains a provision voiding pre-dispute arbitration agreements as they would apply to SOX claims. In Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225 (D. Mass. 2011), the District Court of Massachusetts held that the ban applied retroactively to SOX whistleblower claims. The plaintiff filed in District Court in January 2010, claiming he was wrongfully retaliated against in violation of SOX, after raising concerns relating to defendants' misconduct with securities transactions. The defendants raised the mandatory arbitration agreement contained in the plaintiff's employment agreement as an affirmative defense and moved to compel arbitration and either stay or dismiss the current action. On July 21, 2010, the Dodd-Frank Act enacted a bar to predispute arbitration agreements for whistleblower claims brought under SOX. The plaintiff argued that the arbitration clause was void; the defendants opposed, contending that the Dodd-Frank bar on SOX arbitration agreements did not apply retroactively.

The Court evaluated whether the clause banning arbitration should have retroactive effect according to the framework established by the United States Supreme Court in Fernandez-Vargas v. Gonzales, 548 U.S. 30, 37–38 (2006), which asks first whether Congress expressly prescribed the statute's reach. In the absence of an express statement, the court applies the normal rules of statutory construction to infer the intent of Congress as to the statute's temporal reach. If Congress's intent is unclear, the court then asks "whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of affecting substantive rights, liabilities, or duties on the basis of conduct arising before its enactment." Id. If so, the court will apply the presumption against retroactivity.

In this case, the district court concluded that Congress did not state its express intent regarding retroactivity of Section 922 and, further, applying the normal rules of statutory construction, that its intent was unclear. The court thus moved to the final question, whether the statute would produce prejudicial retroactive consequence. The court acknowledged that Section 922 affects contractual and property rights because it would effectively void a contractual provision agreed upon by the parties in the employment agreement. The presumption against retroactivity usually applies in such instances because these statutes related to "matters in which predictability and stability are of prime importance." Id. at 233 (quoting Landgraf v. USI Film Prods., 511 U.S. 244, 271 (1994). However, the court determined that retroactive application was nonetheless appropriate because the arbitration ban is essentially a jurisdictional statute. The court explained that the parties did not claim that the choice of venue – the Financial Industry Regulatory Authority or a court – would affect the substantive result of the case, and, thus, "conclude[d] that Section 922 of the Act should also be applied to conduct that arose prior to its enactment."

The U.S. District Court for the District of Nevada addressed the same question and reached a different conclusion in Henderson v. Masco Framing Corp., 2011 WL 3022535, at *3–4. The Henderson court held that the Dodd-Frank Act's SOX provisions are not retroactive, disagreeing with the Pezza court's conclusion that retroactive application of Section 922 affected the conferral of jurisdiction rather than substantive contract rights. Id. at *4. Instead, the Nevada court found,

"retroactive application of Dodd-Frank's SOX provisions would not merely affect the jurisdictional location in which such claims could be brought; it would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' or their earlier agreement." Id. (quoting Landsgraf).

d. Compensatory Damages Available for Pain and Suffering

In Brown v. Lockheed Martin Corp., ARB No. 10-050, ALJ No. 2008-SOX-00049 (ARB Feb. 28, 2011), the ARB affirmed the ALJ's award of compensatory damages for emotional pain and suffering without the testimony of a medical or psychiatric professional. Andrea Brown, the former Communications Director for Lockheed Martin Corporation in Houston, Texas, learned that the Vice President of Communications, Wendy Owen, had developed sexual relationships with several soldiers who were participants in Lockheed's "Pen Pal" program. Owen had visited welcome-home ceremonies on the pretext of business to have sexual affairs with the soldiers, purchasing luxury hotel rooms, limousine transportation, and resort access for her encounters, using Lockheed's money.

After Brown's anonymous complaint about Owen's behavior, her work environment worsened significantly. She was place under a hostile supervisor, stripped of her duties, her title, and her parking space, and made to work from home. Things devolved to the point that Brown went on medical leave, suffering from an emotional breakdown and deep depression.

OSHA denied Brown's claims of constructive discharge, but on appeal the ALJ ruled in her favor, finding that a reasonable person would have felt forced to resign under the same circumstances. The ALJ ordered Brown reinstated and a payment of $75,000 in compensatory damages. The ALJ reasoned:

> Compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation under 29 C.F.R. § 1980.109(b). The testimony of medical or psychiatric experts is not strictly necessary. However, damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. . . . Complainant has testified that she suffered from depression and loss of self-esteem during and following her employment and constructive discharge from Respondent. Although no medical evidence has been presented in support, Complainant's son testified in confirmation of Complainant's emotional distress and depression with the resulting effects on both the family and their economic situation. [Three additional witnesses] all confirmed the Complainant's distress over what the undersigned has found to be unlawful discriminatory employment actions while in Respondent's employ. Accordingly, I find Complainant's testimony regarding her emotional pain and suffering, mental anguish, embarrassment, and humiliation to be generally credible. In line with awards made in similar cases, I hereby award Complainant the sum of $75,000.00 as non-economic compensatory damages.

Brown v. Lockheed Martin Corp., 2008-SOX-00049, 54–55 (ALJ Jan. 1, 2010) (internal citations omitted).

The Brown case is important both because the ARB upheld an award of compensatory damages under SOX and because it upheld such an award that the ALJ had made without testimony from medical of psychiatric professionals, but rather based only on the testimony of the plaintiff, her coworkers, and her son.

III. Revitalization of the OSHA Whistleblower Program

In late 2010, after comprehensive audits of the OSHA whistleblower program, two federal watchdog offices issued lengthy reports that criticized OSHA for failing to provide whistleblowers with appropriate investigations of the charges of retaliation they filed with the agency. Both reports – one from the Government Accountability Office ("GAO") in August 2010 and one DOL's own Office of Inspector General in September 2010 – pointed to a number of shortcomings that made it very difficult for whistleblowers to win their retaliation claims at the OSHA investigation stage of the DOL process.[5] The audits found a number of deficiencies in OSHA organization, training and practices, including that that OSHA investigators often failed to interview complainants and their witnesses, and that OSHA issued merit findings in favor of employees in a small minority of cases.

In response to these reports, Assistant Secretary of Labor Dr. David Michaels ordered a "top-to-bottom" review of the program. This effort included not only audits at the national level but visits by hand-picked teams of experienced OSHA investigators to speak with personnel and stakeholders in the various regions. They examined national and regional program structures, operational procedures, investigative processes, budget, and equipment and personnel issues. OSHA's internal review confirmed many of the issues identified by the GAO, as well as additional administrative and organizational problems.

In August 2011, OSHA announced a number of significant changes in the structure and functioning of the whistleblower program.[6] To address training deficiencies, OSHA provided investigators with a two-week basic investigative course and webinars on the amendments to SOX made by the Dodd-Frank Act, and in September 2011 held the first national training conference for the agency's 150 investigators and the 30 or so lawyers from the regional solicitors' offices who provide legal guidance on investigators. At the national training conference in Orlando, investigators attended workshops on a host of substantive and procedural issues that come up on whistleblower investigations. For the first time ever, investigators were also able to discuss the investigative process with a panel of private counsel who represent whistleblowers and companies in OSHA investigations.

OSHA has also increased its investigative staff by more than twenty-five new investigators, and has requested $6.1 million FY 2012 for an additional forty-five investigators. In addition,

[5] The GAO and DOL OIG reports are available at http://www.gao.gov/new.items/d10722.pdf and http://www.oig.dol.gov/public/reports/oa/2010/02-10-202-10-105.pdf.

[6] Dr. Michaels' August 1, 2011, memorandum summarizing the new measures is available online at http://www.whistleblowers.gov/report_summary_page.html.

OSHA had established a separate line item for the whistleblower program for fiscal year 2012 to better account for its activities and has streamlined its internal operations, modifying its data collection system and strengthening its audit program.

Perhaps most important, OSHA recently issued a newly revised Whistleblower Investigations Manual, which is the first revision since the manual appeared in 2003, in an effort to update and standardize its handling of whistleblower cases. The manual includes a number of significant changes and helpful clarifications. Beginning with the initial filing of the complaint, the manual clarifies that whistleblower complaints under all 21 statutes can be submitted orally or in writing, in any language, and updates the filing instructions to reflect that they can now be filed electronically on OSHA's Whistleblower Protection Program website. Whistleblower Investigations Manual[7], Department of Labor, Occupational Safety and Health Administration, September 20, 2011, Chap. 2, Sec. II. The manual emphasizes that OSHA, rather than the complainant, is responsible for correctly determining the statutes under which a complaint is filed, and that a complainant is not required to state explicitly what statute his complaint arises under. Id. at II.D. OSHA is responsible for processing a complaint under the correct statute if the complainant mistakenly files under the wrong statute. Id. The manual notes the importance of processing a complaint in accordance with the requirements of all relevant statutes, where the complaint implicates protected activities under multiple statutes, in order to preserve parties' rights under each of the law. Id.

The manual stresses the responsibility of OSHA for properly conducting a thorough an unbiased investigation, with multiple references to the duty of the investigator to interview the complainant and witnesses, as well as secure relevant documents. Id., Chap. 2, Sec. IIIA.1 (investigator should conduct fact to face interviews with the complainant); id., 3.IV.A (same); id., Chap. 3, Sec. H ("It is the investigator's responsibility to pursue all appropriate investigative leads deemed pertinent to the investigation, with respect to the complainant's and the respondent's positions. Contact must be made whenever possible with all relevant witnesses, and every attempt must be made to gather all pertinent data and materials from all available sources."). It directs investigators to interview witnesses separately and privately to maintain confidentiality and avoid biased testimony, and suggests that if a witness appears rehearsed or reluctant, the investigator should attempt to contact them outside of the workplace. Id. Further, the manual urges that investigators bear in mind while conducting interviews that they, and not the complainants or respondents, are the experts on the requirements of OSHA statutes, making them responsible for eliciting relevant information from complainants and witnesses. Id., Chap. 3, Sec. II.

Recognizing that not all respondents are responsive or compliant, the manual provides guidance on dealing with uncooperative respondents, including procedures for issuing subpoenas in order to obtain witness interviews or records. It further provides that "the respondent may be advised that its continued failure to cooperate with the investigation may lead OSHA to reach a determination without the respondent's input," or "draw an adverse inference against it based on its refusal to cooperate with investigative requests." Id., Chap. 3, Sec. VI.F.3.

[7] OSHA's new 249-page Whistleblower Investigations Manual is available online at http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

The OSHA manual makes clear that a complainant need not allege a "tangible" or "ultimate" employment action to meet the "adverse action" requirement. It provides a lengthy list of adverse actions, noting that it is not all-inclusive, explaining:

> It may not always be clear whether the complainant suffered an adverse action. The employer may have taken certain actions against the complainant that do not qualify as "adverse," in that they do not cause the complainant to suffer any material harm or injury. To qualify as an adverse action, the evidence must show that a reasonable employee would have found the challenged action "materially adverse." Specifically, the evidence must show that the action at issue might have dissuaded a reasonable worker from making or supporting a charge of retaliation. The investigator can test for material adversity by interviewing coworkers to determine whether the action taken by the employer would likely have dissuaded other employees from engaging in protected activity.

Id., Chap. 3, Sec. IV.A.3 (citing Burlington Northern & Santa Fe R. R. Co. v. White, 548 U.S. 53, 68 (2006) (footnote omitted).

The remedies portion of the manual provides that compensatory damages include "compensation for mental distress due to the adverse action, and out-of pocket costs of treatment by a mental health professional and medication related to that mental distress." Id., Chap 6, Sec. II.C. While the manual urges that OSHA make every effort to attempt early resolution of complaints, 3.IV.B, it also outlines a number of safeguards to ensure that private settlements are fair and voluntary, and do not allow a complainant to waive non-waivable rights. Id. at II.E. In particular, it provides that "OSHA will not approve a provision that prohibits, restricts, or otherwise discourages an employee from participating in protected activity in the future," nor will it approve a "gag" provision that restricts the complainant's ability to participate in investigations or testify in related proceedings. Id. at II.E. (2), (3).

The manual devotes a full chapter to SOX and to the the effects on investigations of both the passage of the Dodd-Frank Act and recent interpretations of the law by the ARB. See, e.g., 14.IV.B.1 (a complainant does not have to communicate his reasonable belief to management or authorities); 14.IV.B.2 ("[T]he information provided by the complainant does not need to cite specific rules or regulations, nor must it describe an actual violation of the law or explicitly reference 'fraud' in the complaint. In addition, an employee may file a complaint based upon a violation about to be committed, provided that the employee reasonably believes that the violation is likely to occur.") (citing Sylvester (ARB May 25, 2011)). The chapter also provides special procedures for ensuring that OSHA handles SOX cases in a manner consistent with these and other directives: "In order to ensure consistency among the Regions and to alert the National Office of any significant or unusual issues, Secretary's Findings in all merit SOX cases and all "significant" dismissals must be reviewed by OWPP [Office of the Whistleblower Protection Program]." Id., Chap. 14, Sec. V.A.

Although OSHA only recently formalized its initiatives to improve whistleblower protections in the workplace, practitioners who represent parties in the OSHA investigative process

have already begun to see the effects. For example, OSHA ordered reinstatement and awarded damages to two SOX whistleblowers on consecutive days in September 2011, something that would have been unheard of during previous years. OSHA ordered Bond Laboratories, a manufacturer of nutritional supplement beverages, to pay approximately $500,000 in back pay and to reinstate an officer it found was illegally terminated for repeatedly objecting to the manipulation of accounting data that was presented to potential investors. Press Release, OSHA, U.S. Department of Labor Finds Nutritional Beverage Company, Former CEO in Violation of Sarbanes-Oxley Act Whistleblower Protection Provisions (Sept. 15, 2011). Likewise, it ordered the reinstatement and compensation of a Countrywide whistleblower fired shortly after the company merged with Bank of America in 2008. The whistleblower conducted an investigation of Countrywide in 2007 and found fraud spread throughout the entire region involving "pervasive wire, mail and bank fraud," which he then reported to the company's Employee Relations Department. Press Release, OSHA, U.S. Department of Labor Finds Bank of American in Violation of Sarbanes-Oxley Whistleblower Provisions (Sept. 14, 20110). OSHA found that his termination was a direct consequence of his whistleblowing. OSHA has ordered Bank of America to pay the employee $930,000 as to indemnify him for back wages, compensatory damages and attorney fees.

IV. Conclusion

As a result of a new direction from the ARB and changes in the OSHA whistleblower-protection program, employees who work for publicly traded companies and their subsidiaries today enjoy greater protections when they speak out about fraud on shareholders or other types of fraudulent conduct. The ARB's decisions regarding SOX protections will also influence its treatment of whistleblower cases arising under 20 other whistleblower statutes that the Department of Labor administers, enhancing the protections for employees in a wide range of industries. The changes in the OSHA program affect not only SOX whistleblowers, but also employees who blow the whistle on a far wider range of misconduct in the many industries. It can be said without exaggeration that whistleblower protections in the U.S. workplace are on the rise.