InfoPAK™

Management and Defense of Employee Whistleblower Claims

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Management and Defense of Employee Whistleblower Claims

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This InfoPAK™ provides in-house counsel with comprehensive information on the management and defense of employee whistleblower claims. Highlighting the liabilities and other challenges employers face in this context, it includes an overview of the Sarbanes-Oxley Act and other federal whistleblower laws and the critical elements of an internal reporting mechanism (a so-called “whistleblower” program). These sections are followed by an in-depth review of whistleblower litigation. The final section discusses Dodd-Frank Act whistleblower claims.

This information should not be construed as legal advice or a legal opinion on specific facts, or representative of the views of ACC or any of its lawyers, unless so stated. This is not intended as a definitive statement on the subject but a tool, providing practical information for the reader. We hope that you find this material useful.

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I. Introduction

In recent years, complaints from so-called “whistleblowers” have taken on increased importance as federal, state and local legislatures have enacted new legislation or amended existing statutes to provide for greater protections to individuals who bring to light suspected wrongdoing. These efforts, designed to encourage individuals with information concerning potential fraudulent activities, have placed a heightened awareness of avenues for raising concerns. For example, the number of whistleblower tips received by the Securities and Exchange Commission (SEC or Commission) has increased steadily in the three full years of the whistleblower program’s existence, growing from 3,001 tips in FY2012, to 3,238 tips in FY2013 to 3,620 in FY2014 – an increase of more than 20 percent over that period. In 2014, the Commission received tips from all 50 states, the District of Columbia and Puerto Rico. California, Florida, Texas and New York had the greatest number of tips in that year. In 2014, the Commission also received 448 tips from individuals outside the United States, representing approximately 11.51 percent of all tips received. These tips came from 83 different foreign countries with the United Kingdom, India, Canada, the People’s Republic of China and Australia leading the way. Awards to whistleblowers have also been increasing. Since the inception of the SEC whistleblower program in August 2011, the Commission has authorized 14 awards to whistleblowers. In 2014, more awards – nine in total - were given to individuals than in all the prior years combined. On September 22, 2014, the Commission authorized the largest award to date, more than $30 million to a whistleblower. This also marked the fourth award to a whistleblower residing in a foreign country.

This InfoPAK is intended to provide an overview of the investigation and litigation of whistleblower claims with a focus on claims under the Sarbanes-Oxley and Dodd-Frank Acts. The InfoPAK will also cover recent developments under various state whistleblower statutes. Although the focus of the document is on Sarbanes-Oxley and Dodd-Frank claims, many of the concepts – particularly those in connection with the investigation of whistleblower complaints and management of whistleblowing employees—apply across a wide range of whistleblower complaints.

A. Sarbanes-Oxley

In the wake of a number of widely publicized corporate scandals and the dramatic impact to the U.S. investor community, on July 30, 2002, Congress passed the American Competitiveness and Corporate Accountability Act of 2002, commonly known as the Sarbanes-Oxley Act (Sarbanes-Oxley). Its purpose was to rebuild public trust and investor confidence in publicly traded companies by requiring companies listed on the U.S. stock exchange to adhere to significant new governance standards and requirements. Among its notable provisions, SOX sets forth comprehensive rules regarding financial controls, disclosure and certification, board of director and auditor independence, and comprehensive whistleblower standards. At its inception, Sarbanes-Oxley was greeted with mixed opinions from the business and investor
community. Politicians and regulators regarded it as a much-needed antidote for corrupt corporate practices characterized by previous executive compensation abuses, financial fraud, and the collapse of significant corporations. These events left the investment community at large, as well as regulators, with the perception that something had to be done to curb these abuses—Sarbanes-Oxley was the response. On the other hand, as public companies implemented its requirements, the business community voiced complaints about the burdens of compliance, the resource drain that it was creating, and the impracticability of the regulations, particularly for smaller entities.

Among its other requirements, Sarbanes-Oxley requires that public companies have procedures in place for the confidential and anonymous receipt, retention and treatment of complaints companies receive regarding accounting, internal controls and other related corporate misconduct. Thus, Sarbanes-Oxley extended significant new protections to millions of employees. Since then, many companies have implemented the Act’s extensive mandates. The whistleblower provisions of the Act also represent an opportunity to leverage internal reporting mechanisms as a valuable early warning system for illegal conduct and other wrongdoing. An effective internal whistleblower program will allow a company to:

- Identify misconduct before it occurs;
- Mitigate its consequences;
- Correct the conduct internally;
- Increase accountability;
- Build confidence in the company among shareholders, employees, and consumers; and
- Preclude the wrongdoing from becoming a major focus of law enforcement or the media.

**B. Dodd-Frank**

In 2010, Congress took its next major step toward bringing about Wall Street Reform and protecting investors. On July 21, 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) into law. In large part, the 2,319 pages of federal legislation comprising Dodd-Frank are focused on consumer protection and contain the hotly-contested establishment of a “Bureau of Consumer Financial Protection.” The establishment of this Bureau, however, is far from being Dodd-Frank’s only change. Among its provisions, Dodd-Frank:

- Expands whistleblower liability by adding new whistleblower rights for direct reports to the Securities and Exchange Commission and for financial services employees;
- Enhances provisions for whistleblowers under SOX; and
■ Enhances the anti-retaliation provisions of the False Claims Act.

One of the key provisions of the DFA with respect to employers is the provision that grants the SEC the power to incentivize whistleblowers for any “original” information provided to the Commission resulting in enforcement actions yielding monetary remedies in excess of $1 million. In so doing, Dodd-Frank seeks to leverage the “eyes and ears” of all employees at publicly traded companies, and perhaps even employees of companies with whom these publicly-traded entities do business, for support in enforcing the nation’s securities laws.

II. Whistleblower Law and Developments

A. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act includes provisions prohibiting discrimination against corporate whistleblowers who have revealed financial and other wrongdoing within a publicly traded company. According to former Secretary of Labor Elaine Chao, the law “will protect courageous workers who speak out against corporate abuse and fraud.”

Sarbanes-Oxley includes a broad range of corporate accountability and transparency measures, such as a requirement that corporate boards establish internal independent audit committees. These audit committees must establish complaint procedures and accept anonymous complaints. Sarbanes-Oxley also includes provisions for enhanced financial disclosures, as well as provisions addressing auditor independence and certification of financial statements by corporate officers.

Sarbanes-Oxley’s whistleblower provisions create broad protection for employees of publicly held companies (and their contractors, subcontractors, and agents) who have a reasonable belief that fraud or other wrongdoing has occurred in violation of U.S. securities laws. A range of conduct is protected, including internal complaints, communications with Congress, contacts with government agencies, and participation in investigations of securities law violations. Employees who suffer reprisals for engaging in protected conduct may file administrative complaints with the U.S. Department of Labor’s Occupational Safety & Health Administration (OSHA) within 180 days of the alleged discrimination. Complainants may name the company as well as specific individuals in such complaints.
OSHA is required to determine whether there is reasonable cause to believe that the complaint has merit within 60 days of the filing of the complaint.\textsuperscript{5} If OSHA believes the complaint has merit, it can order relief,\textsuperscript{6} including preliminary reinstatement.\textsuperscript{7} The employee or the employer may thereafter file objections and requests for a hearing before an administrative law judge within 30 days. Either party may appeal the administrative law judge’s decision to the Department of Labor’s Administrative Review Board and, finally, before a U.S. Court of Appeals.

Sarbanes-Oxley creates a right to a \textit{de novo} trial in federal district court if the Department of Labor does not issue a final order within 180 days of the filing of the complaint.\textsuperscript{8}

Sarbanes-Oxley also contains tough criminal provisions. These include granting the SEC the ability to seek criminal penalties for violation of any provision of the Act.\textsuperscript{9} Another provision increases the criminal penalties for persons who retaliate against a whistleblower who provided truthful information to law enforcement about violations of federal law.\textsuperscript{10}

Pursuant to the Act, whistleblowers must prove that discrimination was a contributing factor in the challenged action by a preponderance of the evidence. In such circumstances, an employer may successfully defend against the claim only if it proves, by clear and convincing evidence, that it would have taken the same action against the whistleblower anyway. Ultimately, the employee bears the burden of showing that the employer’s proffered reasons for the challenged action are a pretext for retaliation.

Thus, Sarbanes-Oxley provides significant protective rights for employees, and in so doing, it has created a broad new exception to the at-will employment doctrine. Sarbanes-Oxley is intended to benefit corporate shareholders, employees and consumers by increasing corporate accountability and transparency. Following its enactment, many publicly traded companies established new compliance and ethics policies, procedures and programs. Privately held companies and non-profits have also felt pressure to adopt measures to advance accountability and transparency within their organizations.

\section*{B. The Regulations}

Familiarity with the Department of Labor’s Sarbanes-Oxley regulations is important as significant procedures are outlined:

- **Meeting with the Complainant.** In the regulations, the Department of Labor declares that complainants “are given ample opportunity to meet with OSHA” during the investigation of their complaints.\textsuperscript{11} However, some complainants have reported that the OSHA investigator assigned to their case did not formally interview them face-to-face.\textsuperscript{12} Numerous complainants have expressed concern regarding the quality of OSHA’s investigation.
Limiting Administrative Discovery. The Department of Labor’s regulations state that administrative law judges may limit discovery, in view of the time limit on the Department of Labor’s proceedings that trigger a complainant’s right to a jury trial.\(^{13}\) The regulations also provide that an ALJ may choose to permit discovery in some instances on the condition that the complainant agrees to delay filing a complaint in federal court.\(^{14}\)

Security Risk. The Department of Labor made it clear that the security risk exception to the preliminary reinstatement remedy applies only when an employee’s reinstatement “might pose a significant safety risk to the public” in terms of physical violence. In the event of such circumstances, the Department of Labor may still require “economic reinstatement” where the employer provides the complaining employee his or her normal compensation and benefits.\(^{15}\)

No Participation by the Department of Labor in Most Adjudications. The regulations assert that at the administrative law judge hearing stage and beyond, complainants will have to find their own counsel. The Department of Labor will not ordinarily participate in such proceedings.\(^{16}\)

Employer Liability for Actions of Contractors. The Department of Labor interprets Sarbanes-Oxley to hold employers liable for the actions of their contractors when the organization acted as an employer with regard to the contractor’s employee, “by exercising control of the work product or by establishing, modifying or interfering with the terms, conditions or privileges of employment.”\(^{17}\)

Waiver of Rules. The Department of Labor’s Sarbanes-Oxley regulations permit administrative law judges or the Administrative Review Board to waive any provision in “special circumstances” or if good cause is shown.\(^{18}\)

C. Judicial and Administrative Decisions

Like other employee protection laws, Sarbanes-Oxley’s whistleblower provisions are remedial in nature and should be broadly construed by the DOL and the courts in order to encourage employees to aid in the enforcement of federal securities laws.

When interpreting the Sarbanes-Oxley Act, administrative law judges and the courts look to federal whistleblower statutes for guidance.\(^{19}\) This is partly due to the fact that Sarbanes-Oxley’s whistleblower provisions are based on the whistleblower provisions of other laws, such as the Surface Transportation Amendments Act, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century and the Energy Reauthorization Act.

Since the enactment of Sarbanes-Oxley, there have been a number of critically important decisions that further define the reach of whistleblower protection. These decisions centered on the scope of coverage, the definitions of “protected activity” and “retaliation,” procedural issues and remedies.
D. Financial Industry Regulatory Authority

Financial Industry Regulatory Authority, Inc. (FINRA) is a private corporation that acts as a self-regulatory organization. The FINRA, like the SEC, is seeking to crack down on confidentiality agreements by also paying greater attention to the chilling effect these provisions have on whistleblowers. On November 6, 2014, FINRA issued Regulatory Notice 14-40 regarding confidentiality provisions. The guidance does not prohibit confidentiality agreements but requires they permit the customer or any other person alert FINRA of a firm’s suspicious activities. In order to permit whistleblower rights, confidentiality agreements should expressly authorize direct communications or responses to any inquiries from the FINRA or other regulatory agencies. Notice 14-40 provides similar cautionary advice for confidentiality provisions in discovery stipulations which restrict or prohibit a person’s ability to communicate directly or in response to an inquiry from a regulatory authority. Notice 14-40 demonstrates the increased scrutiny which firms in the financial industry should place upon confidentiality agreements in order to ensure compliance with the FINRA and SEC.

E. State Whistleblower Legislation

State legislatures and courts have also continued to expand the scope of protections afforded to whistleblowers. Some recent state law developments include:

- **California** – Effective January 1, 2014, California revised its whistleblower law, California Labor Code § 1102.5. The new law expands the retaliation protections for employees. Employees are no longer required to report to government or law enforcement agencies. Instead, employees who disclose information to “a person with authority over the employee or another employee who has the authority to investigate, discover or correct the violation or noncompliance” cannot be retaliated against. Therefore, individuals who complain to their supervisors, human resource department or work hotlines will be protected from retaliation. The revision also permits complaints about behavior that the employee reasonably believes violates local (in addition to state and federal) laws, rules or regulations. Additionally, it does not matter if disclosing this type of information is part of the employee’s job duties.

  Another significant revision is that employers may be found liable for “anticipatory retaliation” if they, or any person acting on their behalf, take adverse action against an employee based on the belief that the employee disclosed or may disclose information. Employers can be subject to a civil penalty, up to $10,000 per violation, for preventing an employee from disclosing information or retaliating against an employee for disclosing information related a believed violation of a local, state or federal law rule or regulation.

- **Delaware** – On July 22, 2014, Delaware extended whistleblower protections to employees who report suspected violations of campaign finance laws as defined in Chapter 80 of Title 15. 19 Del. C. § 1703. The new law prohibits public or private employers from taking adverse employment action against employees
who report or intend to report violations of campaign finance law. Whistleblowers are also protected if they refuse to assist or participate in a campaign finance infraction or participate in an investigation, hearing, trial or other inquiry regarding another’s suspected noncompliance with campaign finance laws.

■ **Minnesota** – In *Ford v. Minneapolis Pub. Sch.*, 857 N.W.2d 725 (Minn. Ct. App. 2014), the Minnesota Court of Appeals extended the statute of limitations for Minnesota Whistleblower Act, Minn. Stat. § 181.932, from two to six years rejecting the view that a whistleblower action is a personal injury tort. The matter is unsettled as the Supreme Court of Minnesota has granted further review of the decision.

■ **New Jersey** – On July 15, 2015, the New Jersey Supreme Court held that the protections of New Jersey’s whistleblower statute, the Conscientious Employee Protection Act (“CEPA”), extend to “watchdog” employees, i.e. those whose job duties include ensuring legal compliance. In *Lippman v. Ethicon, Inc.*, 2015 N.J. LEXIS 791, No. A-65/66-13 (July 15, 2015), the Court found CEPA’s language, which provides a broad definition of “employee,” had no express exemptions for employees whose regular job duties include ensuring compliance with the law. In so doing, the Court rejected dicta from an earlier Appellate Division decision which found watchdog employees could not claim CEPA’s protections for raising illegal or unethical conduct as part of their job duties. The Court also rejected the Appellate Division’s imposition of heightened standard for a watchdog employees in an earlier decision involving Lippman, finding no support for this heightened standard in CEPA’s statutory text. Based on the Court’s decision, employees who express disagreement with their employer’s current or proposed business activity in the regular course of their day-to-day job duties will find it easier to state a cause of action, even if the employer ultimately adopts the course of action advocated by the complaining employee.

■ **New York** – On December 17, 2014, New York signed a new law protecting mental hygiene employees who act as whistleblowers from retaliatory action. Governor Andrew Cuomo signed the bill into law in response to reports that mental hygiene direct care workers were losing their employment or suffering other adverse action after reporting neglect, abuse or maltreatment to the authorities. Therefore, mental hygiene employees were given the same whistleblower protections provided to other employees under Section 740 and 741 of New York State’s Labor Law.

■ **Pennsylvania** – Effective August 31, 2014, Pennsylvania extended its whistleblower protections to ensure both nonprofit and private sector employees would be able to file complaints without fear of retaliation. The new definition of employer includes: a public body or any of the following which receives money from a public body to perform work or provide services relative to the performance of work for or the provision of services to a public body—an individual, a partnership, an association, a corporation for profit, a corporation not for profit. Additionally, the maximum penalty for violating the
whistleblower law increased from $500 to $10,000 and from a six months suspension to seven years suspension from public office. The changes were created to increase transparency in government. However, the law now also permits an employer to take disciplinary action against an employee who submits a whistleblower complaint in bad faith.

- **Tennessee** – Effective July 1, 2014, Tennessee eliminated the common law claim of retaliatory discharge. Instead, employees will have to bring their complaints under the Tennessee Public Protection Act. Under the new law, to maintain a whistleblower action, the employee must have reported the alleged illegal activities to an individual or entity other than the employer or corporate affiliate (i.e., outside the company), and the employee must prove that his or her protected activity served as the “sole reason” for termination.

- **Vermont** – Vermont now provides a Public Records Act exemption to protect the identities of whistleblowers who submit complaints about public agency or government contractor misconduct. The following public records are exempt from public inspection and copying: “information that could be used to identify a complainant who alleges that a public agency, a public employee or official, or a person providing goods or services to a public agency under contract has engaged in a violation of law, or in waste, fraud, or abuse of authority, or in an act creating a threat to health or safety, unless the complainant consents to disclosure of his or her identity.”

### III. Investigating Internal Whistleblower Complaints

A lot has happened since TIME MAGAZINE declared 2002 to be “the year of the whistleblower,” and featured whistleblowers Sherron Watkins (Enron), Cynthia Cooper (Worldcom) and Colleen Rowley (FBI) on the cover as persons of the year. Each of those whistleblowers had informed employers of the wrongdoing within their respective organizations, only to have their employers discredit and punish them. None sought out the limelight or money; each sought to have the wrongdoing stopped and the problem corrected for the benefit of their employer.

Since that time, Sarbanes-Oxley has strengthened protections offered to whistleblowing employees of publicly traded companies, while the bounty provisions of the Dodd-Frank Act have created strong financial incentives for employees, contractors and others to take allegations of corporate misconduct directly to the SEC. The challenge for
business leaders is to develop a strong framework capable of responding swiftly and effectively to any internal complaints, while creating a culture of compliance within their organizations that encourages and rewards internal reporting of ethical or legal violations. If employees are not convinced that their complaints will be taken seriously, or if they fear reprisals for raising their voices, even the best-drafted whistleblower policies will be rendered useless.

While Sarbanes-Oxley, Dodd-Frank, and the Foreign Corrupt Practices Act whistleblower claims garner the lion’s share of news headlines, business leaders should be mindful that many other statutes afford protections to whistleblowers in myriad industries. Regardless of the nature of a whistleblower claim, Sarbanes-Oxley provides a guide to implementing an effective reporting and investigative framework.

A. Federal Whistleblower Protection: An Opportunity and a Mandate

The legislative and prosecutorial focus on corporate governance and accountability not only creates the compliance burden of new regulatory mandates, but also provides a true opportunity for corporate leaders to recognize whistleblowers as an effective and essential management resource for the detection and correction of corporate misconduct. But make no mistake, the financial incentives for external reporting are significant. The Dodd-Frank Act allows for the award of monetary incentives to individuals who voluntarily provide original information relating to a violation of the securities laws which results in the collection of monetary sanctions exceeding $1 million. The bounty can range from 10 to 30 percent of the aggregate amount of sanctions collected, to be set at the discretion of the Commission considering a number of factors.

In the SEC’s 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, the staff of the SEC noted that of the current or former employees who received monetary awards for providing information, 80 percent had first raised their concerns within their company before going to the SEC. For business leaders, this may suggest many whistleblowers would prefer to work within their organizations, rather than trigger a media frenzy, a federal agency investigation or congressional hearings. The challenge for organizations is thus to create a corporate culture where internal reporting is an expectation and is encouraged. Only then will companies be able to leverage their whistleblower programs as an early warning device, allowing for swift remedial action if necessary, protecting the organization’s integrity and preserving its reputation in the larger community.

B. Building the Internal Reporting Framework

An organization’s desire to work effectively with whistleblowers carries with it a corporate responsibility to establish an internal reporting procedure that adequately manages the process, communications and outcome for whistleblowers. Beginning
with a code of business conduct and ethics, which serves to cement the organization’s written standards, and cultivating a “culture” of corporate compliance, organizations can provide the appropriate setting for employees to willingly report their concerns of misconduct internally—and thus to place a great deal of trust in the organization. Certain elements that companies should consider when developing effective internal reporting procedures will enable the organization to effectively respond to whistleblower complaints are detailed below.

1. **Communicate Written Standards**

   Enforcing the rules and taking action against misconduct implies that the rules are clear and well-known. Organizations must clearly articulate the rules in a regularly updated and well-communicated code of business conduct and ethics. The code serves not only to communicate the rules of the organization, but also serves as a management device that directs employees “where to go” if they feel the need to voice a concern. If the employee witnesses anything it interprets to be a breach of the code, the organization must have a resource, hotline or specific place for the employee to report these concerns. The code is a critical element of an internal reporting procedure: The employees are informed of what constitutes a breach and where to report that perceived breach. In this manner, the code serves as a means of deputizing all employees, instilling the requirement to uphold the minimum code of conduct and encouraging adherence to the policy through internal reporting.

2. **Provide Visible Leadership**

   Active and passionate leadership and commitment by an organization’s CEO and senior management are effective means of reinforcing the written standards espoused in the code of ethics and business conduct. Members of the senior management team are an integral part of building employee awareness about the rules of the organization and educating employees about the proper procedures for reporting concerns. In fact, the appropriate leadership will signal to employees that ethics and corporate governance is a business priority and essential to the sustainability of the organization.

3. **Establish a Framework that Builds Credibility**

   Employees filing internal reports about code violations must feel that their reports are appreciated, that the organization appropriately investigates reports and takes corrective action and that their employment and reputation will not be put at risk for the disclosure. The ability to satisfactorily manage this “user experience” requires employers to effectively manage expectations once they receive the report, by effectively triaging the call and properly assigning the matter to the correct internal resource. These early steps are essential to ensuring appropriate investigation and corrective action. Ineffective case handling at the inception can lead to mishandling of a complaint and leave an employee with the perception that the organization is not concerned with internal complaints.
Accordingly, a proper intake method for reports imposes on organizations an examination of who should handle the process. Should the organization utilize an internal resource or an external service provider? Often, organizations seek the lowest cost alternative and delegate this responsibility with little consideration of how the employee feels during the process. Deliberation and thoughtfulness on this aspect of the internal reporting mechanism is one of the most important elements of an effective compliance program. Further, because these programs require employees to continue to make reports, an organization must consider the best way to select the individuals handling this portion of the process.

4. Monitor the Framework

Sarbanes-Oxley requires public companies to have an internal reporting process that allows employees and other stakeholders to make certain kinds of reports directly to the audit committee of the board of directors. The framework for complying with this requirement, as well as managing the internal reporting mechanism, must be appropriately managed. Those administering any such mechanism must have sufficient expertise, capacity and authority to protect the employees who report misconduct and to resolve the employee concerns in an appropriate manner. In some cases, employers have had success using employee hotlines, establishing an ombudsman, creating an ethics committee, or developing a special program for employee concerns (e.g., one based on an alternative dispute resolution mechanism such as mediation or arbitration). The point is to establish and monitor a framework and a culture that makes it easier and more comfortable for employees to raise concerns internally, while providing recognition for doing so. For example, some companies have leveraged their human resources or compliance newsletter to highlight and thank employees who report instances of fraud, waste and abuse; or to reward those who come up with suggestions for improvements to financial controls. While these approaches may not be palatable to companies, the importance of a “from the top” commitment to corporate governance and compliance must be a mandate.

5. Ensure that Company Employment and Confidentiality Agreements Don’t Inadvertently Discourage or Prohibit Employees from Making Complaints or Participating in Investigations

In an incredibly important development, in April 2015, the SEC announced an enforcement action against a large company claiming that a confidentiality agreement in use by the company violated an SEC rule that prohibits “any action to impede an individual from communicating directly with the [SEC] about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement . . . with respect to such communications.” The confidentiality agreement in question required employees being interviewed as part of an internal investigation to agree not to disclose the subject matter or details of any interview to outside parties without the prior approval of in-house counsel, or face disciplinary action up to and including termination. Although the SEC did not claim that any person had actually been
deterred from participating in an investigation, or disciplined for reporting an SEC violation, the SEC imposed a $130,000 fine on the company and required that it modify its confidentiality agreement to comply with the SEC rule. Additionally, the company was required to provide this clarification not only to current employees, but also individuals that were formerly employed in the last four years.

Even if not subject to SEC oversight, all organizations are strongly encouraged to review their policies and employment agreements to ensure that they do not prohibit or discourage employees from exercising their rights to report wrongdoing or participate in investigations. The review should include employee agreements (especially frequently used templates) that contain restrictive terms, including:

- employment agreements
- standalone confidentiality agreements
- non-competition agreements
- confidentiality policies within handbooks or codes of conduct and
- confidentiality and non-disparagement provisions in separation agreements.

If necessary, the policy or agreement should be revised to clarify that it “shall not be construed to limit an employee’s right, where applicable, to file or participate in an investigative proceeding of any federal, state, or local governmental agency. An employee’s exercise of any such right shall not be considered a violation of this agreement [or policy].”

6. **Train Managers and Employees**

First-line managers must be prepared for a whistleblower complaint; as many feel threatened, react defensively, and may be prone to retaliation or the appearance of retaliation. This leads to escalating polarization and makes a quick resolution difficult. Managers must be trained to recognize circumstances when retaliation may occur and take appropriate preventive actions. It is also important to educate employees about their rights and responsibilities relating to internal whistleblower complaints.

C. **Investigating Whistleblower Claims**

The investigative process is a critical part of an effective internal reporting program. The following practices will help validate the program, provide employees with confidence in the system and mitigate the organization’s exposure to whistleblower litigation.

1. **Manage the In-Take Triage and Communications**

Similar to managing the dynamics of a customer service center, organizations must determine how it will address employees making reports. The first communication
with an employee is critically important and often the only opportunity to manage expectations, identify with clarity the particulars of the employee’s concern, and to assign the matter to the appropriate internal resource for handling. Communication plans should also include information to employees about how the investigation process will work. This process should educate the employee about what the company can and cannot do to protect the employee. For example, there should be a discussion about the extent to which the company will keep the employee’s identity confidential. This initial exchange with the employee is also the opportunity to build trust (thus dissuading the employee from making external reports about their concerns and providing the company with an opportunity to learn more about the issues presented as part of its compliance efforts), and it must demonstrate the company’s care and compassion for the employee’s concern. These are the considerations that an organization should include (along with costs) as it determines how to delegate this responsibility.

2. **Incorporate “Red-Flag” Protocols**

An effective response to whistleblower complaints requires companies to have the ability, through their initial triage efforts, to filter and separate the material from the immaterial, the substantive from the less substantive. In so doing, organizations can dedicate resources to the issues that are of true concern and thereby mitigate exposure to the claims that pose a serious threat to the organization. Organizations should identify, in advance, the specific aspects of complaints that are characteristic of a significant whistleblower matter. The triage and early communications with the employee in the intake process should provide a means of quickly recognizing such complaints and immediately assigning these to the highest level of the organization’s investigative, compliance and legal resources.

3. **Investigate and Take Corrective Action**

Ultimately, the success of an internal reporting mechanism depends upon an organization’s consistent ability to effectively respond to employee reports. While upfront management of expectations is important for the reasons stated above, employees must also see that their valid concerns lead to appropriate corrective action by the organization. Organizations should consider how the various internal resources charged with responding to a complaint—human resources, finance, safety, compliance and legal—will investigate reports, document the company’s findings and make decisions. Responding to complaints typically includes subject matter expertise, investigative skills, attention to process and decision making and consideration for institutional precedent. An organization’s ability to bring together these vital interests and stakeholders for purposes of taking appropriate corrective action is often a measure of the organization’s perceived responsiveness to employee reports. Accordingly, such organizational competency can be an asset or a liability.

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4. **Prohibit and Affirmatively Guard Against Future Retaliation**

Organizations must protect employees who are willing to put their employment at risk for the sole purpose of reporting a concern about improper or illegal conduct. Prohibiting all forms of discrimination and harassment against these employees is necessary for mitigating retaliation exposure under Sarbanes-Oxley, but it is also critically important for the ongoing effectiveness and credibility of the organization’s internal reporting mechanisms and compliance culture. Organizations that do not build an internal reputation for protecting reporting employees will find a declining pool of employees who are willing to take on the risks of making an internal report.

Increasingly, these organizations may first learn of whistleblower complaints when they are served with an official complaint or from notice by a government agency, rather than through an internal complaint. Training managers on the topic is an important first step, but is not the only means of protecting against retaliation. Organizations should consider institutional mechanisms to guard against a manager’s desire to retaliate. These mechanisms include checks and balances for the employment actions of managers that were the subject of an internal complaint. Once an employee makes an internal complaint, the manager of that employee is undoubtedly susceptible to an allegation that future employment action has retaliatory animus. Organizations can use review protocols for the manager’s future employment actions toward the reporting employee as a means of establishing a non-retaliatory basis for the employment action.

For example, an employee makes an internal complaint against his manager in January concerning financial impropriety in relation to books and records. The matter is promptly investigated and determined to have no merit. For the following calendar year, that manager’s employment actions relative to that employee are reviewed in advance by a human resources official charged with ensuring that all employment actions are supported by legitimate business reasons, in accordance with company policy, and free of any retaliatory animus. The result is a manager who is less likely or able to retaliate, even unintentionally, and a transparent process that documents the legitimacy of any future employment actions relative to the employee. Moreover, the manager is less intimidated by the exposure to retaliation and more likely to continue effectively managing the employee, with the assurance that the organization will review and approve his/her actions.

5. **Provide Relief to the Whistleblower and Hold Wrongdoers Accountable**

Providing comprehensive relief to employees who acted in good faith and suffered reprisal is always in the company’s best interest. It is important to consider the best means of restoring an employee’s career, such as granting a transfer preference or providing specialized career counseling. If possible, publicly recognize the employee’s contribution to maintaining the company’s integrity; this will send a strong signal to all employees and help build confidence and trust in the internal reporting program. Ensure that wrongdoers, and those engaging in reprisals against employees who report prohibited conduct, are held fully accountable for their actions. Implement disciplinary action up to and including
termination. The degree of discipline depends on the severity of the conduct at issue and whether previous incidents have occurred.

6. Continuously Learn, Improve Internal Controls, and Consider Self-Reporting of Violations

The only thing worse than not having any framework for the reporting and investigation of internal complaints of misconduct, is to have a framework that exists only “for show” on paper. The compliance framework must function both in spirit and in fact. A true culture of organizational compliance is marked by an organization that, upon learning of misconduct, takes immediate steps to address the matter by adjusting and improving internal controls as a means of avoiding similar violations in the future.

In some cases, however, conducting an internal investigation and taking appropriate remedial action may not end the matter. Just because the internal investigation is complete does not mean that the violation has not already been reported by a whistleblower or been discovered by law enforcement through other means. For that reason, and for reasons of transparency and the promotion of the culture of compliance, organizations should consider whether self-reporting of the violation is appropriate and desirable under the circumstances. The SEC and Department of Justice will not take failure to do so lightly in the event the violation later comes to light.

IV. Litigating Whistleblower Complaints

In some cases, despite the company’s best efforts to prevent, investigate and correct internal whistleblower complaints, an employee or former employee may still commence litigation against the company. In these circumstances, the company must be prepared to quickly, efficiently and effectively formulate and execute its defense to the whistleblower claims. Using the whistleblower provision of the Sarbanes-Oxley Act as an example, this section will address:

- The procedure typically followed for whistleblower complaints filed with OSHA;
- Particular issues to be aware of when your organization receives an administrative complaint;
- Key areas of the complainant’s prima facie case to consider in evaluating the company’s defense;
- Preparing a successful response to the complaint;
- Dealing with an initial decision from OSHA; and
- Considerations in settling Sarbanes-Oxley complaints.
A. Administrative Procedure Under the Sarbanes-Oxley Act

The whistleblower provision of the Act is contained in § 806. The procedures utilized by OSHA for processing Sarbanes-Oxley whistleblower claims is similar to that used by the Agency for other whistleblower claims it is charged with investigating, such as those under AIR21, STAA and the ERA whistleblower provisions. Section 806 of the Act makes it unlawful for covered entities to discharge, demote, suspend, threaten, harass or in any other way discriminate against an employee based on the terms and conditions of employment because the employee engaged in protected activity as defined by the Act. Under § 806, “protected activity” is defined as any lawful act done by the employee to:

- provide information;
- cause information to be provided; or
- otherwise assist in an investigation.

Further, § 806 specifies that it must involve conduct that the employee reasonably believes constitutes a violation of:

- federal criminal mail, wire, bank and securities fraud statutes;
- SEC rules or regulations; or
- any federal law related to fraud against shareholders, when the information is provided to or the investigation is conducted by a:
  - federal regulatory or law enforcement agency;
  - a member or committee of Congress; or
  - a person with supervisory authority over the employee (or a person working for the employer who has the authority to investigate, discover, or terminate misconduct).  

It is also unlawful to take such action against the employee if the employee:

- files,
- causes to be filed,
- testifies, or
- participates in, or
- otherwise assists in a proceeding filed or about to be filed (with knowledge of the employer) regarding alleged violations of:
  - federal criminal mail, wire, bank, and securities fraud statutes;
  - SEC rules or regulations; or
  - any federal law related to fraud against shareholders.
B. Procedure for Litigating a Sarbanes-Oxley § 806 Complaint

1. Initiating a Sarbanes-Oxley Complaint

To initiate a Sarbanes-Oxley complaint, an employee who believes he or she has been retaliated against, in violation of the Act, may file a complaint of discrimination with the Secretary of Labor within 180 days after the alleged act (in violation of Sarbanes-Oxley) occurs or after the date on which the employee became aware of the alleged violation of the Act. No particular form of complaint is required. A complaint may be filed orally or in writing. Typically, the complaint is in the form of a letter to the Secretary, but telephonic complaints are sufficient. The complaint is filed with the OSHA office responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee.

2. Whom Do You Represent?

Sarbanes-Oxley provides for actions against covered companies, as well as any officer, employee, contractor, subcontractor or agent of such company. Accordingly, it is not uncommon for a Sarbanes-Oxley whistleblower to file his complaint against both the company and individual defendants. The same defense counsel may represent more than one named defendant, provided there is no conflict of interest. A joint defense agreement should be entered into to preserve the confidentiality of communications among the defendants and articulate what happens if a subsequent conflict arises. It is also important for the joint defense agreement to clearly state that all parties had an opportunity to obtain advice about the agreement from their own counsel.

3. OSHA Investigation

Upon receipt of the complaint in the investigating office, the Assistant Secretary will notify the named person or persons that a complaint was filed by providing a copy of the complaint, redacted, if necessary, to protect the identity of any confidential informants. Statements made in the course of OSHA’s investigation are entitled to the absolute privilege that applies to statements made to administrative agencies acting in a quasi-judicial capacity. Within 20 days of the receipt of the notice, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents to demonstrate, by clear and convincing evidence, that the organization would have taken the same unfavorable personnel action in the absence of the complainant’s protected activity. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position. A copy of the notice is also sent to the SEC.

A Sarbanes-Oxley complaint will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint. The prima facie showing is determined by the
information contained in the complaint, and can be supplemented as deemed appropriate by OSHA with interviews of the complainant. The complaint must allege the existence of facts and either direct or circumstantial evidence showing:

- the employee engaged in a protected activity;
- the named person knew or suspected that the employee engaged in the protected activity;
- the employee suffered an adverse action; and
- the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.  

If the complainant has not made a prima facie showing, OSHA will notify the complainant and no investigation will take place.  OSHA will also decline to investigate a complaint if the employer demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of the complainant’s protected activity.  If the complainant passes the initial review (often referred to as the OSHA “gatekeeper”), the Assistant Secretary will conduct an investigation.  The investigation will be conducted in any manner that will protect the confidentiality of any person who provides information on a confidential basis.

Following its investigation, the Assistant Secretary will notify the named entity if, based on the information obtained, the Assistant Secretary has reasonable cause to believe that the named entity has violated Sarbanes-Oxley and preliminary reinstatement is warranted.  The Assistant Secretary will provide the named entity with notice of the substance of the relevant evidence supporting the allegations in the complaint, as developed through the investigation, including any witness statements that may be either redacted or summarized to protect the identities of confidential informants.  The named entity has 10 business days from the Assistant Secretary's notification to submit a written response, to meet with investigators, to present statements from witnesses and to make legal and factual arguments in support of its position that any adverse action was non-retaliatory.  This 10-day period may be expanded, as agreed upon by the Assistant Secretary and the named person, in the interest of justice.

4. Initial Decision and Preliminary Order

Under the regulations, OSHA is required to conclude its initial investigation and issue written findings within 60 days of the filing of the complaint.  In practice, the investigation is rarely concluded in this period of time. If the Assistant Secretary concludes there is reasonable cause to believe a Sarbanes-Oxley violation has occurred, the Secretary will include a preliminary order providing relief to the complainant, along with the initial findings.  The preliminary order will include all relief necessary to make the complainant whole, including, where appropriate:
- reinstatement with the same seniority the employee would have had but for the retaliation;
- back pay with interest; and
- compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees and reasonable attorney’s fees.\textsuperscript{43}

An order of reinstatement is effective immediately upon receipt of the findings and preliminary order. The findings and the remainder of the preliminary order will be effective 30 days after receipt by the respondent.\textsuperscript{44} The Assistant Secretary will also notify the parties if it determines no Sarbanes-Oxley violation has occurred.\textsuperscript{45} A copy of this notice is also sent to the Chief Administrative Law Judge and the Department of Labor, along with a copy of the original complaint.\textsuperscript{46}

5. Appeal to the Office of Administrative Law Judges

The parties have 30 days from receipt of the initial findings and preliminary order to file written objections and/or a request for a hearing with the Chief Administrative Law Judge.\textsuperscript{47} If no objections are filed within this 30-day period, the findings and preliminary order will become effective and become the final decision of the Secretary, not subject to judicial review.\textsuperscript{48} The date of the filing of objections is based upon the date of either the postmark, facsimile transmittal, email or hand-delivery.\textsuperscript{49} In addition to sending to the Chief Administrative Law Judge, copies of the objections must also be sent to all parties of record, the OSHA official who issued the findings and order, the Assistant Secretary and the Associate Solicitor with the Division of Fair Labor Standards.\textsuperscript{50} The timely filing of objections stays all aspects of the preliminary order, other than an order of reinstatement.\textsuperscript{51} To obtain a stay of an order of reinstatement, the named person may file a motion with the Office of Administrative Law Judges seeking a stay of a preliminary order of reinstatement.\textsuperscript{52}

Prior to the filing of objections, the Assistant Secretary may withdraw either his or her findings or the preliminary order and substitute new findings or preliminary order.\textsuperscript{53} The date of the receipt of the substituted findings or order will begin a new 30-day objection period.\textsuperscript{54} Additionally, “[a]t any time prior to the filing of objections to the Assistant Secretary’s findings and/or preliminary order, a complainant may withdraw his or her complaint...” subject to approval by the Assistant Secretary.\textsuperscript{55} Neither a dismissal of the complaint without an investigation nor a determination to proceed with an investigation is subject to review by an administrative law judge.\textsuperscript{56}

A hearing before the administrative law judge is conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges.\textsuperscript{57} Hearings must be conducted expeditiously, and the review is \textit{de novo} on the record.\textsuperscript{58} The administrative law judge has broad discretion to limit discovery in order to expedite the hearing.\textsuperscript{59} For example, the judge may limit the number of interrogatories, document requests or depositions filed by either party.\textsuperscript{60} Formal rules of evidence do not apply.\textsuperscript{61} Rules or principles designed to
assure the production of the most probative evidence will be applied, and the administrative law judge may exclude evidence that is immaterial, irrelevant or unduly repetitious. The Assistant Secretary and the SEC may appear as a party or as amicus curiae at any time at any stage of the proceedings, at the Commission's discretion. The initial OSHA investigation does not establish boundaries for the factual inquiry permitted in the subsequent administrative law judge adjudication. While new violations may not be raised after 90 days, the statute and the regulations provide for both discovery and a de novo hearing regarding the facts related to both the protected activities and the reasons for the adverse action, regardless of OSHA’s findings.

If the administrative law judge concludes the named entity has violated Sarbanes-Oxley, the administrative law judge will issue an order providing all relief necessary to make the employee whole, including all remedies available to the Assistant Secretary. An order of reinstatement or the lifting of a stay of reinstatement becomes effective upon receipt of the decision by the named person. If the administrative law judge determines the complaint was frivolous and was brought in bad faith, the judge may award the named entity a reasonable attorney’s fee, not to exceed $1,000.

6. The Administrative Review Board’s Petition for Review

Either party may seek review of an administrative law judge’s decision by filing a written petition for review with the ARB within 10 business days after the date of the judge’s decision. All provisions of the judge’s order are stayed upon a filing of a petition for review with the Administrative Review Board, except an order of reinstatement or the lifting of a stay of reinstatement. The petition for review must identify the legal conclusions or orders to which they object. Any exception not specifically pled will be deemed waived by the parties. At the time the petition is filed with the Administrative Review Board, the petition must also be served on all parties of record, the Chief Administrative Law Judge, the Assistant Secretary of OSHA and the Associate Solicitor of the Division of Fair Labor Standards. If no petition is filed, the administrative law judge’s decision will become the final order of the Secretary. The judge’s decision will also become the final decision of the Assistant Secretary, unless the Administrative Review Board accepts the case for review within 30 days of the filing of the petition. If the case is accepted for review, the judge’s decision will be inoperative unless and until the ARB issues an order adopting the decision. The one exception is that a preliminary order of reinstatement will be effective while the Administrative Review Board conducts its review, unless the Board stays the order. The Board will determine the terms under which any briefs are to be filed. The Administrative Review Board’s review of the judge’s factual determinations is made under the substantial evidence standard.

The Administrative Review Board shall issue a final decision within 120 days of “the conclusion of the hearing,” which is deemed to be 10 business days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed with the ALJ in the interim.
administrative law judge, if the Administrative Review Board finds the named party has violated Sarbanes-Oxley, it may order any remedy necessary to make the complainant whole. If the Administrative Review Board determines that no violation has occurred, upon the request of the named person, the Board may award a reasonable attorney’s fee to the named person, not to exceed $1,000.

7. Appeal to the Circuit Court of Appeals

Within 60 days after the issuance of a final order by the administrative law judge or Administrative Review Board, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the alleged violation.

C. Particular Concerns with Sarbanes-Oxley Complaints Before OSHA

1. 180-Day Statute of Limitations

The 180-day statute of limitations period commences on the date of the alleged violation or the date on which the complainant became aware of the alleged violation. The Administrative Review Board has held that “[t]he statute of limitations … begins to run when an employee receives ‘final, definitive and unequivocal notice of an adverse employment decision.’ ‘The date that an employer communicates a decision to implement such a decision, rather than the date the consequences of the decision are felt, marks the occurrence of the violation.’ ‘Final’ and ‘definitive’ notice is a ‘communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion or change.’ Unequivocal notice is a ‘communication that is not ambiguous, i.e., free of misleading possibilities.’”

In In the Matter of Poliv v. Jacobs Eng’g Group, Inc., for instance, the Administrative Review Board held that a letter stating that an employer would make “every reasonable effort to return [its employee] to the same position, if it is available,” after the end of the employee’s leave of absence, “or to an equivalent position for which [he was] qualified,” but that it could not “guarantee reinstatement in all cases” did not trigger the start of the statute of limitations period for the employee to file his Sarbanes-Oxley complaint alleging retaliatory termination, because it did not provide final and unequivocal notice that he was or would be terminated.

In another case, the Administrative Review Board held that an email notifying an employee that she would be terminated if she did not meet two requirements by a certain date did not trigger the start of the statute of limitations period for her to file her Sarbanes-Oxley complaint, because evidence that her counsel engaged in further discussions...
regarding her employment status after she received the email showed that this purported termination notice was not final and definitive.\(^\text{85}\)

Under certain circumstances, a showing that the respondent lulled the complainant into inaction may toll the limitations period.\(^\text{86}\)

2. The Initial Burden Placed on the Employee vs. The Burden Placed on the Employer

The complainant must first establish a *prima facie* case by proving, by a preponderance of the evidence, that: “(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action and (4) the protected activity was a *contributing factor* in the unfavorable action.”\(^\text{87}\)

The complainant’s *prima facie* showing may be made through either direct or circumstantial evidence.\(^\text{88}\) “Circumstantial evidence may include temporal proximity, indications of pretext, inconsistent application of an employer's policies, an employer's shifting explanations for its actions, antagonism or hostility toward a complainant’s protected activity, the falsity of an employer's explanation for the adverse action taken and a change in the employer’s attitude toward the complainant after he or she engages in protected activity.”\(^\text{89}\)

OSHA’s regulations specifically state a complainant will satisfy this burden of demonstrating the protected activity was a contributing factor in the adverse personnel action by showing that the adverse personnel action took place shortly after the protected activity.\(^\text{90}\) As such, temporal proximity alone is generally sufficient to prove causation. A lengthy gap in time, however, will weigh against a finding that it is more likely than not that the protected activity played a role in the adverse personnel action.\(^\text{91}\)

The complainant need not show that the protected activity completely or even significantly caused the adverse action. Nor does the complainant need to establish a retaliatory motive.\(^\text{92}\) The Administrative Review Board recently held that in determining whether a complainant has met the burden of demonstrating that the protected activity was a “contributing factor” to the adverse personnel action, the employer’s evidence supporting its affirmative defense of a legitimate, non-retaliatory reason for its action cannot be weighed against the complainant’s causation evidence, because Sarbanes-Oxley places a much higher burden on employers to prove their statutory affirmative defense, by clear and convincing evidence, than on the complainants to prove causation, by a preponderance of the evidence.\(^\text{93}\)

At the evidentiary stage, as opposed to the *prima facie* stage, however, the complainant must prove by a preponderance of the evidence that the “protected activity was a contributing factor in the adverse action,” not merely that “[t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.”\(^\text{94}\) In response to a complainant’s showing that his or her protected activity was a contributing factor in the adverse personnel action, an employer must prove by clear
and convincing evidence that any adverse action taken had no retaliatory connection to the alleged whistleblowing activity.\textsuperscript{95} This investigational framework places a very low burden on an employee who has made a complaint under § 806 and a very high burden of proof upon a responding employer.

Proof by a complainant of the elements of a \textit{prima facie} case of retaliation by a preponderance of the evidence, including proof of ‘contributing factor’ causation, shifts to the employer the burden of proving by ‘clear and convincing evidence’ not only the existence of a legitimate, non-retaliatory basis for the contested personnel action but that the employer would have taken the contested action on that basis alone had the complainant not engaged in protected activity.\textsuperscript{96}

The Administrative Review Board has held that “the plain language of the statute requires a case-by-case balancing of three factors:

- How ‘clear’ and ‘convincing’ the independent significance is of the non-protected activity;
- The evidence that proves or disproves whether the employer ‘would have’ taken the same adverse actions; and
- The facts that would change in the ‘absence of’ the protected activity.\textsuperscript{97}


If the Secretary has not issued a final decision within 180 days from the filing of the complaint, and there is no showing that the delay is the result of the bad faith of the complainant, the complainant may bring an action at law or equity \textit{for de novo} review in the appropriate United States District Court.\textsuperscript{98} This is significant because, in many cases, a Sarbanes-Oxley complaint will not reach the point where a final decision is made within 180 days. A complainant’s ability to proceed in federal court after the expiration of the 180-day period is not premised on a showing of good faith, but only that any delay in a final determination was not a result of the complainant’s bad faith.\textsuperscript{99} Also, a complainant is not required to exhaust administrative remedies prior to bringing an action in federal court, so long as 180 days have passed since the filing of the complaint.\textsuperscript{100}

The complainant must file a copy of the file-stamped complaint with the Assistant Secretary, the administrative law judge or the Administrative Review Board (depending on where the proceeding is pending) within seven days after filing the complaint in the district court.\textsuperscript{101}

The notice must be served upon all parties to the proceeding, the Regional Administrator, the Assistant Secretary of OSHA and the Associate Solicitor of the Division of Fair Labor Standards. A party can only proceed in federal court against those parties named as respondents in the complaint filed with the Department of Labor.\textsuperscript{102}
The 180-day provision makes Sarbanes-Oxley unique. The Act refers to a “final decision” of the Secretary. Consequently, it permits an employee to file an action in district court even after OSHA has made an initial decision, if more than 180 days have elapsed from the filing of the complaint.

Importantly, in *Stone v. Instrumentation Laboratory Co.*, the U.S. Court of Appeals for the Fourth Circuit addressed the right to de novo review in federal court. In Stone, a whistleblower plaintiff sought de novo review in federal court during the time the administrative law judge’s decision was being appealed to the Administrative Review Board. The defendant argued that the case should be dismissed because the judge’s ruling was a final judgment, and thus, the plaintiff should be collaterally estopped from bringing the suit in federal court. The case was appealed to the Fourth Circuit in which the circuit noted, “[t]he text of the statute is clear—if the DOL has not reached a final decision within the time period established by Congress, a complainant has the statutory right not merely to undefined relief in another forum, but to ‘de novo review’ in federal district court. A plaintiff’s right to pursue such relief is not circumscribed in any manner by the statute.” Since the Secretary did not reach a final decision within 180 days of the filing of the complaint and there was no showing of bad faith on behalf of the plaintiff, the Fourth Circuit found that the plaintiff could proceed in district court.

One district court decision, however, declined to apply SOX’s plain language, reasoning that “to interpret [§ 1514A(b)(1)(B)] to mandate a res novo adjudication after such extensive litigation . . . would lead to an absurd result. Thus, this Court is permitted to look beyond the plain language of this statute to avoid this needless duplication of effort.”

4. Sarbanes-Oxley as a Basis for a State Whistleblower Claim or Alleged in Conjunction with Other Statutory or Common Law Claims

Although courts generally do not hold that Sarbanes-Oxley preempts state common law whistleblower claims, some courts have reached the same result by holding that plaintiffs do not have a viable common law claim for wrongful termination in violation of public policy because they have an adequate remedy under Sarbanes-Oxley.

The First Circuit, for example, affirmed a district court decision granting summary judgment to defendant on a common law wrongful termination claim based on the public policy exception to at-will employment because of the comprehensive framework of Sarbanes-Oxley. The First Circuit held that the plaintiff “does not have a claim for wrongful termination under Massachusetts common law. In passing [Sarbanes-Oxley], Congress aimed to create comprehensive legislation to fill the gaps in a patchwork of state laws governing corporate fraud and protections for whistleblowers. It would be entirely inappropriate for plaintiff to be able to use a federal statute designed to address the inadequacies of state law to create a new common law cause of action under Massachusetts law.”

Similarly, in *Rock v. Lifeline Sys. Co.*, the District of Massachusetts held that the plaintiff did not have a viable common law claim of wrongful termination in violation of public policy,
because the allegations that gave rise to the plaintiff’s common law claim arose from the same set of facts that gave rise to her Sarbanes-Oxley claim. The plaintiff alleged that she “was fired for doing what the law requires, namely reporting to her supervisors and managers improper activities which she believed violated various laws, rules and regulations, and which caused a serious danger to the public health and safety.” The Court concluded, “[Sarbanes-Oxley] is designed to protect employees from the very same set of actions that [the plaintiff] presently invokes in the wrongful termination claim. Her reporting of the ‘suspected violations of safety standards’ that she believed ‘present a threat to the safety of the population at large, arises from the same conduct that prompted her to report the alleged mail, wire and securities fraud.’” The plaintiff “therefore does not have a viable common law claim of wrongful termination in violation of public policy.”

At least one other court, however, has held that a plaintiff had a viable common law claim for wrongful termination in violation of public policy, even though his claims were duplicative of his Sarbanes-Oxley claims. The Court relied on the language in Sarbanes-Oxley stating that “nothing in [the remedies] section [of Sarbanes-Oxley] shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law.”

5. ADR Agreements

The Dodd–Frank Wall Street Reform and Consumer Protection Act amended Sarbanes-Oxley to preclude waiver of any rights or remedies under Sarbanes-Oxley by agreement, policy, form or condition of employment, including by a pre-dispute arbitration agreement. It also invalidates any pre-dispute arbitration agreements that require arbitration of Sarbanes-Oxley whistleblower claims.

The question therefore becomes whether the ban on pre-dispute arbitration agreements imposed by the Dodd-Frank Act applies retroactively. There is a split authority among the district courts addressing this issue. Some district courts have held that the Dodd-Frank’s ban on pre-dispute arbitration agreements applies retroactively. In Pezza v. Investors Capital Corp., for instance, the Dodd-Frank Act was enacted while defendant's motion to compel arbitration was pending before the court. After analyzing Section 922 of the Dodd-Frank Act, the United States District Court for the District of Massachusetts held that Congressional intent with respect to the statute’s retroactivity is unclear. Nevertheless, it concluded that retroactive application of Dodd-Frank anti-arbitration amendments to Sarbanes-Oxley was appropriate because it merely affected the conferral of jurisdiction - a procedural right rather than the substantive right of the parties. This was true even though the plaintiff entered into an arbitration agreement before the enactment of Dodd-Frank. Similarly, in Wong v. CKX, Inc., the Southern District of New York held that Dodd Frank’s ban on pre-dispute arbitration agreements applies retroactively, even though all of the events underlying the employee’s claims occurred before the enactment of Dodd-Frank. Again, the court reasoned that Dodd-Frank’s ban on the arbitration of Sarbanes-Oxley whistleblower claims primarily affects the jurisdiction to hear the substantive claim. The Administrative Review Board has followed Pezza and Wong, holding that the Dodd-Frank
anti-arbitration provision constitutes a jurisdictional provision, and that it may be retroactively applied to conduct arising prior to its enactment in appropriate cases.\textsuperscript{116}

In \textit{Henderson v. Masco Farming}, on the other hand, the District of Nevada disagreed. In \textit{Henderson}, the court granted the plaintiff’s motion to compel arbitration and held that even though the Dodd-Frank Act currently prohibits arbitration of Sarbanes-Oxley claims, its provisions are not retroactive.\textsuperscript{117} The court noted that “the largest category of cases in which ... the presumption against statutory retroactivity has [been applied] involve[s] new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.”\textsuperscript{118} According to the court, a “retroactive application of Dodd-Frank’s [Sarbanes-Oxley] 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’ of their earlier agreement.”\textsuperscript{119} Similarly, in \textit{Blackwell v. Bank of Am. Corp.}, the District of South Carolina adopted a magistrate’s decision, holding that the Dodd-Frank Act provision amending Sarbanes-Oxley to preclude arbitration of Sarbanes-Oxley claims does not apply retroactively to an obligation to arbitrate that existed before Dodd-Frank’s enactment.\textsuperscript{120}

\section*{D. Assessing a Whistleblower Complaint}

\subsection*{I. Is the Company Covered by the Statute Which the Employee Claims It Violated?}

In order to invoke § 806 of Sarbanes-Oxley, the complainant has the burden to prove that he was, at the time of the alleged events, employed by a company that has a class of securities registered under §12 of the Securities Exchange Act of 1934\textsuperscript{121} or that is required to file reports under § 15(d) of the Securities Exchange Act of 1934\textsuperscript{122} including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization … or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization.”\textsuperscript{123}

In \textit{Flake v. New World Pasta Company},\textsuperscript{124} for example, the Administrative Review Board sustained the administrative law judge order granting summary judgment to the respondent/employer on the basis that the respondent was not covered by the Sarbanes-Oxley whistleblower provision. According to the court, “[B]ecause there have been fewer than 300 holders of New World Pasta registered securities since its inception, the company’s duty to file reports under Section 15(d) of the Securities Exchange Act of 1934 was automatically suspended by statute.”\textsuperscript{125}

Further, the respondent must be a covered entity at the time of the adverse employment action in order to be covered by Sarbanes-Oxley, but may not need to have been a covered entity during the complainant’s employment.\textsuperscript{126} For example, a company that has filed a registration with the SEC in preparation for an Initial Public
Offering (IPO) is not considered a covered entity until the registration is approved by the relevant exchange authorities, who then certify to the SEC that the security has been approved. A company may be considered a covered entity under Sarbanes-Oxley as long as it qualified as a covered entity at the time of the adverse action, even if it did not qualify as a covered entity during the plaintiff’s employment.

For instance, the Northern District of Illinois held that a company was a covered entity because it had been acquired by a public company by the time the adverse action took place, even though it did not qualify as a covered entity during the plaintiff’s employment. The Court reasoned, “The ‘formerly worked for’ definition of ‘employee’ [under Sarbanes-Oxley] is susceptible to the reading that an individual who formerly worked for an entity that is now public (whether he did so before or after the company became public) and who engages in protected activity under Sarbanes-Oxley after the company goes public may sue for retaliation that occurs in response to that protected activity…. [T]his understanding shows why these facts fit under the rationale for the enactment of Sarbanes-Oxley, which was to prevent public companies from retaliating against people who by virtue of their employment with a covered company (here, a former rather than current employee, as allowed by the relevant regulation) had information about its fraudulent activities.”

Significantly, in 2014, the U.S. Supreme Court ruled in a 6-3 decision that privately owned companies, in addition to publicly traded companies, may be subject to whistleblower liability under Sarbanes-Oxley. In Lawson v. FMR LLC, the Supreme Court held private company employees, in certain circumstances, are entitled to the anti-retaliation protections afforded by Sarbanes-Oxley. However, the decision left unclear the extent of these circumstances, thus generating ongoing debate about the reach of Sarbanes-Oxley.

Until now, privately owned companies were not considered subject to Sarbanes-Oxley whistleblower retaliation claims. Following Lawson, privately owned companies, and contractors and subcontractors of publicly traded companies with employees performing services for publicly traded companies in particular, are potential targets for such claims. Moreover, the extension of Sarbanes-Oxley liability is not entirely defined by Lawson; thus, the full reach of the statute is still undetermined. First and foremost, it is unclear whether a privately held company is exposed regardless of the nature and extent of the particular services it provides to the publicly traded company.

Only a few courts have addressed the scope of Lawson’s holding. In Wiest v. Lynch, the U.S. District Court for the Eastern District of Pennsylvania allowed a lawsuit to move forward under the whistleblower provisions of SOX against a non-publicly traded subsidiary of a publicly traded corporation. In doing so, the Court followed the Supreme Court’s decision in Lawson, extending protection under the Section 806 whistleblower provisions of Sarbanes-Oxley to employees of privately held contractors who served as the public company’s agent with respect to accounting- and tax-related matters. In Gibney v. Evolution Marketing Research, LLC, the U.S. District Court for the Eastern District of Pennsylvania held that Sarbanes-Oxley does
not extend to a private contractor’s alleged overbilling of its publicly-traded client, reasoning that the plaintiff’s “case is fundamentally different [from Lawson] in that it does not implicate the peculiar structure of the mutual fund industry.”

More importantly, in enacting SOX Congress was specifically concerned with preventing shareholder fraud either by the public company itself or through its contractors. In incorporating contractors as a protected class under [SOX], Congress recognized that these contractors could “contribute to,” “facilitate,” and be “complicit in” shareholder fraud and any subsequent cover-up.

[T]he specific shareholder fraud contemplated by SOX is that in which a public company — either acting on its own or acting through its contractors — makes material misrepresentations about its financial picture in order to deceive its shareholders. Accordingly, the Court does not believe SOX was intended to reach the type of scenario at issue here: where there are allegations of fraudulent conduct between two companies who are party to a contract, and one of those companies just happens to be publicly-held.

In Safarian v. Am. DG Energy Inc., the U.S. District Court for the District of New Jersey considered the question of whether an engineer who worked as an independent contractor for a publicly traded company was protected by Sarbanes-Oxley when he reported overbilling, improper construction and the failure to obtain proper permits to the company’s employees. The plaintiff argued that these disclosures were protected because he reasonably believed that the fraudulent billing of customers “result[s] in misstatement[s] of accounting records to . . . shareholders and fraudulent tax submissions to [the] Internal Revenue Service.” The Court disagreed, stating, “Here, Plaintiff is an engineer who has no involvement with the company’s accounting or taxation practices, and the reported activity did not deal with corporate disclosures. . . . Applying the Sarbanes-Oxley Act to any fraudulent actions that might lead to misstatements in the accounting records or tax submissions would unduly expand the Act to a general anti-retaliation statute.”

In In re PALMER v. Humana, Inc., an administrative law judge declined to extend Lawson to a situation in which the complainants alleged that the defendant insurer cancelled a contract with their employer in retaliation for the employees’ complaints that the insurer violated HIPAA. The administrative law judge reasoned that the employees of the contractor sought relief not from their employer, but from the company with whom their employer had a contract. “The adverse action taken was against their employer, not by their employer. While the Court in Lawson extrapolates the statutory language to extend whistleblower protection, that extrapolation appears not to be without limits. Significantly, those limits include a presumed employee-employer relationship between the whistleblower and liable party.” The administrative law judge declined to further depart from the statute, even though the threat of a cancellation of a contract may stifle whistleblower activity by the employees of that contractor.
2. Was the Complaint Directed to the Appropriate Individual/Agency Specified in the Statute?

In order to establish a claim of retaliation under § 806, a complainant must show that the adverse employment action at issue was taken because the employee communicated information protected by Sarbanes-Oxley to a federal regulatory or law enforcement agency, a member of Congress or a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).\textsuperscript{139} It is not sufficient for a complainant to merely assert that a person authorized by the statute eventually found out about his allegations.\textsuperscript{140}

3. What Is the Conduct About Which the Employee Claims to Have “Blown the Whistle”?

At the outset of a Sarbanes-Oxley whistleblower action, it is critical to focus on what the complainant actually communicated and whether it met the statutory definitions of whistleblowing. Generally speaking, protected activity is defined under the Act as reporting an employer’s conduct which the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, securities fraud or a violation of any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.\textsuperscript{141}

In one noteworthy case, the Department of Labor’s Administrative Review Board held that a complainant need only show that he or she reasonably believes that the conduct complained of constitutes a violation of the laws listed in Sarbanes-Oxley.\textsuperscript{142} The Board rejected the notion that protected activity under Sarbanes-Oxley must specifically relate to shareholder fraud or “definitively and specifically” touch one of Sarbanes-Oxley’s enumerated statutory violations.\textsuperscript{143} The Administrative Review Board held that this reasonable belief standard has both a subjective and objective component. The complainant must have a subjective belief that the challenged conduct violates a provision listed in Sarbanes-Oxley, and this belief must be objectively reasonable.\textsuperscript{144} The ARB indicated that the objective component of the reasonable belief standard should be 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.”\textsuperscript{145}

Only four U.S. Courts of Appeals have addressed the Administrative Review Board’s decision: the Second, Third, Fifth and Tenth Circuits. In 2013, the U.S. Court of Appeals for the Third Circuit became the first federal Circuit Court to adopt the Board’s liberal “reasonable belief” standard for determining protected activity under the whistleblower provisions of Sarbanes-Oxley. In \textit{Wiest v. Lynch}, the plaintiff, a former accountant for the defendant company, filed a complaint alleging his former employer had terminated his employment in violation of Sarbanes-Oxley after he raised concerns to his supervisors about certain corporate expenditures. The U.S. District Court for the Eastern District of
Pennsylvania granted the employer’s motion to dismiss the plaintiff’s claims, because they did not meet the “definitively and specifically” standard. On appeal, the Third Circuit reversed the dismissal of two of the plaintiff’s Sarbanes-Oxley retaliation claims. In doing so, the Court adopted the Board’s “reasonable belief” standard.146

The Second Circuit Court of Appeals followed suit.147 The Second Circuit reasoned that Sarbanes-Oxley “extends whistleblower protection to information provided by an employee ‘regarding any conduct which the employee reasonably believes constitutes a violation’ of the enumerated federal provisions. The statute does not specify what, in particular, a purported whistleblower must establish to demonstrate that criminal fraud or securities-related malfeasance is afoot. But [Sarbanes-Oxley]’s ‘critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law.’ A reasonable belief contains both subjective and objective components. That is to say, a plaintiff ‘must show not only that he believed that the conduct constituted a violation, but also that a reasonable person in his position would have believed that the conduct constituted a violation.’”148

Without any detailed analysis, the Fifth Circuit agreed with the Administrative Review Board that Sarbanes-Oxley’s “critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law.”149 In Villanueva v. United States DOL,150 the Court went on to note that “an employee need not cite a code section he believes was violated in his communications to his employer, but the employee’s communications must identify the specific conduct that the employee believes to be illegal.”151

The Tenth Circuit has also deferred to the Administrative Review Board’s position that a complainant is protected from retaliation under Sarbanes-Oxley even if the complaints at issue do not relate to fraud against shareholders.152 The Court then discussed the deference it was required to provide to the agency charged with interpreting Sarbanes-Oxley, OSHA. The Court stated, “Even if the language of [Sarbanes-Oxley] were ambiguous, … [t]his court affords deference to the Board’s interpretation of the Act as expressed in formal adjudications under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.”153

The Fifth Circuit has held that communications regarding alleged violations of state laws do not constitute protected activity under Sarbanes-Oxley,155 nor do communications regarding alleged violations of the laws of foreign countries.154 In Villanueva v. United States DOL, for instance, the Fifth Circuit Court of Appeals declined to decide whether § 806 can have extraterritorial application and, instead, decided the case on the narrower question of whether or not the whistleblower’s activity was covered by the anti-retaliation provision because the complaint concerned violations of foreign and not U.S. law.155 Carnero v. Boston Scientific Corp., however, addressed the extraterritoriality of Sarbanes-Oxley head on and held that Sarbanes-Oxley does not apply extraterritorially.156 Carnero involved a Sarbanes-Oxley whistleblower who was a citizen of Argentina working for the defendant in Brazil. The court held that the statute did not have extraterritorial effect and affirmed the district court’s dismissal of the claim. Similarly, in Ulrich v. Moody’s Corp., the Southern
District of New York held that Sarbanes-Oxley does not apply extraterritorially. The court reasoned, “There is no clear indication of extraterritorial application in either the anti-retaliation provision of the [Sarbanes-Oxley] Act or the anti-retaliation provision of Dodd-Frank.” The court then cited the Second Circuit’s recent decision in Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. 2014), holding that the Dodd-Frank Act does not apply extraterritorially and stating, “there is no explicit statutory evidence that Congress meant for the anti-retaliation provision to apply extraterritorially, and none of the tangential indications of extraterritorial application elsewhere in Dodd-Frank to which [plaintiff] points are sufficiently germane or cogent to overcome the presumption against extraterritoriality.”

E. Defending Against a SOX Complaint

An employer can successfully defend against a Sarbanes-Oxley claim by demonstrating, with clear and convincing evidence, that it would have taken the same adverse employment action against the complainant in the absence of his alleged protected activity. “The court’s role is not that of an employer’s super-personnel department. Consequently, it is not the court’s role to second-guess the wisdom of an employer’s decisions, as long as the decisions are not motivated by some impermissible factor.”

F. Addressing Orders of Preliminary Reinstatement

One of the most significant remedies available under § 806 of the Act is preliminary reinstatement by OSHA as part of its initial decision. Based on the allegations in the complaint and its investigation, if OSHA determines a violation of § 806 has occurred, it has the ability to order that the complainant be reinstated to his or her previous position as part of the remedy. Pursuant to the Sarbanes-Oxley regulations, an order of preliminary reinstatement is not stayed pending an appeal to the administrative law judge or the Administrative Review Board. Therefore, according to the regulations, an employer is required to reinstate an employee, even if the employer chooses to file objections to OSHA’s initial decision. The employee would have to be reinstated during the appeal, which could be problematic for the employer, especially if the employer is ultimately successful on appeal.

In practice, however, it may not be so easy for a complainant to enforce a preliminary award of reinstatement. In the Matters of Scott Bechtel, Wil Jaques v. Competitive Technologies, Inc., two former vice presidents filed a whistleblower Sarbanes-Oxley complaint with the Secretary of the Department of Labor alleging that their employer terminated their employment due to concerns they raised with the company’s CEO regarding disclosures to the SEC and shareholders. The employer contended it discharged the complainants for performance and other reasons unrelated to any protected activity under the Act. OSHA conducted an investigation and issued a preliminary order, finding the employer had violated Sarbanes-Oxley and requiring it to reinstate the complainants to their previous positions. Pursuant to the Sarbanes-
Oxley regulations, the employer filed objections to the preliminary order and requested a hearing before an administrative law judge. The employer also made an application to the judge seeking a stay of the reinstatement. The administrative law judge declined to stay the reinstatement, finding that based on the findings made by OSHA, the employer was unlikely to establish it could succeed on the merits of its Sarbanes-Oxley defenses and had not demonstrated how reinstatement of the plaintiffs would create irreparable harm.

Despite the administrative law judge’s refusal to stay reinstatement, the employer refused to reinstate the individuals. As a result, complainants filed an action in the United States District Court for the District of Connecticut, *Bechtel v. Competitive Technologies, Inc.*, seeking enforcement of OSHA’s preliminary order. The district court issued a preliminary injunction enforcing the Department of Labor’s preliminary order of reinstatement.

On appeal, the United States Court of Appeals for the Second Circuit held that the district court lacked the power to enforce OSHA’s preliminary order. In reaching this conclusion, the court looked to the plain language of the Act. The court noted that the language of the Sarbanes-Oxley whistleblower provision only provides federal jurisdiction to actions brought by the DOL and private parties when a final order has been issued or when no final order is issued within 180 days after the filing of the complaint. The court found the statutory grant of federal jurisdiction did not extend to preliminary orders. As such, the court concluded the district court lacked jurisdiction to issue an injunction enforcing OSHA’s preliminary order of reinstatement.

However, the ability of a complainant to enforce a preliminary order of reinstatement may be different if the preliminary order of reinstatement is issued after an evidentiary hearing. In *In the Matter of Welch v. Cardinal Bankshares Corp.*, for example, the Administrative Review Board denied Cardinal Bankshares’ (Bank) motion to stay a preliminary reinstatement order. In a footnote, the Administrative Review Board recognized the Second Circuit’s decision in *Bechtel*, but distinguished the case on the basis that in *Bechtel*, there had been no evidentiary hearing or administrative law judge decision and order on the merits. In examining the Bank’s motion for a stay, the Administrative Review Board found the Bank offered no reasons for why it would succeed on appeal, especially in light of the judge’s finding, “after a full evidentiary hearing and the development of a complete evidentiary record by the parties,” that the Bank terminated Welch’s employment for engaging in protected activity. The Board ultimately found that the Bank had failed to offer sufficient evidence as to any of the factors for determining injunctive relief, and denied the Bank’s motion for a stay. The decision in *Bechtel* indicates that a Sarbanes-Oxley complainant may be without an effective mechanism for enforcing a preliminary order of reinstatement from OSHA. However, as demonstrated by the Board’s decision in *Welch*, a reinstatement order issued after a full evidentiary hearing carries significant weight.
G. Settlement of Sarbanes-Oxley Whistleblower Complaints

1. Confidentiality Concerns with Settlements

A publicly traded company covered under the Act may be required to disclose the terms of a settlement agreement in SEC filings, thus publicizing the terms of any such agreement. This is a securities law issue separate from the employment law issues involved in the whistleblower claim. Prior to entering into any settlement agreements, employers must obtain separate advice from their securities counsel regarding any disclosure obligations.

2. Requests for Dismissal at the Administrative Level

Settlement agreements must generally be submitted for approval to the ALJ or ARB, and will subsequently be issued as the final order in the matter. To avoid this disclosure of the terms of the settlement agreement, in some instances, the complaint can be withdrawn without advising the administrative law judge or Administrative Review Board that the withdrawal is due to a settlement. The method by which this is accomplished should be clearly spelled out in the terms of the settlement agreement. If 180 days have passed since the filing of the complaint, the complainant should notify the Department of Labor that he or she is invoking his right to bring a district court action and request dismissal of the Department’s action. However, the settlement agreement should reflect complainant’s agreement that he or she will not actually file a district court action.

3. Possible Qui Tam Actions

If a claim involves alleged fraud committed against the United States government or a government agency, a private individual may institute a qui tam action against the company. Federal statutes providing incentive for qui tam actions generally prohibit disclosure of the fact that allegations have been made to the government or that an investigation is being conducted. Consequently, the company will not know whether any such action is pending at the time it reaches a settlement agreement with a whistleblower. Thus, the company might settle a whistleblower claim only to face federal litigation over the same issues.

The terms of a settlement agreement will not override any present or future governmental action. The company must decide whether to settle in the face of this risk. Although not yet tested in litigation, it is recommend that the company remove incentives offered by these federal statutes by obtaining an agreement that the whistleblower will not retain proceeds he receives from any federal qui tam action, and such proceeds will be distributed elsewhere as designated by the court. Another settlement possibility would be to obtain an agreement that the complainant will be questioned under oath on the record, so the company will have notice of any information she or he may have and an opportunity to investigate and correct any issues.
4. Effect of Settlement on Parallel Litigation

There is a significant possibility that the same factors alleged by the whistleblower will show up in parallel litigation; for example, in a shareholder derivative suit. As with a qui tam action, settlement with a whistleblower will not preclude action by shareholders or other third parties. The whistleblower and the plaintiffs in the parallel action are natural allies, and the corporation should expect discovery in the whistleblower suit to be targeted by lawyers in the shareholder litigation. If your company communicates with other lawyers who represent the company in parallel litigation, it is important to make certain that all communications are privileged work product and the client does not waive this privilege as a result of communication among the lawyers.

In some instances, a prior Sarbanes-Oxley claim may preclude subsequent litigation of the same issues. In one case, for instance, the administrative law judge rejected the plaintiff’s Sarbanes-Oxley claim. She did not seek review of this decision, but instead subsequently filed a lawsuit in federal district court alleging that she was fired for reporting Sarbanes-Oxley violations while younger male employees were not, in violation of Title VII and age discrimination under the Age Discrimination in Employment Act. The Third Circuit granted summary judgment for the defendant, holding that the plaintiff had been afforded a full and fair opportunity to litigate the reason for her termination in a federal administrative proceeding. The court recognized that the express language of Sarbanes-Oxley explicitly provides that when a final administrative order could have been reviewed by a court of appeals, that order cannot be judicially reviewed in any other civil proceeding.

V. Dodd-Frank Act Whistleblower Claims

A significant aim of Dodd-Frank is to “motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.” Section 748 amends the Commodity Exchange Act to create a whistleblower incentive program and whistleblower protection provision that are substantially similar to the SEC whistleblower act and reward program. The Act established incentives and protections for those who report wrongdoing. The statute created awards for whistleblowers and a private cause of action for whistleblowers who suffer retaliatory discharge.

The definitional section of the Act, defines a “whistleblower” as “any individual who provides . . . information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.”
The anti-retaliation provision, prohibits an employer from retaliating against a whistleblower who makes one of three types of disclosures:

- Those required by Sarbanes-Oxley,
- Those required by the Securities Exchange Act of 1934 and
- Those required by any other law, rule, or regulation subject to the SEC’s jurisdiction. 171

The courts and the SEC have grappled with the question of whether the anti-retaliation protections, which seem to include internal reporting, broaden the definition of a whistleblower. The SEC has taken the position that, for purposes of the anti-retaliation protections, a whistleblower includes anyone who provided information under 15 U.S.C. § 78u-6(h)(1)(A), even if he or she did not report directly to the SEC. 172 In its comments to the Final Rules, the SEC stated in relevant part, as follows:

This change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission. Specifically, Section 21F(h)(1)(A)(iii) – which incorporate [sic] the anti-retaliation protections specified in Section 806 of the Sarbanes Oxley Act, 18 U.S.C. § 1514A(a)(1)(C) – provides anti-retaliation protections for employees of public companies … when these employees report to (i) a federal regulatory or law enforcement agency, (ii) any member of Congress or committee of Congress, or (iii) a person with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct. 173

Many federal district courts presented with the issue have taken the same position as the SEC. 174

However, the only Circuit Court of Appeals to rule on this issue adopted the opposite view. In Asadi v. G.E. Energy (USA), L.L.C., the court recognized applying a broader meaning to the term “whistleblower” would essentially read the words “to the Commission” out of the definition. 175 The court focused its analysis on the relevant text of the statute and dismissed the plaintiff’s claim because he failed to make disclosures to the SEC and, thus, could not qualify as a “whistleblower.” A number of district courts have relied on Asadi and found the DFA whistleblower protections only apply to those who report to the SEC. 176

In June 2014, the SEC brought its first case under the new authority pursuant to regulations adopted under Dodd-Frank to bring anti-retaliation enforcement actions, charging a hedge-fund advisory firm and its owner of retaliating against a trader who had reported potentially illegal activity to the SEC. 177

According to the SEC’s Order, the Company and its owner, without admitting or denying any wrongdoing, agreed to pay $2.2 million (disgorgement of $1,700,000, prejudgment interest of $181,771 and a civil penalty of $300,000) and to cease and desist from committing
future violations of the Securities Exchange Act and Investment Advisers Act. Sean McKessy, the head of the SEC’s Office of the Whistleblower, warned that the agency “will continue to exercise [its] anti-retaliation authority in these and other types of situations where a whistleblower is wrongfully targeted for doing the right thing and reporting a possible securities law violation.” This case is just the beginning of the SEC exercising its authority to bring anti-retaliation actions. Therefore, companies should utilize extreme caution when dealing with whistleblowing employees.

VI. Conclusion

The events leading to passage of the Sarbanes-Oxley Act placed a tremendous emphasis on compliance and ethics programs. Best practice programs are designed to emulate the elements referenced in the U.S. Sentencing Commission’s guidelines for an effective organizational compliance program. Thus, such programs routinely include internal reporting mechanisms and a so-called whistleblower policy that places a great deal of importance on those employees who report concerns of fraud and inappropriate conduct to management.

Retaliation against such employees will continue to be a source of exposure for companies. As more and more employees recognize their “protected” status by virtue of internal complaints, the practice of making such complaints will likely continue as employees seek heightened protection from negative employment actions. In some instances, the underlying protected activity will have merit. Nevertheless, the potential for retaliation is significant and must be managed by concerned companies. The risks of ensuing litigation, the complexity of settlement and the potential for reporting obligations pushes for proactive management and, indeed, avoidance of whistleblower litigation. Particularly as federal stimulus funds reach the private employer community, organizations should continually review and improve the company’s whistleblower policies and the risk management of these claims.
VII. About the Authors

A. Firm Overview

Founded in 1958, Jackson Lewis is dedicated to representing management exclusively in workplace law. With 800 attorneys practicing in major locations throughout the U.S. and Puerto Rico, Jackson Lewis is included in the AmLaw 100 and Global 100 rankings of law firms. The firm’s wide range of specialized areas of practice provides the resources to address every aspect of the employer/employee relationship. Jackson Lewis has one of the most active employment litigation practices in the world, with a current caseload of over 6,500 litigations and approximately 650 class actions.

Jackson Lewis is a founding member of L&E Global Employers’ Counsel Worldwide, an alliance of premier employment law boutique firms and practices in Europe, North America and the Asia Pacific Region.

B. About Jackson Lewis’ Corporate Governance and Internal Investigations Practice

Jackson Lewis represents publicly-traded and privately-held organizations in a variety of matters involving corporate compliance, internal investigations and whistleblower litigation. The firm regularly advises employers on the development of compliance programs that meet industry best practices and comply with the U.S. Sentencing Commission Guidelines for Organizations as well as the Federal Acquisition Regulations. In addition, Jackson Lewis has extensive experience conducting internal investigations relating to code of conduct concerns, potential Foreign Corrupt Practice Act violations, and related anti-bribery matters. Jackson Lewis attorneys regularly defend employers against whistleblower claims pursuant to the Sarbanes-Oxley Act of 2002, the Dodd-Frank Act of 2010; the False Claims Act (including Qui Tam/Relator claims); and other federal, state and local whistleblower laws.

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VIII. Additional Resources


IX. Endnotes


4 Employees are not required to complain to their employers first.


6 The relief may include back pay, attorneys’ fees, and other compensatory damages. Employees who bring frivolous or bad faith claims may be subject to an award of employer’s attorneys’ fees of up to $1,000.

7 Preliminary reinstatement may not be ordered if the employee poses a risk of physical violence. In the alternative, “economic reinstatement” (continued pay and benefits for the employee) may be ordered. See 69 Fed. Reg. 52,108-109 (2004).

8 This provision does not apply if the delay was due in part to the complainant’s own bad faith.


10 This provision applies to every employer, not just to publicly traded companies. See Retaliation Against a Victim, Witness, or an Informant, 18 U.S.C. § 1513 (e) (2008).

Deborah Solomon, “For Financial Whistle-Blowers, New Shield is an Imperfect One,” WALL ST. J.,


14 Id.


20 43 P.S. § 1422.

21 1 V.S.A. § 317(c)(42).


24 Id.


Id.

Id.

Id.


Id.

Id.

Id.


Id.

Id.

Id.


Id.

Id.

Id.


Id.

29 C.F.R. § 1980.106(a) (2008). A request by the named party for attorney’s fees based on an allegation the complainant filed a frivolous complaint or filed the complaint in bad faith must also be made to the ALJ within this 30-day period. See id.


Id.

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51 29 C.F.R. § 1980.106(b) (2008). Failure of a complainant to timely serve the respondent
with a copy of his objections and request for hearing does not necessarily warrant a
dismissal of the complaint, absent

prejudice to the respondent for improper service. See Richards v. Lexmark Int’l, Inc., 2004-
SOX-49 (ALJ Oct. 1,

regulations were not

jurisdictional and therefore were subject to equitable considerations, including tolling,
when the complainant

failed to timely serve respondent with a request for an ALJ hearing due to inadequate
instructions in the ALJ
determination letter).

52 Id.


54 Id.

55 Id. The complainant must file a withdrawal in writing, which the Assistant Secretary will
then determine

whether to approve.


59 Id.


63 Id.


70 Id.

71 Id.

72 Id.


74 Id.

75 Id.

76 Id.


84 Id. at *11-16.


90 Id.

91 752 F.3d 339, 350 (4th Cir. 2014) (“The contributing factor standard in SOX cases is indeed meant to be quite broad and forgiving. However, under the particular circumstances presented here, the standard would simply be toothless if we held that a preponderance of the evidence shows that these long-past activities affected [the employee’s] termination given the lengthy history of antagonism and the intervening events which caused the Outside Directors to view Feldman as insubordinate.”).

92 Halliburton, Inc. v. Administrative Review Bd., 771 F.3d 254, 263 (5th Cir. 2014).

93 Id.


102 Hanna v. WCI.

103 591 F.3d 239 (4th Cir. 2009).
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brought under the Dodd-Frank Act itself, 15 U.S.C. § 78u-6(h), are not exempt from pre-dispute arbitration agreements. Khazin v. TD Ameritrade Holding Corp., No. 14-1689 (3d Cir. Dec. 8, 2014). The Court reasoned that Congress did not append an anti-arbitration provision to the Dodd-Frank cause of action stated in the Act while contemporaneously adding such provisions to SOX and various other statutes suggests that the omission was deliberate. Id.


118 Id. at *11–12.

119 Id. at *13.


127 Roulett v. American Capital Access, 2004-SOX-78 (ALJ Dec. 22, 2004) (finding respondent who had withdrawn registration from SEC prior to approval was not a covered entity under Sarbanes-Oxley).


129 Id. at *19-21.


133 Id.

134 Id. (citations omitted).


136 The lawsuit in Safarian was brought under Dodd-Frank, which protects whistleblowers who disclose information "required or protected" under Sarbanes-Oxley. 15 U.S.C. § 78u-6(h)(1)(A)(iii).


138 Id.


140 See Fredrickson v. Home Depot U.S.A., Inc., 2007-SOX-13 (ALJ July 10, 2007) (in order to be protected under the Act, the employee must purposefully communicate his alleged concerns to a person or entity expressly designated in the statute).


143 Id.

144 Id.

145 Id.

146 No. 11-4257 (3d Cir. Mar. 19, 2013).

147 In addition to the Courts of Appeal, two federal district courts have also rejected the "definitively and specifically" standard. See Taylor v. Fannie Mae, 2014 U.S. Dist. LEXIS 119042 (D.D.C. Aug. 21, 2014) (deferring to the ARB’s Parexel decision); Stewart v. Doral Fin. Corp., 997 F. Supp. 2d 129 (D.P.R. 2014) (same).


150 Id.

151 Id. at 109-10 (citation omitted).

152 Lockheed Martin Corp. v. Administrative Review Bd., 717 F.3d 1121 (10th Cir. 2013).

153 Id. at 1131 & n.5.

154 Villanueva, 743 F.3d at 109-10.

155 Id.

156 433 F.3d 1 (1st Cir. 2006).


158 Id. at *19-20.

159 Johnson v. Stein Mart, Inc. at *15.

160 Id. at *15-16 citing Bozeman, at 1351-52) (internal quotations omitted).


164 See Bechtel v. Competitive Technologies, Inc., 448 F.3d 469 (2d Cir. 2006).

165 ARB Case No. 06-062; ALJ Case No. 2003-SOX-15 (ARB June 9, 2006).

166 See also Johnson v. U.S. Bancorp, ARB No. 13-014, ALJ No. 2010-SOX-37 (ARB May 21, 2013) (applying four-part test for determining whether to stay preliminary order of reinstatement).


720 F.3d 620, 630 (5th Cir. 2013).

Berman v. Neo@Ogilvy LLC, 2014 U.S. Dist. LEXIS 168840 (S.D.N.Y. Dec. 4, 2014) (holding permitting a private right of action without first requiring contact with a government agency is too expansive an interpretation); Verfuerth v. Orion Energy Sys., 2014 U.S. Dist. LEXIS 156620 (E.D. Wis. Nov. 4, 2014) (sending e-mails to the board of directors about security law violations did not entitle Plaintiff to protections of DFA). See also Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. N.Y. 2014) (finding that whistleblower antiretaliation provision of DFA does not apply extraterritorially thus declining to determine whether a whistleblower must report to the SEC).

In Re Paradigm Capital Management, Inc.