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SUBCOMMITTEE ON THE SARBANES-OXLEY ACT OF 2002

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I. INTRODUCTION

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002 ("SOX"), Pub. L. 107-204. Enacted in the wake of the Enron and WorldCom scandals, the Act was designed to restore investor confidence in the nation's financial markets by improving corporate responsibility through required changes in corporate governance and accounting practices and by providing whistleblower protection to employees of publicly traded companies who report corporate fraud.

SOX contains both a civil and a criminal whistleblower provision.

- Section 806, codified at 18 U.S.C. §1514A, creates a civil cause of action for employees who have been subject to retaliation for corporate whistleblowing. Under Section 806, publicly traded companies may not "discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment" because of any protected whistleblowing activity. 18 U.S.C. § 1514A(a). Section 806 addressed Congress's concern that corporate whistleblowers had been subject to a "patchwork and vagaries" of state laws, with a whistleblowing employee in one state being more vulnerable to retaliation than a similar employee in another state. *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy). Section 806 was intended to set a national floor for employee protections and not to supplant or replace state law. *Id.*

- Section 1107, SOX's criminal whistleblower provision, codified at 18 U.S.C. §1513(e), makes it a felony for anyone to knowingly retaliate against or take any action "harmful" to any person, including interfering with the person's employment, for providing truthful information to a law enforcement officer relating to the commission or possible commission of a federal offense. As part of a criminal obstruction of justice statute, Section 1107 is enforced by the U.S. Department of Justice. Retaliation under Section 1107 is listed as a possible predicate act under RICO.

The Department of Labor Office of Administrative Law Judges hears Section 806 whistleblower claims following the filing of objections to OSHA investigative findings. SOX also contains a kick-out provision which allows a complainant to file a de novo action in federal court if the DOL does not issue a final decision within 180 days. Many decisions of the ALJs and courts have been criticized as interpreting the whistleblower provisions in an unduly restrictive, pro-employer manner, which has been perceived by many as limiting whistleblowers' ability to have their claims heard on the merits. Partially in response to such criticism, in 2010 Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Dodd-Frank, *inter alia*, significantly expands SOX's civil whistleblower protections and creates additional anti-retaliation requirements for employers. The Dodd-Frank amendments and their effects upon Section 806 are discussed in greater detail in Section II, *infra*.

Under the Obama administration, the membership of the DOL's Administrative

Review Board ("ARB") has been completely restructured. In January 2010, Labor Secretary Hilda Solis appointed Paul Igasaki as Chair of the ARB and E. Cooper Brown as Vice-Chair. In July 2010, Joanne Royce and Luis A. Corchado were appointed. Finally, Lisa Wilson Edwards joined in March 2011. As a result, the ARB consists entirely of judges appointed by the Obama administration. Subsequently, in 2011 the ARB issued several decisions which significantly broaden SOX whistleblower protections and undermine the more employer-friendly precedents from the previous administration. These decisions will be discussed throughout this Report.

II. DODD-FRANK ACT OF 2010 AND ITS EFFECT ON SARBANES-OXLEY WHISTLE-BLOWER PROTECTIONS

President Obama signed Dodd-Frank, Pub. L. 111-203, into law on July 21, 2010. The new law, which Congress intended to effect a sweeping overhaul of the nation's financial sector in response to arguably the deepest economic downturn since the Great Depression, created two controversial "bounty" programs that would reward individuals who reported securities or commodities-trading violations to federal regulators. At the same time, the Dodd-Frank Act significantly added to the protections available to corporate whistleblowers in several ways, including by amending Section 806 to expand its reach, and by creating a new cause of action in federal court directly under Dodd-Frank. [1]

A. Dodd-Frank Amendments to SOX Section 806

Although the Dodd-Frank amendments to Section 806 have not generated as much controversy as the new whistleblower-incentive programs, the changes are significant. Sections 922(b) and (c) of Dodd-Frank double the statutory filing period for SOX retaliation complaints from 90 to 180 days, give parties a right to a jury trial in district court actions, exclude SOX whistleblower claims from the reach of pre-dispute arbitration agreements, and extend protection from retaliation to employees of nationally recognized statistical rating organizations. 18 U.S.C. §§ 1514A(a), 1514A(b)(2). In addition, Section 929A expands the coverage of SOX 806 to include subsidiary entities of publicly traded corporations. 18 U.S.C. § 1514A(a). Although the Dodd-Frank whistleblower provisions are too new to have generated much case law, the ARB and some courts have addressed the issue of subsidiary coverage and the retroactivity of the Act's ban on arbitration of SOX claims.

1. Section 929A – Subsidiaries Covered

Section 929A of the Dodd-Frank Act expanded the scope of SOX coverage to include subsidiary entities of publicly traded corporations "whose financial information is included in the consolidated financial statements of [publicly traded companies]." 18 U.S.C. § 1514A(a). Prior to enactment of the Dodd-Frank Act, except in limited circumstances, the Department of Labor frequently interpreted SOX's whistleblower protection provisions to apply solely to publicly traded companies subject to the registration and reporting requirements of

[1] In addition to amending Section 806 and creating a new cause of action for whistleblowers who faced retaliation for reporting securities violations to the SEC, the Dodd-Frank Act, in Section 1079B, amended the anti-retaliation provision of the False Claims Act, 31 U.S.C. § 3730(h), by expanding the scope of protected activity and by establishing a standard statute of limitations of three years.

the *Securities Exchange Act of 1934*. Because of this, wholly-owned subsidiaries of publicly traded companies – entities that were not subject to the registration and reporting requirements of the *Securities Exchange Act* – often avoided the application of SOX 806 without ever reaching the merits stage of a proceeding.

Section 929A of the Dodd-Frank Act now explicitly provides that the anti-retaliation provisions of SOX apply to employees of publicly traded companies and to employees of subsidiaries of publicly traded companies whose financial information is incorporated into the consolidated financial statements of publicly traded companies. Accordingly, employers falling under this latter category can no longer avoid coverage of SOX merely because they do not file directly with the SEC.

As discussed in Section III.B, *infra*, the ARB has issued several post-Dodd-Frank opinions in which it has found that this amendment was simply a "clarification" of existing law, and thus need not be given retroactive effect in order for Section 806 to apply to subsidiaries in pre-amendment cases. Previously, the Act's retaliation provisions had only sometimes been applied to private subsidiaries of publicly traded companies. *See, e.g.*, *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004) ("covered employee" where the officers of a publicly traded parent company had the authority to affect the employment of the employees of the subsidiary); *Platone v. Atlantic Coast Airlines Holdings Inc.,* 2003-SOX-27 (ALJ Apr. 30, 2004) (employee of a non-publicly traded subsidiary was a covered "employee" where the company's parent was the alter ego of the subsidiary and the ability to affect the complainant's employment).[2] As noted above, however, the DOL and courts often dismissed SOX complaints because the whistleblower worked for a subsidiary. *See Savastano v. WPP Group, PLC.*, 2007-SOX-34 (ALJ July 18, 2007) (employee not covered where complaint did not allege facts supporting a finding that the non-publicly traded employer and its non-publicly traded holding company were acting as agents of a publicly traded parent company).

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

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

2. Retroactivity of Pre-Dispute Arbitration Ban

Courts have reached inconsistent decisions regarding whether other provisions of Dodd-Frank's amendments to Section 806 will apply retroactively. In *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Mass. 2011), the court held that the provision voiding pre-dispute arbitration agreements as applied to SOX whistleblower claims applied retroactively. The plaintiff filed in district court in January 2010, claiming he was wrongfully retaliated against in violation of SOX after raising concerns relating to defendants' misconduct in securities transactions. The defendants raised the mandatory arbitration agreement contained in the plaintiff's employment agreement as an affirmative defense and moved to compel arbitration and either stay or dismiss the current action. The plaintiff argued that the arbitration clause was void under the Dodd-Frank amendments that went into effect on July 21, 2010, but the defendants contended that the Dodd-Frank bar on SOX did not apply retroactively.

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

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

The only other court to have addressed the question to date, the U.S. District Court for the District of Nevada, reached a different conclusion in *Henderson v. Masco Framing Corp.*, 2011 WL 3022535, at *3–4 (D.Nev. July 22, 2011). The *Henderson* court held that the Dodd-Frank Act's SOX provisions were not retroactive, disagreeing with the *Pezza* court's conclusion that retroactive application of Section 922 affected only the conferral of jurisdiction and not substantive contract rights. Instead, the Nevada court found, the "retroactive application of Dodd-Frank's SOX provisions would not merely affect the jurisdictional location in which

such claims could be brought; it would fundamentally interfere with the parties' contractual rights and would impair the 'predictability and stability' or their earlier agreement."

Two other courts have declined to address the issue of whether the Dodd-Frank amendments to SOX Section 806 apply retroactively because they each dismissed on other grounds. *See Wiest v. Lynch*, 2011 WL 2923860, at *10 n.4 (E.D. Pa. July 21, 2011) (declining to address whether Section 929A would apply retroactively); *Hiller v. Meritage Homes of Texas, LLC*, 2011 WL 1232065, at *6 n.3 (S.D. Tex. Mar. 31, 2011) (declining to address the issue of retroactivity because Meritage's motion to compel arbitration was denied on other grounds.").

B. SEC Award Program

In addition to the changes to SOX Section 806, Dodd-Frank creates a new SEC whistleblower award or "bounty" program, which incentivizes the reporting of fraud.[3] Under the new program, the SEC is required to pay awards to eligible whistleblowers who voluntarily provide the commission with original information that leads to a successful enforcement action in which the SEC recovers monetary sanctions in an amount over $1 million. A whistleblower who meets this and other criteria is entitled to an award of 10% to 30% of the amount recovered by the SEC or by certain other authorities in "related actions."

Dodd-Frank defines a "whistleblower" as an "individual . . . or two or more individuals acting jointly." Section 21(F)(a)(6).[4] The final rules make it clear that a corporation or other such entity is not eligible for whistleblower status. Rule 21-F2(a).

The SEC will view information provided as voluntary only if the whistleblower provides it to the Commission before he has received an official request, inquiry, or demand for it. Rule 21F-4(a)(1), (2). The SEC rules also made it clear that a whistleblower would be deemed to have submitted information "voluntarily" as long as an official inquiry had not been not directed to him as an individual, so employees remain eligible even if an inquiry has been directed to their employer. *Id.* If a whistleblower is obligated to report information to the SEC as a result of a preexisting duty, it will not be considered voluntary. Rule 21F-4(a)(3). This disqualification is not triggered by an employee's contractual obligation to his employer or another third party or the receipt of a request for the same or related information as part of an internal investigation, so an employer cannot remove the incentives that are key to the effectiveness of the program by requiring all employees to sign agreements requiring them to report any perceived securities violations to the SEC. Adopting Release at 35-37.[5]

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[3] Dodd-Frank created a nearly identical program for information regarding violations of commodities-trading regulations, which is administered by the Commodities Trading Futures Commission ("CTFC"). This article addresses only the SEC program, which the SEC is further along in establishing than is the CTFC, and which has generated considerably greater attention from both sides of the whistleblower bar.

[4] Section 922 of the Dodd-Frank Act amended the *Securities Exchange Act of 1934* to add Section 21F, which establishes the whistleblower award program. Citations herein are to the *Exchange Act*, in accordance with the practice of the Securities and Exchange Commission ("SEC"). These rules also appear at 17 C.F.R. pt. 240 and 249 (2012).

[5] The Adopting Release and the final rules, a combined 305 pages, are available on the SEC's website at

In order to qualify as "original information" that will support a claim for an award, the whistleblower's tip must consist of information that is 1) derived from the individual's "independent knowledge" or "independent analysis," 2) not already known to the SEC from any other source (unless the whistleblower is the original source of the information, such as where she has reported the information first to the Department of Justice, which passed the information to the SEC), and 3) not "exclusively derived" from certain public sources, including government reports, hearings, audits or investigation, or the news media, unless the whistleblower is a source of the information contained therein. Rule 21F-4(b)(1). The whistleblower may have observed the facts first-hand, but may also come into possession of the knowledge through "experiences" or communications. This suggests that the whistleblower can have "independent knowledge" of facts despite having learned them from someone else such as a co-worker, customer or client, as long as that third person is not a company attorney, compliance officer or other representative who would be ineligible for a reward under Rule 21F-4(b)(4), discussed below.

Consistent with its goal of promoting enforcement of securities laws while also respecting a company's efforts to build and maintain an effective internal compliance program, the SEC has designated certain categories of employees and other individuals – those who obtain information in connection with a company's legal representation or those integral to internal compliance functions – as presumptively ineligible for participation in the whistleblower-reward program. *See* Rule 21F-4(b)(4)(i)-(iii). Further, other individuals who learn information from these categories of persons will not be considered to be providing original information if they then report it to the SEC. Rule 21-F4(b)(4)(vi). Persons who obtain information for a tip using methods that violate criminal laws are also excluded. Rule 21F-4(b)(4)(iv).

The exclusions for upper level-management, compliance personnel, and auditors set forth in Rule 21F-4(b)(4)(iii) may not apply if the person obtains their information outside of their roles in compliance, investigation, or audit. *Id.* Nor do these exclusions apply if the would-be whistleblower "reasonably believes" that disclosure to the SEC is needed to prevent "substantial injury to the entity or investors," Rule 21F-4(b)(4)(v)(A), if the would-be whistleblower "reasonably believes" that the entity is acting in a way that would impede an investigation of the violations, Rule 21F-4(b)(4)(v)(B), or if at least 120 days have passed since the whistleblower reported the information internally to the company's audit committee, chief legal officer, or other appropriate official of the entity, or since obtaining information under circumstances indicating that they those officials were already aware of the information. Rule 21F-4(b)(4)(v)(C).

When information concerns conduct not already under investigation or examination by the SEC, it will be considered to have led to successful enforcement if it is "sufficiently specific, credible, and timely" to cause the staff to commence an investigation or reopen a closed investigation and the Commission brings a successful judicial or administrative action based in whole or in part on the conduct identified. Rule 21F-4(c)(1). If the conduct is already under investigation, the information will be deemed to have led to successful enforcement if it "significantly contributed " to the success of an investigation, meaning it

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http://www.sec.gov/rules/final/2011/34-64545.pdf. The text of the rules themselves begins on page 241.

significantly reduced the time or resources necessary or increased the number successful claims or prosecutable parties. *See* Adopting Release at 100.

Under the final rule, in determining whether recovery in an enforcement action exceeds the $1,000,000 threshold, the word "action" generally means a single judicial or administrative proceeding. Rule 21F-4(d). However, in certain circumstances actions can be aggregated. The SEC adopted this broad interpretation of the term "action" in accordance with congressional intent to increase the incentives for employees to report violations. Actions may include cases from two or more administrative or judicial proceedings that arise out of a common nucleus of operative facts, and any follow-on proceedings arising out of the same nucleus of operative facts may be aggregated as well. Rule 21F-4(d)(1). Factors that may be taken into account when determining whether two or more proceedings arise from the same nucleus of operative facts include parties, factual allegations, alleged violations of federal securities laws, or transactions and occurrences. *See* Adopting Release at 110.

Where the SEC has brought a successful enforcement action, the SEC will also issue awards based on amounts collected in "related actions" brought by the Attorney General of the U.S., certain regulatory authorities and self-regulatory organizations, and state attorneys general under certain circumstances. Rule 21F-3. The rule regarding related actions is discussed in detail in the Adopting Release at 20-24.

The final rules set forth a number of factors that the SEC may consider when calculating the final award. Factors that might increase an award include participation by the whistleblower in an internal compliance system, the significance of information provided by the whistleblower, the degree of assistance provided by the whistleblower, and the SEC's programmatic interest in the particular securities violations at issue.[6] Rule 21 F-6(a)(1)-(4). Factors that might decrease an award include the culpability of the whistleblower, unreasonable reporting delay, or interference with internal compliance and reporting systems. Rule 21 F-6(b)(1)-(3). In short, the rules enable a whistleblower to maximize his or her award by report violations timely and effectively, to use internal channels where practical, and to assist the SEC as needed.

The rules also balance concerns about culpable whistleblowers receiving awards with the understanding that, at times, those with the best access to information may have participated in wrongdoing at some level. In order to incentivize such whistleblowers to come forward with securities violations, the rules do not exclude culpable whistleblowers from awards altogether, but they do prevent them from recovering from their own misconduct. In determining whether the whistleblower has met the $1,000,000 threshold and in calculating an award, the SEC will exclude any monetary sanctions that the whistleblower is ordered to pay individually or that an entity is ordered to pay based substantially on the conduct of the whistleblower. Rule 21F-16. The rule thus allows culpable whistleblowers, who may be uniquely situated to provide

[6] The SEC's description of its law-enforcement interests provides some guidance to practitioners who are assessing the Commission's likely response to a given "tip." Key to the SEC's response will be, *inter alia,* whether the conduct at issue involves an industry-wide practice, Rule 21F-6(a)(3)(iii); the type, severity, duration and isolated or ongoing nature of the violations, *id.*; the danger to investors "and others," Rule 21F-6(a)(3)(iv); and the number of entities and individuals who have suffered harm. *Id.*

information regarding securities violations, to come forward while not creating incentives that would encourage them to engage in securities violations.

C. New Cause of Action

Dodd-Frank also creates a new cause of action, set forth in Section 21F(h)(1)(A), which allows "whistleblowers" to sue in federal court if their employers retaliate against them because they have provided information about their employer to the SEC in accordance with the above-described whistleblower bounty program; because they have initiated, testified, or assisted in any investigation related to the program; or because they have made disclosures "required or protected" under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, or any other law, rule, or regulation under the jurisdiction of the SEC.

A Dodd-Frank retaliation claim may be filed directly in federal court within three years "after the date when facts material to the right of action are known or reasonably should have been known to the employee" (but subject to a maximum of six years). Section 21F(h)(1)(B)(iii). A whistleblower's remedies include reinstatement, double back pay with interest, attorneys' fees, and the reimbursement of other related litigation expenses. Section 21F(h)(1)(C).

Even though the statute by its terms provides the new cause of action only to "whistleblowers," which Section 21F(a)(6) of the Act defines as individuals who provide information to the SEC, one federal district court has concluded that the protection in 21F(h)(1)(A)(iii) extends to individuals whose disclosures are "required or protected" under SOX, and who have reported internally but not reported their information to the SEC. *See Egan v. TradingScreen, Inc.* (*Egan I*), No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011). *Egan I* also held that an employee who provides information to someone who then passes it on to the SEC can be considered a "whistleblower" under the statute. *Id.* at *8-9.

On a motion to dismiss the plaintiff's amended complaint, however, the court held that the plaintiff had failed to provide specific allegations that his reports had been passed on to the SEC by internal investigators at the company, and thus the plaintiff was not a "whistleblower" and had not engaged in protected activity under the statute. *See Egan v. TradingScreen Inc.* (*Egan II*), No. 10-cv-08282, 2011 WL 4344067, at *2-4 (S.D.N.Y. Sept. 12, 2011). This decision is potentially far-reaching as it would allow plaintiffs who have engaged in protected activity under Section 806 of SOX to circumvent the administrative scheme outlined in SOX and take their claims directly to federal court, and to do so with the benefit of a longer statute of limitations (180 days under SOX versus three years for claims filed in court under the Dodd-Frank Act, Section 21F(h)(1)(B)(iii)(bb)). The question whether other courts will adopt this reasoning will be answered over the next few years.

III. COVERED EMPLOYERS

Section 806 applies to publicly traded companies, as defined below, or to "any officer, employee, contractor, subcontractor or agent" of such companies. *See* 18 U.S.C. § 1514A(a). These terms have been subject to differing interpretations. As discussed in Section

II.A, *supra,* subsidiaries of publicly traded companies are now expressly covered, without resort to agency or intergrated employer principles.

A. Publicy Traded Companies

Section 806 applies to companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)). This provision is relatively unambiguous and has been strictly construed. The fact that a company may own or even issue securities, alone, is insufficient to qualify it for Section 806 coverage. Recent cases include:

- *Hudes v. Aetna Life Ins. Co*., 2011 WL 3805679 (D.D.C. Aug. 30, 2011) ("the World Bank is not a 'company' within the meaning of § 1514A"; although it issues securities, those securities "are explicitly 'deemed to be exempted securities' under both the Securities Act and the Exchange Act").

- *Hylton v. The Seminole Tribe of Fla.*, ARB No. 10-078, ALJ No. 2010-SOX-14 (ARB Oct. 31, 2011) (despite allegations that respondent sovereign Indian tribe purchased a publicly traded company and entered into business relationships with publicly traded companies, respondent is not a company covered under Section 806; moreover, it is subject to sovereign immunity).

- *Krise v. Management & Training Corp.*, 2011-SOX-25 (ALJ June 17, 2011) (respondent's alleged reporting requirements as a government contractor do not establish Section 806 coverage).

B. Subsidiaries

As discussed in Section II.A, *supra,* Dodd-Frank amended SOX to expressly cover "any subsidiary or affiliate (of a publicly-traded company) whose financial information is included in the consolidated financial statements of such company." Pub.L. 111-203, §929A (July 21, 2010).

1. Post-Dodd-Frank ARB Decisions

In 2011, the ARB issued three opinions rejecting its previous agency analysis in *Klopfenstein v. PCC Flow Tech. Holdings, Inc*., ARB No. 04-149, ALJ No. 2004-SOX-11 (ARB May 31, 2006), and concluding that this §929A standard applies to pre-Dodd-Frank cases.

- In *Johnson v. Siemens Bldg. Techs., Inc*., ARB No. 08-032, ALJ No. 2005-SOX-015 (Mar. 31, 2011), the ARB concluded that Section 929A was a clarification of Section 806 and then interpreted the pre-amendment language consistent with Section 929A, holding that, at a minimum, Section 806 covers a subsidiary whose financial information is included in a publicly traded parent company's consolidated financial statements. There also was

discussion regarding whether SOX's "contractor, subcontractor, or agent" provision may expand coverage even beyond 929A's scope, but the ARB did not need to resolve this issue.

- The *Johnson* interpretation of the amendment was consistent with the Senate Committee Report on the Dodd-Frank Act, which indicated that the new law:

  > … amends Section 806 of the Sarbanes-Oxley Act of 2002 to make clear that subsidiaries and affiliates of issuers may not retaliate against whistleblowers, eliminating a defense often raised by issuers in actions brought by whistleblowers. Section 806 of the Sarbanes-Oxley Act creates protections for whistleblowers who report securities fraud and other violations. The language of the statute may be read as providing a remedy only for retaliation by the issuer, and not by subsidiaries of an issuer. This clarification would eliminate a defense now raised in a substantial number of actions brought by whistleblowers under the statute.
  >
  > S. REP. No. 111-176, at 114 (2010).

- In *Merten v. Berkshire Hathaway, Inc.*, ARB No. 09-025, ALJ No. 2008-SOX-40 (ARB June 16, 2011), the ALJ, following *Klopfenstein*, applied the "intergrated enterprise" test to determine whether a non-publicly traded subsidiary was an agent of the publicly traded parent company for purposes of coverage under Section 806. The ARB vacated the decision and remanded to the ALJ to determine the issue of liability consistent with *Johnson, supra*.

- In *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18 (June 28, 2011), the respondent was a non-publicly traded limited liability company, but one of its parent companies was publicly traded. The ARB found, consistent with *Johnson*, that although the Dodd-Frank Act was passed after complainant's employment, the ALJ erred by not making findings on whether the respondent appeared on the consolidated financial statements of its publicly traded parent companies.

2. Post-Dodd-Frank Court Decisions

It is not clear whether the federal courts will agree with the ARB that the §929A standard applies to pre-Dodd-Frank cases, however at least one court did not adopt this interpretation.

- In *Hein v. AT&T Operations, Inc.*, 2010 WL 5313526 (D. Colo. Dec. 17, 2010), the plaintiff sued her former employer, a corporate subsidiary of AT&T, which was not itself a publicly traded company. The court held that, "in light of the corporate law principle that parent companies are not liable for their subsidiaries' actions," the former employee was not covered under § 1514A and granted summary judgment in favor of the defendant. Notably, the

summary judgment motion was filed prior to the enactment, and the opinion contains no discussion, of Section 929A.

- In *Wiest v. Lynch*, 2011 WL 2923860 (E.D. Pa. July 21, 2011), the defendant argued that it was not covered under Section 806 because it was not a publicly traded corporation. Section 929A did not become effective until after the complaint was filed, but the plaintiff argued that Section 929A should apply retroactively. However, the court did not address these arguments because it dismissed on other grounds.

C. Agents/Contractors/Officers

SOX civil whistleblower provisions cover not only publicly traded companies and subsidiaries, but also "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C. §1514A(a). The terms "officer," "employee," "contractor," "subcontractor," and "agent" are not defined in the Act, and there has been significant debate as to the scope of these terms.

1. ARB's Broad Interpretation Of "Contractor, Subcontractor Or Agent" Coverage

The ARB recently issued opinions suggesting that a broad interpretation of the "contractor, subcontractor or agent" coverage provision.

- In *Charles v. Profit Investment Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-40 (ARB Dec. 16, 2011), the complainant named several business entities as respondents in her SOX complaint. The ALJ granted summary decision to the respondents because the employer was a privately held company. The ARB reversed, reasoning that the use of the term "any" in the phrase "any officer, employee, contractor, subcontractor, or agent of such company" indicated that Congress intended this clause to be interpreted in "an all-encompassing manner." The ARB then held that the ALJ erred by concluding that only the publicly traded company was covered under Section 806 and that Section 806 could not include any privately held company under contract with the publicly traded company. The ARB reasoned that there were disputed facts as to the agency relationships between the respondents and the potential employment relationships between the complainant and the various respondents.

- In *Johnson v. Siemens Bldg. Techs, Inc.*, *supra*, the ALJ found that the privately held respondent was not a covered employer because it was not acting as an agent of its publicly traded parent with respect to the complainant's employment. The ARB reversed based on its conclusion that Section 806 covers subsidiaries whose financial information is included in a publicly traded parent company's consolidated financial statements. But the ARB also noted in passing that, assuming an agency analysis applied, the ALJ erred by failing to consider alternative grounds for agency coverage. Judge E.

Cooper Brown, in a concurring opinion, explained this position in greater detail. Specifically, Judge Brown explained that the ALJ only looked at "actual authority," and not two other bases for attributing legal consequences of a party's actions to another party – "apparent authority" and "respondeat superior." Judge Brown also observed: "Construed as an antifraud provision, rather than an employment or labor law, it is sufficient, as an example, to establish that the retaliating entity exists as an agent of the publicly traded parent company 'for purposes of producing accounting or financial information which is consolidated into the parent's financial reports, or that an agent or contractor facilitated fraud like the subsidiaries, off-the-books special purpose entities (SPEs), and the accounting firms that helped precipitate the financial collapse of Enron, the key corporate figure in the legislative history of Sarbanes-Oxley.'" Judge Brown concluded that, in such circumstances, the focus for coverage purposes is "on the agent's role in preparing financial data or its participation in fraud or deception."

BUT SEE:

- In *Field v. BKD, LLP*, ARB No. 09-136, ALJ No. 2009-SOX-46 (ARB May 27, 2011), the ARB affirmed dismissal of a SOX complaint against an outside accounting firm and one of its subsidaries. The complainant argued that Section 806 should apply because the parent firm was a certified public accounting firm registered with the Public Company Accounting Oversight Board, had a contract with a public entity and provided services to publicly-owned companies. The Board rejected these arguments, finding that it was undisputed that neither respondent was a publicly-traded company or a subsidiary of a publicly-traded company.

2. Federal Court Suggests Narrow Interpretation Of "Contractor, Subcontractor Or Agent" Coverage

In contrast to the above ARB decisions, the Seventh Circuit has suggested a more limited interpretation of Section 806's "contractor, subcontractor or agent" coverage provision.

- In *Fleszar v. U.S. Dept. of Labor*, Judge Easterbrook, in dicta, suggested that the scope of "contractor, subcontractor, or agent" coverage should be limited to entities that "participate in the activities" of the publicly-traded company, particularly activities in relation to the employment of the claimant. The court explained:

> We don't share Fleszar's belief that the phrase "contractor, subcontractor, or agent" means anyone who has any contract with an issuer of securities. Nothing in § 1514A implies that, if the AMA buys a box of rubber bands from Wal-Mart, a company with traded securities, the AMA becomes covered by § 1514A. In context, "contractor, subcontractor, or agent" sounds like a

> reference to entities that participate in the issuer's activities. The idea behind such a provision is that a covered firm, such as IBM, can't retaliate against whistleblowers by contracting with an ax-wielding specialist (such as the character George Clooney played in "Up in the Air").
>
> 598 F.3d 912 (7th Cir. 2010).

3. Employee Of Publicly-Traded Company Reporting Violation By Company's Contractor, Subcontractor Or Agent

In *Sharkey v. J.P. Morgan Chase & Co*., 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011), the court found that an employee of a publicly-traded company engaged in protected activity under Section 806 by complaining to the publicly-traded company that its client, not the publicly-traded company, was engaged in covered illegal activities (e.g., mail fraud, bank fraud, money laundering or violations of federal securities laws). The court reasoned that "[t]he statute by its terms does not require that the fraudulent conduct or violation of federal securities law be committed directly by the employer that takes the retaliatory action."

4. Employee Of "Contractor, Subcontractor Or Agent" Reporting Violation By Publicly-Traded Company

In *Lawson v. FMR LLC*, 724 F. Supp. 2d 141 (D. Mass. 2010), the court concluded that an employee of a "contractor, subcontractor or agent" of a publicly-traded company was covered under Section 806 when he reported activity that related to fraud against shareholders of the publicly-traded company. The facts of the case were unique. The publicly-traded company was a mutual fund that fell within the scope of Section 806 due to its filing requirements, but had no employees of its own. Plaintiffs worked for an investment company acting as investment advisors for the fund. The court found that they acted as "agents" of the fund by, among other things, performing administrative and executive tasks for the fund, including making fundamental decisions as to how the assets would be invested.

In contrast, in *Gupta v. Johnson & Johnson*, 2010-SOX-54 (ALJ Jan. 07, 2011), the complainant was an employee of a proprietorship owned by his spouse, which had a distribution contract with a division of the publicly-traded respondent and, therefore, could have been construed as a "contractor" of a publicly-traded company. Complainant lost his job as a result of the publicly-traded respondent terminating its contract with the proprietorship. The ALJ found that the complainant was not covered under Section 806, in part because he "did not suffer an adverse employment action as an employee of the Respondent." The ALJ rejected the complainant's claim that he was covered because the proprietorship was a "contractor" of the publicly-traded respondent. Notably, the decision does not suggest any nexus between any protected activity by the complainant and the respondent's reasons for terminating the contract.

5. Retaliation By "Contractor, Subcontractor Or Agent" Against Employee Of Publicly Traded Client

In *Kalkunte v. DVI Financial Services, Inc*., ARB Nos. 05-139, 05-140, 2004-SOX-56 (ARB Feb. 27, 2009), a non-publicly traded "turnaround specialist" company, which was hired to manage a publicly traded company through bankruptcy and dissolution, was held liable for the termination of complainant, an employee/attorney of the publicly traded company. The ARB concluded that the turnaround specialist company was acting as a "contractor, subcontractor, or agent" of the publicly traded company because its main principal acted as the publicly traded company's CEO, had the power to affect the complainant's employment, and made the decision to fire the complainant. The ARB also expressed that the main principal who acted as CEO was an "officer" under SOX, and could have been held personally liable, but found that the issue of his personal liability was not before it.

6. Retaliation By "Contractor, Subcontractor Or Agent" Against Its Own Employee

In *Spinner v. David Landau & Assoc., LLC*, 2010-SOX-29 (ALJ June 2, 2010), the complainant was employed by respondent, a private company, and was assigned by his employer to perform auditing work for a publicly-traded client. The ALJ rejected complainant's argument that he was covered under the "contractor, subcontractor or agent" provision in Section 806. Significantly, the behavior of the respondent private company, not the publicly-traded company, was at issue.

D. Individual Liability

Section 806's prohibition of retaliation by "officers, employees, contractors, subcontractors or agents of covered companies" has been interpreted as establishing individual liability for wrongful retaliation. *See* 69 Fed. Reg. 52104, 52105 (Aug. 24, 2004) ("[T]he definition of 'named person' will implement Sarbanes-Oxley's unique statutory provisions that identify individuals as well as the employer as potentially liable for discriminatory action.").

1. Scope Of Individual Liability

Individual liability under Section 806 has been limited to persons who have the authority to affect the terms and conditions of the complainant's employment.

- In *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., ARB 04-149, 2004- SOX-11 (ARB Aug. 31, 2009), the ARB applied this general rule and concluded that the employer's vice president, who participated in the investigation of complainant, but not complainant's termination, was not sufficiently involved in the pertinent employment action to be subject to liability. The ARB concluded that "he was not a decision maker in the termination of [complainant]'s employment."

- In *Bury v. Force Protection, Inc*., 2011 WL 2935916 (D.S.C. June 27, 2011), the district court dismissed Section 806 whistleblower claims against individual defendants because the allegations against them were pled "only the most general and conclusory fashion." For example, the complaint

ascribed conduct to unnamed "senior management" (which included the individual defendants and sometimes lumped the individual defendants in with decisions taken by the employer.

2. Must Exhaust Administrative Remedies As To Individual Defendants

District courts continue to hold that plaintiffs must exhaust their administrative remedies against individual defendants in order to proceed against them in federal court. *See Smith v. Psychiatric Solutions, Inc.*, 2009 WL 903624 (N.D. Fla. Mar. 31, 2009); *Bridges v. McDonald's Corp.*, 2009 WL 5126962 (N.D. Ill. Dec. 23, 2009).

In order to exhaust administrative remedies, it is unsettled whether the individual defendant must actually be identified as a respondent in the OSHA complaint. *Contrast Jones v. Home Federal Bank*, 2010 WL 255856 (D. Idaho Jan. 14, 2010) (although defendant was not named as respondent in plaintiff's OSHA complaint, he was sufficiently identified within the complaint) *with Smith v. Corning, Inc*., 2007 U.S. Dist. LEXIS 52958 (W.D.N.Y. July 23, 2007) (dismissing SOX claim against individual defendant not named as respondent in plaintiff's OSHA complaint).

However, the DOL generally is more lenient in allowing complainants to amend their pleadings to add as respondents parties who were not named in the OSHA complaint. *See Randall v. Bank of America Corp.*, 2011-SOX-34 (ALJ June 21, 2011) ("Pleadings may be liberally amended. Had Complainant offered a basis , it might have been possible to do so").

E. Extraterritorial Application

1. Supreme Court Decision In *Morrison v. National Australia Bank*

In *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), the U.S. Supreme Court held that U.S securities laws do not apply extraterritorially to cover transactions by non-U.S. investors in securities of non-U.S. companies effected on non-U.S. exchanges (so-called "foreign-cubed cases"), even if the losses may arise from fraudulent conduct in the United States. The decision set aside the long-standing "conduct" and "effects" tests previously applied by the courts. In their place, the Court adopted a "transactional" test, under which Section 10(b) only applies to transactions in securities listed on domestic exchanges or domestic transactions in other securities. The Court reasoned that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States."

One month after the *Morrison* decision, the Dodd-Frank Act was signed into law. Section 929P amended the Exchange Act to provide U.S. district courts with jurisdiction over an action brought or instituted by the SEC alleging a violation of the antifraud provisions of the Exchange Act involving "[c]onduct occurring outside the United States that has a foreseeable substantial effect within the United States." Section 929Y(a) directed the SEC to solicit public comment on whether the scope of the antifraud provisions should be extended to private rights of

action to the same extent as that provided to the SEC by Section 929P. The SEC currently is conducting a study to determine whether private rights of action should be similarly extended.[7]

2. ARB Application Of *Morrison*

Recently, the ARB, applying the *Morrison* analysis, limited the extraterritorial application of Section 806.

- In *Villanueva v. Core Laboratories, NV*, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011), complainant, a foreign citizen working in Columbia for a Columbian company that was an indirect subsidiary of a Dutch company whose securities were publicly traded on the NYSE, alleged that his employer was violating Colombian tax evasion laws. The parent company had an office in Houston, where the complainant alleged that the retaliatory decision occurred. Applying the *Morrison* "transactional" test, the ARB found, even if executives in Houston directly controlled all aspects of the Colombia company's business, it would "not change the fact that the disclosures involved violations of extraterritorial laws and not U.S. laws or financial documents filed with the SEC. [The complainant] did not point to a U.S. law or domestic financial statement that was fraudulent. Therefore, under the facts presented in this case, [the complainant's] reporting of foreign tax law is beyond the reach of Section 806."

SEE ALSO:

- In *Pik v. Credit Suisse AG*, 2011-SOX-6 (ALJ Mar. 3, 2011), the ALJ dismissed the complaint because the complainant was a foreign national who worked exclusively in Switzerland for a foreign company and did not complain to superiors in th United States. The decision does not address the *Morrison* "transactional" test.

- In *Carnero v. Boston Sci. Corp.*, 433 F.3d 1 (1st Cir. 2006), which pre-dated *Morrison*, the First Circuit refused to apply Section 806 to a foreign national who was directly employed by Argentinean and Brazilian subsidiaries of a corporation covered by SOX, reasoning that Congress was silent as to any intent to apply Section 806 abroad. However, the court left open the possibility that Section 806 may apply to conduct occurring overseas in cases where the complainant's employment relationship had a more substantial nexus to the U.S.

F. Covered Employees

29 C.F.R. §1980.101 defines "employee" as "an individual presently or formerly working for a company or . . . an individual applying to work for a company or . . . whose

[7] *See* http://www.federalregister.gov/articles/2010/10/29/2010-27357/study-on-extraterritorial-private-rights-of-action.

employment could be affected by the company or company representative." Courts and ALJs have addressed whether the following categories of persons fall within Section 806's definition of "employee."

1. Applicants

Section 806's definition of "employee" includes "an individual applying to work for a company. . . ." 29 C.F.R. §1980.101.

In *Levi v. Anheuser Busch Companies, Inc*., ARB 08-086, 2008-SOX-28 (ARB Sept. 25, 2009), the ARB held that "in a case dealing with an applicant and prospective employer, the successful complainant must show that he properly applied to an open position for which the company was seeking applicants and that he was qualified." The ARB found that the complainant failed to offer evidence that he properly applied for a job for which respondent was seeking applicants and that he was qualified.

2. Former Employees

29 C.F.R. §1980.101 expressly includes "an individual … formerly working for a company" within the definition of "employee." Likewise, in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the U.S. Supreme Court held that the term "employees" as used in Title VII's retaliation provisions includes former employees. Former employees have been found to be covered under Section 806, even when the alleged protected activity and retaliation occurs post-employment.

- In *Portes v. Wyeth Pharmaceuticals, Inc*., 2007 WL 2363356 (S.D.N.Y. Aug. 20, 2007), the district court concluded that alleged post-employment harassment against a former employee for filing an OSHA complaint after his termination fell within the purview of Section 806, although the court ultimately dismissed the claim because the plaintiff failed to amend his OSHA complaint to include the harassment claim.

- In *Hunter v. Anheuser-Busch Companies, Inc*., 2008-SOX-28 (ALJ Apr. 9, 2008), an ALJ rejected a former employee's claim that the respondent retaliated against him in violation of SOX by not responding to his written request to rehire him. The ALJ acknowledged that former employees may be covered in cases involving blacklisting or interference with employment, but that the former employee must demonstrate that he applied to be hired into an existing job vacancy that the respondent was actively trying to fill, or was solicited by the company to apply for rehiring, and that he was not hired for the particular position.

3. Independent Contractors

In evaluating whether a complainant is an independent contractor and not a covered "employee," ALJs have applied the common law agency test, which, as set forth in

Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318 (1992), focuses on the hiring party's right to control the manner and means by which the product is accomplished.

However, in light of Section 806's expansive language incorporating coverage of "an individual whose employment could be affected by a company or company representative," some ALJs have questioned whether the *Darden* test is appropriate in the Section 806 context.

- In *Deremer v. Gulfmark Offshore Inc*., 2006-SOX-2 (ALJ June 29, 2007), an ALJ, applying the *Darden* principles, found that complainant was an independent contractor. Nonetheless, the ALJ found that the independent contractor was an "employee" as defined in 29 C.F.R. § 1980.101 because he was "an individual whose employment could be affected by a company or company representative." The ALJ observed that the regulation was purposely broad, and that the term "employment" "includes any service or activity for which an individual was contracted to perform for compensation. Therefore, a contractor or subcontractor may be 'an individual whose employment could be affected by a company or company representative.'"

4. Officers and Directors

In *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440 (2003), the U.S. Supreme Court set forth six factors to consider when determining whether shareholder-directors are considered "employees" under the Americans with Disabilities Act. The Court concluded that physician-shareholders who owned a medical clinic probably were not employees where they controlled the operation of the clinic, shared the profits, served on the corporation's board of directors and were personally liable for malpractice claims.

At least one ALJ recently applied *Clackamas* to Section 806 claims:

- In *Cunningham v. LiveDeal, Inc*., 2011-SOX-4 (ALJ Apr. 1, 2011), the ALJ, observing that the issue of whether a corporate director is protected under Section 806 "appears to be an issue of first impression," held that an independent director who served on various board committees was not protected by Section 806. The ALJ, applying *Clackamas*, noted that complainant was an independent director for purposes of NASDAQ regulations, and that independent directors have a special role under the SOX and NASDAQ regulatory scheme. Specifically, corporate governance rules prohibit any person who, during the past three years, was employed by the Company from being an independent director. Thus, classifying an independent director as an "employee" for the purposes of SOX protection would directly conflict with the definition of the term as it is used in the NASDAQ rules and SOX filings.

G. Criminal Provision

Section 1107 of SOX amended the existing criminal obstruction of justice statute

by making it a crime to knowingly and intentionally retaliate against any person who provides truthful information to a law enforcement officer relating to the commission or possible commission of any federal offense. *See* 18 U.S.C. §1513(e). Section 1107 is enforceable solely by the Department of Justice, with supervisory authority assigned to the Criminal Division. U.S. D.O.J., U.S. Attorneys' Manual, Ch. 9-69.100 (2008). The Labor Department has no jurisdiction to enforce section 1107. *See* Amicus Brief of the Acting Assistant Secretary of Labor for Occupational Safety and Health, *Ede v. Swatch Group & Swatch Group USA*, ARB 05-053, 2004-SOX-68 (Apr. 6, 2005); *see also* Attorney General Memorandum on Implementation of the Sarbanes-Oxley Act of 2002 (Aug. 1, 2002) (stating the DOJ will "play a critical role" in implementing SOX's criminal provisions, including Section 1107).

1. Criminal Liability Under Section 1107

For individuals, criminal sanctions include fines up to $250,000 and/or imprisonment up to 10 years and, for organizations, fines up to $500,000. *See* 18 U.S.C. § 3571. The legislative history of Section 1107 reflects that a primary purpose for establishing *criminal* sanctions for whistleblower retaliation was to prevent persons who retaliate against corporate whistleblowers from using federal bankruptcy laws to discharge civil judgments against them. *See* 148 Cong. Rec. H4686 (daily ed. July 16, 2002) (statement of Rep. Sensenbrenner).

- **Expansive Scope Of Coverage**

Section 1107 applies not only to publicly traded companies, but to *any* "person," meaning employers, supervisors and other retaliating employees are potentially liable under the criminal provision. Employers are covered regardless of their corporate status or number of employees. Moreover, Section 1107 coverage is not limited to the employment relationship. Therefore, third parties, regardless of their agency relationship with the employer, may be liable. Finally, unlike the civil whistleblower provision, Section 1107 expressly applies overseas. *See* 18 U.S.C. 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section.").

- **Expansive Definition of Protected Activity**

Section 1107 is not limited to employees reporting fraud or securities violations, but covers disclosures to *any* federal law enforcement officer relating to commission or possible commission of *any* federal offense. "Law enforcement officer" includes any federal officer or employee "authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense." 18 U.S.C. § 1515(a)(4). This provision could reasonably be interpreted as encompassing complaints to the EEOC under federal employment discrimination statutes such as Title VII, ADA or ADEA. Whether such an interpretation is adopted hinges largely on the meaning of the term "federal offense," which is not defined in SOX. Although most commonly used in reference to criminal violations, this term has been applied in both civil and criminal contexts. *See, e.g., Cole v. United States Dept. of Agric.*, 133 F.3d 803 (11th Cir. 1998) (referring to "criminal and civil offenses"). Yet, at least one court has suggested a narrower interpretation of this provision:

- In *United States v. Blitch*, 2008 WL 5255558 (M.D. Ga. Dec. 15, 2008), the

district court refused to apply Section 1107 to claims that a judge retaliated against a law enforcement officer by calling prospective employers and urging them not to hire the officer. The court reasoned, in part, that such retaliation was not intended to be covered under Section 1107 because "the overriding purpose of the legislation was to protect corporate employees who report wrongdoing within their corporations and to insure that corporate wrongdoing is brought to light."

- **Expansive Definition Of Prohibited Retaliation**

The conduct prohibited by Section 1107 is extremely broad, covering any action "harmful" to a person, including "interference with the lawful employment of livelihood" of any person. It is not necessary for the aggrieved person to report an actual violation, rather a disclosure merely must be "truthful" and relate to the "possible commission" of a federal offense. Congress did not define the terms "harmful" or "interference," but there is nothing in the statute that would limit these concepts to injuries involving economic harm or even to retaliation occurring within the scope of the employment relationship. Accordingly, the scope of prohibited conduct under Section 1107 appears to be at least as broad as, and probably broader than, conduct prohibited under the hostile work environment theory under other employment statutes. Yet, at least one court has suggested a narrower interpretation of this provision:

- In *Rowland v. Prudential Financial, Inc*., 2007 WL 1893630 (D. Ariz. July 2, 2007), the court dismissed a civil Section 1107 claim alleging that defendants "harassed [her] . . . because of the statutory protected disclosure[] to the EEOC, NASD, SEC, Federal and State agencies." The court, without further discussion, concluded that "[s]uch allegations do not state a claim arising under . . . 1107." The Ninth Circuit affirmed on the basis that Section 1107 does not provide a private right of action. *Rowland v. Prudential Financial, Inc*., 362 Fed. Appx. 596 (9th Cir. Jan. 11, 2010).

2. Whistleblowing Must Be "To A Law Enforcement Officer"

To be protected under Section 1107, whistleblowing activity must be directed to a "law enforcement officer" relating to the commission or possible commission of any federal offense. *See* 18 U.S.C. §1513(e). Courts have rejected all attempts to establish Section 1107 protected activity where complaints were not made to a law enforcement officer.

- In *MacArthur v. San Juan County*, 416 F. Supp. 2d 1098 (D. Utah June 13, 2005), plaintiffs contended they suffered retaliation in violation of Section 1107 for having informed their employer/hospital governance board of ethnic remarks made by hospital administration concerning another employee. The court noted that Section 1107 "simply cannot be read to reach the reporting of ethnic remarks to a local hospital's governance board."

- In *Stark v. Zeta Phi Beta Sorority, Inc*., 587 F. Supp. 2d 170 (D.D.C. 2008), the court concluded that statements to the media do not enjoy whistle blower protection under Section 1107.

- In *Egan v. TradingScreen Inc*., 2011 WL 1672066 (S.D.N.Y. May 4, 2011), the court dismissed a complaint alleging violation of the Dodd-Frank whistleblower provision because the plaintiff did not adequately plead that any disclosures were made to the SEC. The court further found none of the plaintiff's disclosures protected by Section 1107 because the complaint did not contain sufficient allegations that disclosures were made "to a law enforcement officer."

3. Civil Liability Under Section 1107

All courts that have addressed the issue have held that Section 1107 does not create a private cause of action. *See, e.g., Rowland v. Prudential Financial, Inc*., 362 Fed. Appx. 596 (9th Cir. Jan. 11, 2010); *Hines v. California Public Utilities Comm*., 2010 WL 4919234 (N.D. Cal. Nov. 24, 2010); *Heard v. U.S. Dept. of State*, 2010 WL 3700184 (D.D.C. Sept. 17, 2010).

4. Civil RICO Implications

Retaliation against corporate whistleblowers may give rise to a cause of action under the civil RICO statute, with the availability of treble damages. Section 1107 amends 18 U.S.C. § 1513(e) and, under RICO, "racketeering" includes "any act which is indictable under . . . 18 U.S.C. § 1513." See 18 U.S.C. § 1961. Therefore, by engaging in retaliation prohibited by Section 1107, a company or person may commit a predicate act of racketeering under RICO.

Prior to the enactment of Section 1107, retaliatory discharge did not fall within the definition of "racketeering" activity and therefore generally could not give rise to a RICO action. *See Beck v. Prupis*, 529 U.S. 494 (2000). Even where an employee could allege that his or her employer committed a predicate act under RICO, the employee rarely could assert a viable RICO claim because the employee's injury was almost never proximately caused by the predicate act, but rather by a separate adverse employment action. *See Sedima, S.P.R.L. v. Imrex Co., Inc*., 473 U.S. 479 (1985); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41 (1st Cir. 1991).

Section 1107, by expressly identifying retaliatory conduct as a predicate act, significantly expands the likelihood of establishing the necessary causal link between the predicate act and the injury. However, a plaintiff must also establish the other civil RICO elements, including a "pattern of racketeering."

- The first case to address this issue was *Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131 (D. Me. 2006). The plaintiff alleged that defendants instructed him to withhold information from Department of Justice investigators and "fired" him in retaliation for conveying truthful information in that investigation, in violation of § 1513(e). The court dismissed plaintiff's RICO claims because it found that a single act of termination, combined with alleged instructions by the employer to

withhold information during "a single federal investigation," did not constitute a "pattern of racketeering" sufficient to support a RICO claim.

- In contrast, in *DeGuelle v. Camilli*, 664 F.3d 192 (7th Cir. 2011), the Seventh Circuit recently reversed dismissal of a complaint alleging RICO claims by an employee who was terminated after reporting an alleged tax fraud scheme to federal law enforcement. The court found that, although "the § 1513(e) retaliatory acts on their own do not demonstrate a pattern of racketeering activity," the plaintiff adequately alleged a pattern of racketeering activity for RICO purposes under the "continuity plus relationship" test, despite defendant's claim that the alleged acts of retaliation, including his termination, a lawsuit and defamation, were unrelated to the separate alleged predicate acts (fraud, destroying records and witness tampering by offered the plaintiff an increase in salary and payment of attorney's fees if he agreed to sign a confidentiality agreement and release of claims). The court broadly observed that "[r]etaliatory acts are inherently connected to the underlying wrongdoing exposed by the whistleblower." Moreover, the court noted that the same actors who allegedly participated in the fraudulent activities and offered the plaintiff an increase in salary in exchange for a release and confidentiality were the same actors responsible for his termination, providing a link between the fraud scheme and the retaliation. Additionally, the court found that there was temporal proximity among the predicate acts, suggesting they were interrelated and "not isolated events."

IV. PROTECTED CONDUCT

Section 806 provides protection to employees for two types of employee conduct.

- First, the Act protects employees "who provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee *reasonably believes* constitutes" securities fraud, bank fraud, wire fraud, or violation of "any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. §1514A(a)(1) (emphasis added). The assistance must be provided to or the investigation must be conducted by: "(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) 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)." 18 U.S.C. §1514A(a)(1)(A)-(C).

- Second, the Act affords protection to employees who "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation" of the laws mentioned above. 18 U.S.C. §1514A(a)(2).

The Dodd-Frank Act has added protections for certain whistleblowers. These additional protections are addressed in Section II, *supra.*

A. Reasonable Belief

Section 806 only protects an employee who "reasonably believes" the information he or she reports constitutes a violation of the enumerated provisions. Although the Act does not define "reasonable belief," remarks submitted by Senator Leahy explain that the "reasonable belief" standard:

> is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts. Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting admissible evidence at any later proceeding would be strong indicia that it could support such a reasonable belief. The threshold is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence.

The cases interpreting SOX's reasonable belief standard have established that, consistent with other anti-retaliation statutes, both subjective and objective components must be satisfied. The subjective component requires that the complainant or whistleblower make the allegations in good faith. The objective component requires that a "reasonable person" would have believed the reported conduct violated the relevant statute.

Cases requiring both a subjective and objectively reasonable good faith belief include: *Gale v. DOL*, 384 Fed. Appx. 926 (11th Cir. June 25, 2010); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009); *Harp v. Charter Comm., Inc.*, 558 F.3d 722 (7th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Pearl v. DST Sys., Inc*., No. 08-2196 (W.D. Mo. Jan. 7, 2010); *Klopfenstein v. PCC Flow Techs. Holdings,* ARB 04-149 (ARB May 31, 2006).

1. Subjective Belief

The subjective belief component was addressed by the Eleventh Circuit in *Gale*, *supra*, in which the court concluded that a subjective belief means that the employee "actually believed the conduct complained of constituted a violation of pertinent law." The court found that the plaintiff did not have a subjective, good faith belief where he merely felt "really uncomfortable" and "uneasy." Specifically, the complainant, when pressed at his deposition, admitted that while he was "uncomfortable" with certain accounting practices that he observed, he did not *actually believe* that his company was participating in illegal or fraudulent activities.

Courts evaluating whether a whistleblower's belief is in "good faith" sometimes look to the whistleblower's relevant experience and knowledge. For example, in *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009), the court stated that, "[a]s to the subjective component, the law is not meant to protect those whose complaints are not undertaken in subjective good faith." The court agreed with the district court that a "plaintiff's particular educational background and

sophistication [is] relevant to the subjective component. Subjective reasonableness requires that the employee 'actually believed the conduct complained of constituted a violation of pertinent law.'" The court found that there was no evidence that the Complainant did not make his complaints in subjective good faith.[8]

In *Miller v. Stifel, Nicholas & Co.*, 2011 WL 4435629 (D. Minn. Sept. 20, 2011), the court found that where the complainant testified that she was unsure whether the ethical lapses complained of constituted violations of any law or regulation pertinent to SOX, it could not be said that she "actually believed" the conduct complained of constituted such a violation.

2. Reasonable Belief

Objective reasonableness is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the whistleblower. Recent decisions by the ARB have significantly broadened the scope of what constitutes "protected activity" under Section 806(a).

- **The ARB Decision in *Sylvester v. Parexel Int'l LLC***

In *Sylvester v. Parexel Int'l LLC*, ARB 07-123 (ARB May 25, 2011), the ARB reversed the ALJ's dismissal of a complaint on grounds that complainants failed to allege that they had engaged in conduct protected under SOX. The two complainants were former employees of Parexel, a company that tests drugs for drug manufacturers. Parexel's contractual relationships with its clients played a significant role in determining its annual revenues, the importance of which the company communicated to its shareholders. Sylvester's job entailed ensuring that the company's research data complied with all applicable laws promulgated by the Food and Drug Administration. Neuschafer was a clinical research nurse.

Neuschafer first reported concerns to co-workers and supervisors in March 2006 when she observed omission of testing time data from charts of drug study participants. In response, a Parexel employee simply inserted the then-current time into each chart. Neuschafer then brought her concerns that this constituted reporting of false clinical data to the supervisor of the study, who dismissed the falsifications as "no big deal." Sylvester, who had witnessed the co-worker insert the false data, subsequently reported it to supervisors. Sylvester claimed that the employee's insertion of false times violated the FDA's Good Clinical Practice ("GCP") standards. Sylvester submitted another similar complaint in May 2006.

Subsequent to their complaints, Sylvester and Neushafer claimed they were subjected to various forms of retaliation, such as verbal abuse, threatening letters, vandalism, and unwarranted warning letters issued by Parexel. In June of 2006, Sylvester was discharged, and told

[8] A plaintiff's relevant experience and knowledge are also relevant to the objective component. *See Allen v. DOL*, 514 F.3d 468 (5th Cir. 2008) (complainant's belief was unreasonable due to accountant's background and work experience and because potentially non-compliant financial statements were publicly available for verification); *Welch v. Cardinal Bankshares Corp*., ARB 05-064, 2003-SOX-15 (ARB May 31, 2007) ("an experienced CPA/CFO like Welch could not have reasonably believed that the ... report presented potential investors with a misleading picture of Cardinal's financial condition"), *aff'd, Welch v. Chao*, 536 F.3d 269, 279 (4th Cir. 2008).

that it was because she was "not a team player. Neushafer was discharged in August of 2006, and given the reason that her "personality did not fit in." The complainants filed complaints with OSHA, stating that Parexel terminated their employment in retaliation for complaining to Parexel managers about fraudulent acts.

Parexel argued that complainants' allegations were not specifically related to a violation of any of the provisions of SOX, did not involve shareholder fraud or conduct otherwise adverse to shareholder interests, and did not constitute reasonable concerns about SOX violations. The ALJ agreed and dismissed their complaints.

The ARB reversed, holding that under the plain language of SOX, where the activity involves providing information to one's employer, "the complainant need only show that he or she 'reasonably believes' that the conduct complained of constitutes a violation of the laws listed in Section 1514." Further, the Board concluded that a whistleblower need not wait until the illegal conduct occurs to make a complaint, so long as the employee "reasonably believes that the violation is likely to happen." Finally, the ARB clarified that a complaint does not have to allege shareholder fraud in order to be protected by SOX. The ARB stated that the legislative history of the law indicates that it was enacted not solely to address securities fraud, but "corporate fraud generally." In issuing this decision, the ARB overruled prior authority that had required a complainant to establish that the activity or conduct for which protection is claimed "definitively and specifically" related to one or more of the laws listed under Section 806(a).[9] The ARB stated this standard was inconsistent with the statutory language of Section 806(a) and had been applied too strictly in prior decisions.

- **The ARB Decision in *Prioleau v. Sikorsky Aircraft Corp.***

In *Prioleau v. Sikorsky Aircraft Corp*., ARB No. 10-060, ALJ No. 2010-SOX-3 (ARB Nov. 9, 2011), the complainant initially submitted a report to his employer complaining about "an apparent conflict" between a new litigation preservation notice and the employer's document deletion policy, stating that the litigation preservation notice "may violate the policy." Although the plaintiff later specified that he should have used the word "fraud" instead of "conflict" and explained why his employer was potentially engaging in fraudulent activities, the ALJ found that he had not engaged in protected activity because his initial report had failed to "definitively and specifically" articulate a SOX violation and thus was not protected.

The ARB, relying on *Sylvester*, reversed and held that "whether activity is protected concerns whether a complainant has a reasonable belief that there is a violation [of one of the laws enumerated in SOX] when he makes the communication, not whether he communicates that belief to the respondent or whether he puts the respondent on notice of protected activity." Moreover, the Board stated that protected activity does not have to relate to shareholder fraud, if complainant "reasonably believes" the conduct complained of constitutes a violation of one of the laws listed in

[9] *See Platone v. FLYi, Inc*., ARB 04-154, 2003-SOX-27 (ARB Sept. 29, 2006) (holding that the complainant did not engage in protected activity because she did not provide her employer with specific information regarding conduct she believed constituted fraud); *Jones v. First Horizon Nat'l Corp*., ARB No. 09-005 (ARB Sept. 30, 2010) (letter appended to an EEOC complaint that included accusations of fraudulent conduct was not the "precise statement" necessary to have engaged in protected conduct under SOX).

Section 806(a).

As the above ARB decisions reflect, the DOL under the current administration has taken the position that, contrary to earlier precedent, "protected activity" under Section 806(a) is to be interpreted broadly.

- **Federal Courts Have Applied A Higher Standard**

In *Wiest v. Lynch*, 2011 WL 5572608 (E.D. Pa. Nov. 16, 2011), the federal district court held that an employee's complaint concerning treatment of certain corporate expenses was not protected activity under Section 806(a), as it did not "definitively and specifically" relate to shareholder fraud or a law covered by Section 806(a). The court specifically observed that the ARB's decision in *Sylvester* was not controlling.

In *Sharkey v. J.P. Morgan Chase & Co.*, 805 F. Supp. 2d 45 (S.D.N.Y. 2011), the court noted that it must "look to the 'basis of knowledge available to a reasonable person in the circumstances with the employee's training and experience.'" The court found that the plaintiff had adequately pled her reasonable belief that her former employer's client was engaged in multiple violations of SOX, including fraud, money laundering, mail fraud, bank fraud, and/or federal securities laws violations, based upon "myriad" specific factual allegations.

OTHER JUDICIAL DECISIONS:

- *Harp v. Charter Comm., Inc.*, 558 F.3d 722 (7th Cir. 2009) (no objectively reasonable belief where statements made by the supervisor were ambiguous and failed to support an objectively reasonable belief that a fraudulent payment had been ordered).

- *Harkness v. C-Bass Diamond, LLC*, 2010 U.S. Dist. LEXIS 24380 (D. Md. Mar. 16, 2010) (defendant's general counsel's belief that SEC regulations had been violated was not reasonable "[i]n light of [plaintiff's] professional experience and the legal resources available to her").

B. Enumerated Fraud Provisions

To constitute protected activity, the subject matter of a SOX complaint must implicate a violation of "section 1341, 1343, 1344, or 1348, any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. §1514A(a).

- **The ARB Decision in *Brown v. Lockheed Martin Corp.***

In *Brown v. Lockheed Martin Corp*, ARB No. 10-050, ALJ No. 2008-SOX-049 (ARB Feb. 28, 2011), the ARB held that, contrary to earlier ALJ decisions, protected activity under Section 806 does not require a showing of fraud against shareholders. The complainant, Director of Communications at one of Lockheed's facilities, reported to Human Resources her concerns that a Vice President was misusing the company's Pen Pal Program, which was created

to facilitate communications between Lockheed employees and U.S. soldiers serving overseas. Specifically, complainant said the VP had developed sexual relationships with several soldiers in the Pen Pal program, purchased a laptop computer for one soldier, sent inappropriate e-mails and items via mail to soldiers in Iraq, and traveled to welcome-home ceremonies to visit soldiers on the pretext of business. The complainant contended that the VP was expending company funds for these activities and passing them on to the customer, presumably the federal government.

The ALJ found, and the ARB affirmed, that the complainant engaged in SOX protected activity because she reasonably believed that the VP committed wire or mail fraud by mailing inappropriate items and improperly billing the U.S. government, by mail or wire, for her purchases with company funds. The ARB concluded that, because the complainant established protected activity relating to mail fraud and wire fraud, it did not need to address whether the disclosures also related to fraud against shareholders.

- **The ARB Decision in *Inman v. Fannie Mae***

The ARB went one step further in *Inman v. Fannie Mae*, ARB No. 08-060, ALJ No. 2007-SOX-47 (ARB June 28, 2011), and held that "an allegation of fraud is not a necessary component of protected activity under Section 806." The complainant was a Senior Manager responsible for establishing and maintaining "appropriate internal controls with SOX teams in Controllers." He alleged that Fannie Mae fired him because he "discovered several irregularities in financial records that he attempted to correct or report to his superiors." Specifically, he reported that certain amortization figures were based on flawed and manipulated data, resulting in a $52.4 million expense overstatement and a $2.6 billion anomalous income result.

The ALJ held that the complainant did not engage in SOX protected activity because he did not "definitely and specifically" complain that "the events he was reporting constituted evidence of fraud." The ARB reversed, finding that the "definitively and specifically" standard was rejected in *Sylvester*. Moreover, the Board stated that "an allegation of fraud is not a necessary component of protected activity under Section 806," because a reasonable belief about a violation of "any rule or regulation of the Securities and Exchange Commission" could encompass a situation in which the violation, if committed, is completely devoid of any type of fraud.

Finally, the ARB rejected Fannie Mae's argument that the complainant did not engage in protected activity "because Fannie Mae was already aware of the concerns he was raising." The ARB reasoned that "neither the SOX nor its implementing regulations indicate that an employee does not engage in protected activity when he informs his employer about violations of which the employer is already aware."

- **Federal Courts Have Applied A Higher Standard**

In *Nance v. Time Warner Cable, Inc.*, 433 F. App'x 502 (9th Cir. 2011), the Ninth Circuit held that an "employee's communications must *definitively and specifically* relate to [one] of the listed categories of fraud or securities violations [in] 18 U.S.C. § 1514A(a)(1)." In *Nance*, the plaintiff communicated with his superiors about possible errors or inconsistencies in Comcast's subscriber count. The Ninth Circuit concluded that these communications did not

constitute protected activity because "[n]one of Nance's statements linked the inconsistency to fraud or to a securities violation.… Nance was not required to use the word 'fraud' or to cite the code section he believed was violated, but his statements must still be related to fraudulent or otherwise illegal conduct in order to be protected."

OTHER JUDICIAL DECISIONS: *Vodopia v. Koninklijke Philips Electronics, N.V.*, 398 F. App'x 659 (2d Cir. 2010); *Day v. Staples, Inc.,* 555 F.3d 42 (1st Cir. 2009); *Welch v. Chao,* 536 F.3d 269 (4th Cir. 2008); *Allen v. DOL,* 514 F.3d 468, 476 (5th Cir. 2008).

Some courts have required allegations of fraud against shareholders in particular. *See Livingston v. Wyeth, Inc.*, 2006 U.S. Dist. LEXIS 52978 (M.D.N.C. July 28, 2006), *aff'd*, 520 F.3d 344 (4th Cir. 2008) (noting that the Fourth and Fifth Circuits, and a number of ALJs, have found that "[t]o be protected under Sarbanes-Oxley, an employee's disclosures must be related to illegal activity that, at its core, involves shareholder fraud").

Cases not requiring allegation of fraud against shareholders in particular: *O'Mahony v. Accenture Ltd*., 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008) (noting that "[Section 806] clearly protects an employee against retaliation based upon the whistleblower's reporting of fraud under any of the enumerated statutes regardless of whether the misconduct relates to 'shareholder' fraud"); *Reyna v. Conagra Foods, Inc.*, 506 F. Supp. 2d 1363 (M.D. Ga. June 11, 2007) ("[t]he statute protects an employee against retaliation based upon that employee's reporting of mail fraud regardless of whether that fraud involves a shareholder of the company").

C. "Provide Information"

Under Section 806(a)(1), an employee must "provide information" (or cause information to be provided) in order to engage in protected activity.

1. Specificity of Information Provided

- **The ARB Decision in *Mara v. Sempra Energy Trading, LLC***

In *Mara v. Sempra Energy Trading, LLC*, ARB No. 10-051, ALJ No. 2009-SOX-18 (ARB June 28, 2011), the ALJ, applying the old "definitive and specific" standard, dimissed the complaint finding that the complainant's raising accounting irregularities, but failing to allege "fraud" when reporting her concerns, was not sufficient in itself to establish protected activity under SOX. The ARB reversed and rejected the "definitive and specific" standard, finding such a standard "inconsistent with the statutory language of Section 806." The ARB remanded based on its recent decision in *Sylvester*, in which the ARB ruled that a complainant can engage in protected conduct under Section 806 without alleging the specific elements of fraud - including materiality, scienter, reliance, economic loss, or loss causation.

- **The ARB Decision in *Vannoy v. Celanese Corp.***

In *Vannoy v. Celanese Corp*., ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011), the ARB held that an employee's theft of confidential personal and corporate

information from the employer's computer system, in violation of a confidentiality agreement, may be protected activity, depending on the circumstances surrounding the theft. Complainant Vannoy filed an internal complaint that misuse and abuse of employee credit cards was posing a financial risk to the company. He also filed a complaint with the IRS pursuant to its "Whistleblower Rewards Program." In support of his complaints, Vannoy took, either by e-mail or on compact discs, business documents related to company operations and containing sensitive personal identifying information of former and current company employees. The ALJ dismissed and concluded that Vannoy's reporting was based on a belief that Celanese was engaged in "improper accounting practices, [and that the company] was taking improper business expense deductions which led to a tax windfall," but did not relate to SOX prohibitions or shareholder fraud.

The ARB reversed, finding that the ALJ erred in ruling that the reported misconduct must relate to shareholder fraud. Moreover, the ARB explained that Vannoy need not believe that Celanese had committed actual fraud at the time of his protected disclosures, as long as he had a reasonable belief "that a violation is likely to happen." The ARB also held that disclosures to the IRS may be covered under SOX. The ARB noted that employee whistleblower bounty programs prevent companies from enforcing confidentiality agreements to stop whistleblowers from cooperating with the SEC. The ARB further observed that, although the misappropriation of information may have violated company policy or the agreement, no charges were brought against the employee his actions.

- **Federal Courts Have Applied A Higher Standard**

Federal district courts have generally held, contrary to the recent ARB cases, that a complaint must involve specific allegations *See Nance, supra*; *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) ("employee must show that his communications to the employer specifically related to one of the laws listed in § 1514A"); *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989 (9th Cir. 2009) (employee's communications must "definitely and specifically" relate to one of the categories of fraud or securities violations listed under section 1514A(a)(1)); *Allen v. DOL*, 514 F.3d 468, 476 (5th Cir. 2008) ("employee's complaint must definitively and specifically relate to one of the six enumerated categories found in § 1514A"); *Getman v. DOL*, 2008 WL 400232 (5th Cir. Feb. 13, 2008) (no protected activity because plaintiff had never actually conveyed her belief that upgrading rating would violate a securities law).

2. Reporting Information Already Known to the Public or Management

There is authority under other whistleblower statutes for the proposition that a report of information that has already been made public or is already known to the company does not constitute protected activity. *Francisco v. Office of Pers. Mgmt.*, 295 F.3d 1310 (Fed. Cir. 2002) (WPA); *Meuwissen v. Dep't of the Interior*, 234 F.3d 9 (Fed. Cir. 2000) (WPA).

Yet, in *Allen v. DOL*, 514 F.3d 468 (5th Cir. 2008), an ALJ rejected respondent's argument that, to constitute protected activity, a complaint must provide information that was not already known by the company. However, the ALJ concluded the complainant could not have a reasonable belief that respondent was engaged in fraud, in part because respondent already knew

about the problem before complainant reported it and was making it a priority to remedy it. The Fifth Circuit affirmed the ARB's decision upholding the ALJ.

Where an employee's job consists of investigating and reporting wrongdoing, courts have held that the performance of such job duties does not constitute protected activity under similar whistleblower statutes. *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Sasse v. DOL*, 409 F.3d 773 (6th Cir. 2005) (U.S. attorney who alleged DOJ retaliated against him while investigating environmental crimes failed to show agency violated whistleblower provisions of environmental laws because performance of his job duties was not protected whistleblowing activity); *Huffman v. OPM*, 263 F.3d 1341, 1352 (Fed. Cir. 2001) ("law enforcement officer whose duties include the investigation of crime by government employees and reporting the results of an assigned investigation to his immediate supervisor is a quintessential example" of conduct that is not protected by the WPA); *Langer v. Department of the Treasury*, 265 F.3d 1259, 1267 (Fed. Cir. 2001) (IRS employee, whose duty it was to review actions taken by the IRS's Criminal Division, did not engage in activity protected by the WPA by informing DOJ officials that their grand jury investigations disproportionately targeted African-Americans).

3. Reporting Illegal Conduct of a Third Party

- **The ARB Decision in *Funke v. Federal Express Corp.***

In *Funke v. Federal Express Corp*., ARB No. 09-004, ALJ No. 2007-SOX-43 (ARB July 8, 2011), the ARB held that complaints concerning third party conduct are protected by SOX. Specifically, the ARB concluded that an employee engaged in protected activity when she reported suspicions that a third-party customer of her employer was using FedEx as a conduit for mail fraud, although there were no allegations that FedEx was complicit in the fraud. The ARB reasoned that Section 1514A protects an employee who provides information "regarding *any* conduct which the employee reasonably believes constitutes a violation" of one of six enumerated laws or regulations contained therein. In addition, the ARB held that the employee was protected by SOX when she made her report to local law enforcement.

Federal Courts Have Adopted A Similar Standard

At least two courts have similalry expanded the definition of "providing information" to reports of illegal conduct of a third party. In *Sharkey v. J.P. Morgan Chase & Co.*, 2011 WL 135026 (S.D.N.Y. Jan. 14, 2011), the plaintiff reported to her employer her belief that one of her clients had engaged in illegal activities including mail fraud, bank fraud, and money laundering. Although the court ultimately concluded that the plaintiff's belief was unreasonable, it held that the plaintiff had properly pled that she engaged in protected activity under the SOX whistleblower provision by alleging that she reported her concerns about the client's illegal activity.

In *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472, 491 (E.D.N.C. March 10, 2011), the court agreed with *Sharkey*'s conclusion that "[SOX] by its terms does not require that the fraudulent conduct or violation of federal securities law be committed directly by the employer that takes the retaliatory action."

D. "Supervisory Authority" or "Authority to Investigate, Discover, or Terminate Misconduct"

SOX provides protection to employees "who provide information [to], cause information to be provided [to], or otherwise assist in an investigation [by] . . . 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*." 18 U.S.C. §1514A(a)(1)(C).

The term "supervisory authority" has been broadly construed. In *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004), the complainant, former chairman of the local bank advisory board, allegedly informed two local executive officers of the respondent bank that a lending company they had formed possibly violated banking laws, was a fraud against shareholders. The respondent moved for summary decision on the theory that the complainant testified he had "actual authority" over the executives and therefore the complainant did not "provide information" to "a person with supervisory authority over the employees." Despite this testimony, the ALJ found a genuine issue of material fact existed as to whether the CEO had authority over the complainant, or *vice versa*.

The phrase "such other person working for the employer who has authority to investigate, discover, or terminate misconduct" also has been broadly construed. In *Smith v. Hewlett-Packard,* ARB No. 06-064 (ARB Apr. 29, 2008), the ARB concluded that a complaint to an outside agency was protected if the complaint addressed violations of any of the fraud provisions enumerated in Section 806. *See also Jayaraj v. Pro-Pharmaceuticals, Inc*., 2003-SOX-32 (ALJ Feb. 11, 2005) (comments to the company's COO, complainant's peer, were protected because the COO had the "authority to investigate, discover and terminate misconduct related to securities law"); *Deremer v. Gulfmark Offshore, Inc.*, 2006-SOX-2 (ALJ June 29, 2007) (disclosures to external audit firm and investigating law firm were protected since holding otherwise "would produce a result inconsistent with the purpose of the Act").

In contrast, in *Tides v. Boeing Co.*, 644 F. 3d 809 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 518 (2011), the Ninth Circuit recently held that leaking confidential documents to the outside media is not protected activity. The plaintiffs, members of the company's SOX's Audit group, claimed to have found several deficiencies in the company's auditing practices. After management allegedly did not respond to their concerns, the plaintiffs reported their concerns to the *Seattle Post-Intelligencer*, which then published an article on the topic. Plaintiffs argued that going to the media "is a way of communicating a message" and thus constitutes protected activity under the statute. The Ninth Circuit rejected this argument, finding that it would lead to a "boundless interpretation of the statute."

E. Participation Clause

In addition to protecting employees who report possible fraud or assist in investigations, SOX contains a "participation clause" that explicitly protects employees who "file, cause to be filed, testify, participate in, or otherwise assist in" proceedings alleging violations of securities laws, SEC rules or regulations, or other federal laws relating to fraud

against shareholders. The case law under this provision – defining the range of activities that are covered – is still developing. Also, while the precise language of the Act is not found in other DOL-enforced whistleblower provisions, some other DOL-enforced whistleblower provisions include comparable language referring to employees who file or participate in "proceedings." *See, e.g*., 42 U.S.C. §9610(a) (CERCLA); 42 U.S.C. §5851(a)(1)(F) (ERA).

In *Romaneck v. Deutsche Asset Mgmt.*, 2006 WL 2385237 (N.D. Ca. Aug. 17, 2006), plaintiff claimed to be engaged in protected activity by anticipating testifying before the SEC in an investigation related to market-timing. Though defendant claimed plaintiff's general statements that "he would tell the whole truth and let the chips fall where they may" lacked specificity since they did not reference a specific SOX violation, the Court found Defendant's opposition was baseless as it tied the specificity requirement to the "provide information" language that appears only in one prong of the Act – 18 U.S.C. §1514A(a)(1). The absence of "provide information" in the prong that relates to employee testimony – 18 U.S.C. §1514A(a)(2) – enabled the Court to relax the specificity requirement in this circumstance.

Additionally, in *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007), complainant called an SEC attorney to get information about the legality of certain agreements to which respondent was a party; however, the SEC brought no forth no proceeding against respondent as a result of complainant's inquiries. Even though a strict reading of the Act only protects contacts relating to proceedings, the ALJ noted that such an application of law "would require a narrow and overly technical reading of the Act that would run counter to the legislative history which reflects that the law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." Consequently, the ALJ ruled that "when an employee contacts the SEC in connection with a reasonable belief of a securities law violation within the scope of Sarbanes-Oxley . . . that action is protected even if no formal SEC proceeding is ever initiated."

In *Miles v. Wal-Mart Stores, Inc.,* 2008 U.S. Dist. LEXIS 5781 (W.D. Ark. Jan. 25, 2008), the district court ruled it was protected activity for an administrative employee to contact an executive being investigated for mail and wire fraud regarding the shredding of potentially relevant documents. The defendant argued the investigation had not yet matured into a proceeding at the time of plaintiff's act, but the court rejected that argument because the plaintiff had clearly identified the grand jury proceeding at issue and only 8 months had lapsed between her act and the executive's conviction.

However, in *Brookman v. Levi Strauss & Co*., 2006-SOX-36 (ARB July 23, 2008), the ARB, affirming the ALJ, rejected the employee's argument that his cooperation with the SEC regarding potential violations was protected activity under the participation clause because the employee's allegations were "too vague to constitute a protected activity since it did not identify [the employer's] alleged misconduct."

V. VIOLATIVE CONDUCT - RETALIATION

A. Statutory Language

Section 806(a) provides that no publicly traded company or individual may

"discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" for engaging in protected activity under Section 806. 18 U.S.C. § 1514A(a). [10]

B. The Supreme Court's Ruling in *Burlington Northern & Santa Fe Railway v. White*

In 2006, the Supreme Court held in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), that a plaintiff may pursue a retaliation claim under Title VII if the "employer's challenged action would have been material to a reasonable employee," and likely would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." The Supreme Court specifically rejected more restrictive standards of proof that had been used by several U.S. Courts of Appeals.

Affirming the verdict in White's favor, the Supreme Court contrasted the language of Title VII's anti-discrimination provision, which prohibits discrimination as to "terms and conditions of employment," with Title VII's anti-retaliation provision which prohibits "discrimination" but is not limited by the additional phrase "terms and conditions of employment." The opinion reasoned that this difference in language showed Congress' intent to forbid a broader range of retaliatory acts than are prohibited under the anti-discrimination provision. The opinion stated that the requirement of "material adversity . . . is important to separate significant from trivial harms," and that the "reasonable employee" standard "avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." The opinion also stated that the standard was phrased "in general terms because the significance of any given act of retaliation will often depend on the particular circumstances. Context matters."

In a potentially far-reaching statement, the opinion held that Title VII's anti-retaliation provision "does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace." *Id.* at 2414. The opinion reasoned that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." The court cited as an example a decision in which the Tenth Circuit held that actionable retaliation could take the form of an employer's filing false criminal charges against a former employee. *Id.* (citing *Berry v. Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996)).

C. The Impact of *Burlington Northern* on the Interpretation of Section 806(a)

Section 806(a) provides that covered employers may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment." Thus, it could reasonably be construed consistent with Title VII's anti-discrimination provision rather than the anti-retaliation provision analyzed in *Burlington Northern*. Yet, DOL decisions have indicated that *Burlington*

[10] The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111-203) enacted in July of 2010 greatly expands many of the whistleblower protections under §806(a), however whether these broadened protections will impact the standards discussed in this section remains to be seen.

Northern will result in a broader interpretation of Section 806(a). Courts and the DOL have utilized the *Burlington Northern* standard to varying degrees when determining whether an employer has caused a complainant to experience an adverse employment action in violation of Section 806.

- In *Allen v. Stewart Enters., Inc.*, ARB 06-081 (ARB July 27, 2006), the ARB applied two tests to determine whether the complainants had experienced adverse employment actions. The ARB explained that the ALJ had applied both the "tangible job consequences" test (e.g., constitutes a significant change in employment status) and the "detrimental effect" test (an action is adverse if it is reasonably likely to deter employees from making protected disclosures). The ARB then reached its decision regarding whether a workspace relocation and alleged improper attribution of error reports to the complainants' department constituted adverse employment actions. The ARB determined that neither action significantly changed the complainants' employment status or would have deterred others from protected activity.

- In *Allen v. Administrative Review Bd.*, 514 F.3d 468 (5th Cir. 2008), the Fifth Circuit affirmed the ARB's decision in *Allen v. Stewart Enters., Inc.*, *supra*. Although the court did not go into detail discussing the standard for "adverse employment action" under Section 806(a), it noted that the ARB has previously relied on the definition set forth in *Burlington Northern* when deciding whistleblower cases under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). The court found that due to the similarity of the whistleblower protections afforded by both AIR 21 and SOX, the *Burlington Northern* definition of "adverse employment action" applied to SOX whistleblower claims.

Most recently, the ARB issued a decision that broadened the standard for "adverse action" set forth in *Burlington Northern*.

- In *Menendez v. Halliburton, Inc.* ARB 09-002, 09-003 (ARB Sept. 13, 2011), a former employee claimed that he was retaliated against after he complained about certain accounting practices to his supervisor and circulated a memorandum detailing his position on those practices. His supervisor told him that the memorandum was good, but that he was not a team player. The plaintiff then took his complaint to a vice president, who told him that if he felt strongly about it, he could take it to the Audit Committee. Instead of going to the Audit Committee, the plaintiff first made a confidential complaint to the SEC. After learning that the SEC had contacted the company in connection with his complaint, the plaintiff, beleiving his identity would be kept confidential in accordance with corporate policy, sent an e-mail to Audit Committee addressing the his concerns. However, his e-mail was forwarded to the Audit Committee members and various other employees, including the plaintiff's supervisor, who was implicated by the complaint. In a subsequent e-mail pertaining to document retention as a result of the SEC complaint, the General Counsel

identified the plaintiff as the source of the SEC complaint to several of the same individuals, as well as other executives. The plaintiff was then ostracized in the office, received no phone calls or e-mails, went on a paid leave of absence and subsequently found other employment.

The ARB held that the procedures required by SOX for the confidential submission of employee complaints are a "term and condition of employment" for employees covered by SOX, and therefore protected under Section 806(a). The Board stated that the language of Section 806(a) is broader than Title VII, and therefore requires a broader interpretation of "adverse action" than the standard set forth by the Supreme Court in *Burlington Northern*. The Board adopted the standard for "adverse action" that it had recently set forth in *Williams v. American Airlines, Inc.*, ARB 09-018, (ARB Dec. 29, 2010) for whistleblower cases brought under AIR 21, based on the similarity between the two statutes. Under the *Williams* standard, the term "adverse action" applies to any "unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." The Board noted that *Burlington Northern* remains a helpful guide for the analysis of adverse actions under SOX, but SOX's statutory language controls.

D. Proof Issues

1. Prior Knowledge, Particularly by the Decisionmaker of Complainant's Protected Conduct.

In *Staub v. Proctor Hospital*, 131 S. Ct. 1186 (2011), the U.S. Supreme Court held that an employer may be held liable for discrimination if a lower level supervisor influences the decision to take adverse action, even if the ultimate decision is made by an independent manager who lacks discriminatory animus. The Court, approving the so-called "cat's paw" theory, found that if the lower level supervisor acts with discriminatory animus, intending to cause an adverse employment action, and if that act is a proximate cause of the final personnel action, then the employer will be liable.

The ARB has applied *Staub* in a whistleblower case brought under the Energy Reorganization Act.

- In *Bobreski v. J. Givoo Consultants, Inc*., ARB No. 09-057, ALJ No. 2008-ERA-003 (ARB June 24, 2011), the complainant applied for an open position at respondent's nuclear power plant, was qualified for the position and was on the hiring list, but he was not selected for the job. Complainant alleged that the refusal to hire was based on a complaint he made while previously employed by the company. The ALJ found that there was no causal link between the complainant's protected activity and the decision not to hire him. The ARB reversed and remanded for further consideration, in part because the ALJ did not adequately address whether one of the supervisors who may have had retliatory animus against the complainant based on his complaint during

his previous period of employment contributed to the company's decision not to hire him. The ARB found that the ALJ's finding that this supervisor did not have much "direct" involvement or communication when the actual hiring decision occurred was insufficient under the *Staub* cat's paw theory.

PRE-*STAUB* CASES:

- *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ Mar. 10, 2005) (rejecting complainant's "speculation and supposition" that the executive who decided to terminate the complainant's employment "must have known" about the complainant's protected activity and finding it unreasonable to conclude the complainant's supervisors would have relayed his questions about accounting to higher executives because it was part of the complainant's job to raise questions about proper accounting practice).

- *Jayaraj v. Pro-Pharmaceuticals, Inc*., 2003-SOX-32 (ALJ Feb. 11, 2005) (although CEO testified he decided to terminate complainant's employment and was unaware that she had engaged in protected activities, the ALJ found it was likely the COO had told the CEO about the complainant's protected activity in light of evidence that the CEO and COO had worked closely together since the founding of the company).

2. Causal Nexus

a. Knowledge Alone Not Sufficient

The DOL SOX regulations provide that a *prima facie* showing of causation may be established by showing that "[t]he named person knew or suspected, actually or constructively, that the employee engaged in protected activity" and that "the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action." 29 C.F.R. § 1980.104(b)(1). Thus, knowledge alone should be insufficient to establish causation.

This is consistent with case law under other anti-retaliation statutes. *See, e.g.*, *Brackman v. Fauquier County, Va.*, 72 Fed. Appx. 887 (4th Cir. 2003) (Title VII) (need more than knowledge of protected activity to show causation); *Gibson v. Old Town Trolley Tours, Inc.*, 160 F.3d 177, 182 (4th Cir. 1998) (decisionmaker's knowledge of plaintiffs race and age discrimination complaint did not establish retaliation absent evidence that plaintiffs "complaint in some way triggered" supervisor's failure to complete employment reference form as requested); *Mesnick v. General Elec. Co.*, 950 F.2d 816, 828 (lst Cir. 1991) ("knowledge on an employer's part . . . cannot itself be sufficient to take a retaliation case to the jury").

b. Temporal Proximity

To establish the *prima facie* showing that "the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable

action," the DOL has opined that "[n]ormally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action." 29 C.F.R. § 1980.104(b)(2).

Yet, the mere fact that adverse action follows protected activity is not necessarily sufficient to prove causation.

- In *Taylor v. Wells Fargo*, 2004-SOX-43 (ALJ Feb. 14, 2005), *aff'd* ARB 05-062 (ARB June 28, 2007), the complainant's employment was terminated nine days after she engaged in protected conduct. However, her employment was terminated four days after the last in a series of insubordinate acts. The ALJ ruled that "[t]he timing of the termination is not suspicious when that timing is credibly explained by a non-retaliatory motive." (*affirmed by Taylor v. Administrative Review Board*, 288 Fed.Appx. 929 (5th Cir. 2008)).

- *Richard v. Lexmark Int'l Inc.*, 2004-SOX-49 (ALJ June 20, 2006). Termination one day after raising concerns about inventory accounting problems was held not to be sufficient proof of causation in In that case, the employer proved that it had decided to terminate the employee several weeks before the employee expressed concerns about accounting issues.

3. Pre-existing Performance Problems

In *Pardy v. Gray*, 2008 WL 2756331 (S.D.N.Y. July 15, 2008), the court found that an employee who had been placed on probation twice before her complaint was terminated for legitimate reasons unrelated to her complaint.

ADDITIONAL CASES: *Giurovici v. Equinox, Inc.*, 2008 WL 4462991 *8 (ARB Sept. 30, 2008) (employee had deteriorating work performance, repeated incidents of insubordination, and refused to work with other employees); *Taylor v. Wells Fargo, Texas*, 2004-SOX-43 (ALJ Feb. 14, 2005), *aff'd* ARB 05-062 (ARB June 28, 2007) (complainant engaged in series of unprofessional and contentious actions that resulted in final written warning for breach of ethics, and ultimately termination); *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (employer changed its decision to discharge complainant for failing to attend a mandatory training once the employer learned about the complainant's protected activity, but later discharged the complainant for insubordination because the complainant had stopped working and failed to cooperate with the employer's lawful investigation of the complainant's allegation); *Robinson v. Morgan Stanley*, 2005-SOX-44 (ALJ Mar. 26, 2007) (well-documented pre-existing performance issues regarding work product and accepting adverse performance feedback).

4. Previously Planned Decisions

Termination one day after raising concerns about inventory accounting problems was held not to be sufficient proof of causation in *Richards v. Lexmark Int'l Inc.*,

2004-SOX-49 (ALJ June 20, 2006). In that case, the employer proved that it had decided to terminate the employee several weeks before the employee expressed concerns about accounting issues.

5. Post-termination Acts of Retaliation

In dicta in *Burlington Northern & Santa Fe Ry. v. White*, the U.S. Supreme Court suggested that post-employment acts may constitute retaliation. Courts and ALJs have reached similar conclusions in Section 806 whistleblower claims.

- In *Portes v. Wyeth Pharmaceuticals, Inc*., 2007 WL 2363356 (S.D.N.Y. Aug. 20, 2007), the district court concluded that alleged post-employment harassment against a former employee for filing an OSHA complaint after his termination fell within the purview of Section 806, although the court ultimately dismissed the claim because the plaintiff failed to amend his OSHA complaint to include the harassment claim.

- In *Hunter v. Anheuser-Busch Companies, Inc*., 2008-SOX-28 (ALJ Apr. 9, 2008), an ALJ rejected a former employee's claim that the respondent retaliated against him in violation of SOX by not responding to his written request to rehire him. The ALJ acknowledged that former employees may be covered where the previous employer engages in blacklisting or interference with employment, but that the former employee must demonstrate that he applied to be hired into an existing job vacancy that the respondent was actively trying to fill, or was solicited by the company to apply for rehiring, and that he was not hired for the particular position.

6. Hostile Environment

A hostile work environment may constitute adverse action, but ALJs have typically required proof that (1) the harassing conduct was sufficiently severe or pervasive to alter the conditions of employment, and (2) the harassment would have detrimentally affected a reasonable person and did so affect the complainant. *Hendrix v. American Airlines, Inc.*, 2004-AIR-10, 2004-SOX-23, at 17 (ALJ Dec. 9, 2004). In contrast, "[d]iscourtesy or rudeness should not be confused with harassment." *Id*. *See also Allen v. Stewart Enters., Inc.*, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), *aff'd* ARB 06-081 (ARB July 27, 2006) (allegedly hostile acts not "severe and pervasive" enough to rise to level of hostile environment); *Grove v. EMC Corp.*, 2006-SOX-99 (ALJ July 2, 2007) (evidence did not establish that complainant had been subjected to harassment sufficiently severe or pervasive enough to have created a hostile work environment).

The outcomes of these cases may be called into question by *Burlington Northern*. *See Deremer v. Gulfmark Offshore, Inc.*, 200- SOX-2 (ALJ June 29, 2007) (stating that *Burlington Northern* had lowered the overall standard of conduct that constitutes retaliation to be weighed under the standard that must be applied in whistleblower cases involving hostile work environment claims).

7. *De Minimis* Acts of Retaliation

In *Allen v. Stewart Enterprises, Inc.*, 2004-SOX-60, 61 and 62 (ALJ Feb. 15, 2005), *aff'd* ARB 06-081 (ARB July 2006), the ALJ rejected the complainants' argument that they suffered tangible job consequences when they were moved to a new workspace with less overhead storage, smaller desk areas, no personal storage area, and unsatisfactory lighting. Again, this reasoning may be called into question by *Burlington Northern*.

VI. PROCEDURES

On November 3, 2011, OSHA amended the regulations governing the processing of SOX claims. The amended rules implement the statutory changes to SOX in the Dodd-Frank Act and also make the procedures for handling SOX claims more consistent with OSHA's handling of similar whistleblower protection statutes. The revised rules are published at 76 Fed. Reg. 68084-68097.

A. Procedures and Burden of Proof

1. Statutory Provisions

Section 806 provides that a SOX action will be governed by "the rules and procedures set forth in AIR21. 18 U.S.C. § 1514A(b)(2)(A). AIR21, in turn, has been analyzed in accordance with the ERA, so that both statutes may be looked to for guidance in interpreting SOX.

2. Dodd-Frank Act Amendments

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203 (July 21, 2010) made several significant procedural changes to Section 806 of SOX:

- The statute of limitations period was doubled (from 90 days to 180 days) and begins to run on the date on which the employee *became aware of* the violation.
- Where a SOX claim is removed to federal court, there is an express right to try the case before a jury.
- SOX retaliation claims are not subject to arbitration agreements

3. Agency Interpretations

OSHA's interim final regulations implementing SOX, issued on November 3, 2011, clarify the procedures to be applied in SOX whistleblower retaliation actions. OSHA's Whistleblower Investigations Manual ("OSHA Manual"), issued September 22, 2011, provides further guidance as to how such retaliation actions will be handled by the agency.

The SEC also has been given authority to promulgate rules and regulations

interpreting SOX, including its whistleblower provisions. Section 3 states that "[t]he Commission shall promulgate rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act." To date, the SEC has not promulgated any such rules and/or regulations.

4. Filing of Complaint

a. Predispute Arbitration Agreements and Waivers

Under the 2010 amendments to Section 806, employers cannot condition employment on the employee's waiver of his or her Section 806 rights, including the right to a jury trial.

b. With Whom the Complaint Must Be Filed

Whistleblower complaints must first be filed "with the Secretary of Labor." 18 U.S.C. § 1514A(b)(1)(A). In turn, the Secretary has delegated to the Assistant Secretary for OSHA responsibility for receiving and investigating complaints. 29 CFR § 1980 n.1 (citing Secretary's Order 5-2002, 67 FR 65008 (Oct. 22, 2002)). The pertinent DOL regulation instructs that the complaint should be filed with the OSHA Area Director responsible for the area where either the complainant resides or the alleged wrongful acts occurred, but may be filed with any OSHA officer or employee. 29 CFR § 1980.103(c).

One federal court has held that where a common law wrongful discharge claim is premised on the public policy articulated in Section 806 of SOX, the plaintiff need not comply with the statutory enforcement scheme. *Romaneck v. Deutsche Asset Mgmt.*, 2006 WL 2385237 (N.D. Cal. Aug. 17, 2006).

c. 180-Day Statute of Limitations

In 2010, the Dodd-Frank Act changed the statute of limitations for SOX from "no later than 90 days after the date the violation occurred" to "no later than 180 days after the date on which the violation occurs, or after the date on which the employee *became aware of* the violation." 18 U.S.C. §1514A(b)(2)(D). "Filed" has been interpreted as meaning when the complaint is received by the Labor Department. *Murray v. TXU Corp*., 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003). However, the regulations state that, for complaints sent by mail, the date of the postmark will be the date of filing. 29 CFR § 1980.103(d). *See also Reddy v. Medquist, Inc*., 2004-SOX-35, ARB 04-123 (ARB Sept. 30, 2005) (SOX complaints may be filed by e-mail).

Complaints need not be in writing and OSHA will reduce oral complaints to writing. 29 CFR § 1980.103(b). OSHA will accept a SOX complaint in any language. *Id.*

The 180-day limitation period commences on either the date the alleged violation occurs or the date the employee becomes aware of the violation. 29 CFR § 1980.103(d). The regulations define the phrase "date the alleged violation occurs" as "when the discriminatory decision has been both made and communicated to the complainant." 29 CFR § 1980.103(d).

In *Corbett v. Energy East Corp*., ARB 07-044, 2006-SOX-65 (ARB Dec. 31, 2008), the ARB clarified that the statute of limitations under § 1514A(b)(2)(D) starts to run from the date an employee receives "final, definitive, and unequivocal notice" of a discharge or other discriminatory act. "'Final' and 'definitive' notice is a communication that is decisive or conclusive, *i.e.*, leaving no further chance for action, discussion, or change." *Coppinger-Martin v. Nordstrom, Inc.*, ARB 07-067, 2007-SOX-019 (ARB Sept. 25, 2009). "'Unequivocal' notice means communication that is not ambiguous, i.e., free of misleading possibilities." *Id.* at 4.

If the notice of termination is ambiguous, the statute of limitations may start to run upon the actual date of termination as opposed to notice of termination. In *Snyder v. Wyeth Pharmaceuticals*, ARB 09-008, 2008-SOX-055 (ARB April 30, 2009), an employee was informed that he was being terminated but was also given an opportunity to present information countering the basis for the termination of his employment. During an ensuing three-month investigation, he was suspended without pay. Finding that the initial notice of termination was ambiguous, the ARB held that the statute of limitations began to run from the effective date of his termination.

In *Murray v. TXU Corp*., 279 F. Supp. 2d 799 (N.D. Tex. 2003), the court held that a federal district court lacks jurisdiction over a SOX retaliation complaint if the plaintiff failed to file the original complaint with DOL within the statute of limitations.

d. Equitable Tolling

OSHA opines that the 180-day filing period may be equitably tolled for "certain extenuating circumstances." OSHA Manual, at 2-6. For example, valid extenuating circumstances could include:

- Concealment by the employer of the existence of the adverse action or the discriminatory grounds for the adverse action;
- Inability of the employee to file within the statutory time period due to debilitating illness or injury;
- Inability to timely file due to natural disaster; or
- The employee mistakenly filed a timely discrimination complaint with another agency.

OSHA also specifies certain conditions which will not justify extension of the filing period, including:

- Ignorance of the statutory filing period;
- Filing of unemployment compensation claims;
- Filing a workers' compensation claim;
- Filing a private negligence or damage suit;
- Filing a grievance or arbitration action; or
- Filing a discrimination complaint with a state plan state or another agency

that has the authority to grant the requested relief.

OSHA Manual, at 2-7, 8.

The 180-day tolling period is subject to equitable tolling. *Carter v. Champion Bus, Inc.*, ARB 05-076, 2005-SOX-23 (ARB Sept. 29, 2006) (applying equitable tolling principles and holding that filing of alleged SOX complaint with EEOC did not warrant equitable tolling because the EEOC is not the responsible government agency for the adjudication of SOX whistleblower cases and generic allegations in the complaint letter would not have caused the EEOC to deem it a SOX complaint).

Several ALJ decisions also have addressed whether the 180-day filing period may be equitably tolled. In *Taylor v. Express One Int'l, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002), an ALJ held that filing the complaint with the wrong agency (the FAA) was a sufficient basis for tolling the time limit for filing a complaint under AIR21. The ALJ noted that the improperly filed complaint raised the statutory claim at issue and the complainant had filed his complaint without the assistance of legal counsel.

In *Hyman v. KD Resources*, ARB No. 09-076, ALJ No. 2009-SOX-20 (ARB Mar. 31, 2010), the ARB applied the equitable tolling doctrine where the employer "lulled" the employee into reasonably believing that he would be returned to his former employment or alternatively given a one-year consulting contract, he would be financially compensated for having been wrongfully terminated, and that his employer would resolve the SOX compliance issues he had disclosed. The ARB, however, has continued to hold that an employer is not required to inform the complainant of the existence of, or deadlines for, potential causes of action under SOX. *Daryanani v. Royal & Sun Alliance*, ARB No. 08-106, ALJ No. 2007-SOX-79 (ARB May 27, 2010).

In *Ubinger v. CAE Int'l*, ARB 07-083, 2007-SOX-036 (Aug. 27, 2008), the ARB affirmed the ALJ's decision that there was no basis for equitably tolling the filing time limit where the complainant's primary basis for such waiver was that his complaints were legitimate and that he had no knowledge of Section 806. The ARB held that the severity of an alleged violation does not warrant tolling of the limitations period and that ignorance of the law will not generally support a finding of equitable modification.

The recent amendment to Section 806 clarifying that the statute of limitations begins to run when the employee "becomes aware of the violation" likely overturns the ARB's 2009 decision, *Coppinger-Martin v. Nordstrom, Inc.*, ARB 07-067, 2007-SOX-19 (ARB Sept. 25, 2009), in which the ARB previously held that "[c]oncealing the reason for an adverse employment action does not toll the statute of limitations…nor does it estop the employer from asserting timeliness as a defense" *Id.*

e. Continuing Violation Theory

In *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002), the ALJ held that discrete retaliatory acts are not actionable if they occurred outside the statute of limitations, even if they were related to acts that fall within the prescriptive period. Citing

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), the ALJ reasoned that a discrete retaliatory act "occurs" on the day it happens and the complaint must be filed within the statutory time frame based on the happening of that event. *See also Dolan v. EMC Corp*., 2004-SOX-1 (ALJ Mar. 24, 2004) (applying *Morgan* to SOX claims and holding that retaliatory acts outside the statute of limitation period are actionable only in hostile work environment claims).

In *Walker v. Aramark Corp*., 2003-SOX-22 (ALJ Aug. 26, 2003), the ALJ held that OSHA's dismissal of the complaint as untimely was proper because the complainant's first contact with OSHA regarding his termination was beyond the statute of limitations. Following OSHA's determination, the complainant attempted to argue another retaliatory act, to wit, the respondent's contesting of his application for unemployment benefits. The ALJ held that, even if this new alleged act of retaliation was timely filed, it would not make the complaint regarding termination timely because, under *Morgan*, these retaliatory actions constitute "discrete acts" and therefore the continuing violation doctrine would not apply.

By contrast, in *Brune v. Horizon Air Industries, Inc*., 2002-AIR-8, at 10 (ALJ Dec. 16, 2003), the ALJ held that, consistent with *Morgan*, claims of retaliatory conduct earlier than occurring outside the statute of limitations and prior to the complaint's filing may be timely where such conduct takes the form of an ongoing hostile work environment. The ALJ found the unlawful "practice" was management's ongoing attempt to constrain the employee's discretion by threats and by singling him out, and requiring justification for his actions. Although some of the acts occurred outside the statute of limitations, the ALJ found the actions collectively created a hostile work environment and "should be viewed as one unlawful employment practice."

5. Preliminary *Prima Facie* Showing

The regulations require OSHA to dismiss the complaint prior to its investigation if the complainant fails to make a *prima facie* showing that the protected activity was a "contributing factor" in the adverse employment action. 49 U.S.C. § 42121(b)(2)(B)(i); 29 CFR § 1980.104. SOX regulations set forth what elements must be satisfied to make this *prima facie* showing. 29 CFR § 1980.104(e)(1). Generally, the complaint must allege the existence of facts and evidence to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a "contributing factor" in the adverse employment action. 29 C.F.R. § 1980.104(e)(2). Normally, this burden will be satisfied if the adverse action occurred "shortly after" the protected activity. 29 C.F.R. § 1980.104(e)(3). Thus, a significant gap in time between the complainant's protected conduct and the adverse action may result in dismissal. *See Heaney v. GBS Properties LLC*, 2004-SOX-72 (ALJ Dec. 2, 2004) (dismissing complaint for failure to make a *prima facie* case where the complainant engaged in protected conduct several years prior to his termination).

To establish a *prima facie* SOX case, the employee must demonstrate: (1) the employee engaged in protected activity; (2) the employer knew of the protected activity; (3) the employee suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. *Livingston v. Wyeth, Inc*., 520 F.3d 344, 351 (4th Cir. 2008) (granting summary judgment because the complainant failed to demonstrate that he made a complaint to employer about conduct that he reasonably believed constituted a violation of an SEC rule or regulation); *Van Asdale v. International Game*

Technology, 498 F. Supp. 2d 1321, 1329 (D. Nev. 2007).

In *Klopfenstein v. PCC Flow Technologies Holdings, Inc*., ARB 04-149, 2004-SOX-11 (ARB May 31, 2006), the ARB held that a SOX complainant need not show that protected activity was a *primary* motivating factor in order to establish causation, only that protected activity was a *contributing* factor. The ARB held that a "contributing factor" is "any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." The ARB noted this test is specifically intended to overrule the existing case law, which required a whistleblower to prove his protected activity was a "significant," "motivating," "substantial," or "predominant" factor in an employment action.

In *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos. 2007-SOX-39 & 42 (ARB May 25, 2011), the ARB held that the heightened pleading requirements established in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S .Ct. 1937 (2009) do not apply to SOX claims. Noting that SOX claims are rarely suited for Rule 12 dismissals because they involve inherently factual issues such as "reasonable belief" and issues of "motive," the ARB concluded that OSHA's duty to interview the complainant and attempt to supplement the complaint is fundamentally incompatible with requiring SOX complainants to meet a plausibility pleading standard.

6. Notice of Receipt

"Upon receipt of . . . a complaint, the Secretary of Labor shall notify, in writing [the person named in the complaint and the employer] of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, ..." and provide them the opportunity to respond and meet with the Secretary. 49 U.S.C. §42121(b)(2).

When a case is opened for investigation, the Supervisor will prepare a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit a written position statement. OSHA Manual, at 2-5. This suggests that the employer will not be notified until after the investigator already has made his or her decision regarding whether the complainant established a *prima facie* case.

The burden of giving notice to the employer and persons named in the complaint does not fall entirely upon the agency. For example, in *Steffenhagen v. Securitas Sverige*, *AR,* 2003-SOX-24 (ALJ Aug. 5, 2003), the complainant did not serve his complaint upon the multiple respondents and did not respond to OSHA's numerous requests for contact information regarding the respondents. The ALJ held that pursuant to the Rules of Practice and Procedure before the Office of ALJs, as well as Federal Rules of Civil Procedure 4(m) and 41(b), dismissal of the complaint was warranted, based on complainant's failure to serve the complaint.

7. Notice to SEC

At its request, copies of all pleadings must be sent to the SEC. 29 CFR § 1980.108(b). Furthermore, the SEC may participate as *amicus curiae* at any time in the

proceedings. 29 CFR § 1980.108(b).

8. Respondent's Statement of Position

The respondent must be given the opportunity to submit a written statement, with affidavits or documents substantiating its position. 29 CFR § 1980.104(b). The respondent also may have the opportunity to meet with representatives of OSHA and present evidence in support of its position. *Id*.

At this stage, if the respondent demonstrates in its submission by "clear and convincing evidence" that it would have taken the same adverse action in the absence of the complainant's protected activity, an investigation of the complaint will not be conducted. 49 U.S.C. § 42121(b)(2)(B)(ii); 29 CFR § 1980.104(e)(4). In one of the earliest SOX decisions on the merits, "clear and convincing" evidence was defined as an evidentiary standard that "requires a burden higher than 'preponderance of the evidence' but lower than 'beyond a reasonable doubt.'" *Getman v. Southwest Securities, Inc*., 2003-SOX-8, at 10 (ALJ Feb. 2, 2004) (*citing Yule v. Burns Int'l. Security Service*, 1993-ERA-12 (Sec'y May 24, 1995)); *see also Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002). The ARB has relied on the Black's Law Dictionary definition: "Clear and convincing evidence is '[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.'" *Peck v. Safe Air Int'l, Inc. d/b/a Island Express*, ARB 02-028, 2001-AIR-3 (Jan. 30, 2004).

Throughout the investigation, OSHA must provide to the complainant a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, and other applicable confidentiality laws. OSHA must also provide the complainant with an opportunity to respond to such submissions. 29 CFR § 1980.104(c).

9. Investigation and Determinations

If, during the preliminary complaint-and-response phase, the respondent does not demonstrate by clear and convincing evidence that it would have taken action against the employee in the absence of protected activity, OSHA must investigate the complaint within 60 days of receiving it to determine whether there is reasonable cause to believe that the respondent discriminated against the complainant in violation of the statute. 29 CFR § 1980.105(a). OSHA has delegated the overall responsibility for all whistleblower investigation activities to the Regional Administrators, who are authorized to issue determinations and approve settlement of whistleblower complaints. This authority may be re-delegated, but no lower than the Assistant Regional Administrator or Area Director level. OSHA Manual, at 1-12.

The findings are required to be sent to all parties of record by certified mail, return receipt requested. 29 C.F.R. § 1980.105(b). Requests to be notified through regular mail or email have no legal effect. *Crosier v. Boeing Co.*, 2009-SOX-00056 (ALJ Dec. 2, 2009).

Statements made to DOL in the course of a SOX whistleblower investigation have been found to be protected by an absolute privilege from a state law defamation claim because

they were statements to an administrative agency acting in a quasi-judicial capacity. *Morlan v. Qwest Dex, Inc.*, 332 F. Supp. 2d 1356 (D. Or. 2004), *aff'd*, 156 F. App'x 949 (9th Cir. 2005) (plaintiff's suit for defamation based, in part, on statements made by employer's attorney during DOL investigation of SOX whistleblower complaint; attorney wrote in letter to DOL that employer had terminated plaintiff for "enhancement of data" and "falsification of documents").

10. Preliminary Orders of Reinstatement

If, after the investigation, OSHA determines there is "reasonable cause" to believe the complaint has merit, with limited exceptions "it shall issue" a preliminary order restoring the complainant to his or her employment status and requiring the employer to take affirmative action to abate the violation. 49 U.S.C. § 42121(b)(3)(B); 29 CFR § 1980.105(a)(1). Reinstatement orders are immediately effective and are not stayed pending the resolution of any objections or appeal. *See* 49 U.S.C. § 4212 (b)(2)(A). If preliminary, immediate reinstatement is to be ordered under SOX, the investigator first must contact the named party and provide, in writing, the "substance of the relevant evidence" supporting the finding. 29 CFR § 1980.104(f). The named party must be given an opportunity to provide a written response and to present rebuttal witness statements within 20 days. *Id.*; OSHA Manual, at 2-13.

For discussion of preliminary orders of reinstatement, refer to Section VII.F, *infra*.

11. Objections

Within 30 days of receipt of findings, either party may file objections and request a hearing on the record before an ALJ. If no objection is filed within 30 days, the preliminary order is deemed a final order that is not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A); 29 CFR § 1980.106(b). The 30-day objection period starts to run when the notice is sent, rather than when it is received. *Croxier v. Boeing Co.,* 2009-SOX-00056 (ALJ Dec. 2, 2009).

Objections must be filed with the Labor Department's Chief ALJ and mailed to the OSHA official who issued the findings and the Associate Solicitor, Division of Fair Labor Standards. 29 CFR § 1980.106(a). In *Steffanhagen v. Securities Sverige, AB*, 2004-ERA-3 (ALJ Dec. 15, 2003), the ALJ held that the party seeking ALJ review also must serve its notice of hearing upon the non-moving parties and that failure to do so is grounds for dismissal.

The 30-day objection period is subject to equitable tolling. *See, e.g. Lotspeich v. Starke Memorial Hospital*, ARB 05-072, 2005-SOX-14 (ARB July 31, 2006) (applying equitable tolling principles and holding that complainant's untimely filing of her appeal due to her attorney's failure to timely provide her a copy of OSHA's findings did not warrant equitable tolling of the 30-day limitations period).

In *Lerbs v. Buca DiBeppo, Inc*., 2004-SOX-8 (ALJ Dec. 30, 2003), the ALJ held that the 30-day objection period is not a jurisdictional requirement and, therefore, is subject to equitable tolling. The ALJ in *Lerbs* decided that the complainant's failure to serve a copy of his objections on the respondent within 30 days of receipt of OSHA's determination was not grounds for dismissal. *See also Richards v. Lexmark Int'l, Inc*., 2004-SOX-49 (ALJ Oct. 1,

2004) (denying motion to dismiss where respondent was not prejudiced by complainant's failure to timely serve respondent with his request for a hearing).

Parties alleging that the complaint was frivolous or brought in bad faith must file requests for attorneys' fees within 30 days. 29 CFR § 1980.106(a).

12. Discovery and Hearing Before ALJ

a. Case Assigned to ALJ

Upon receipt of an objection and request for hearing, the Chief ALJ assigns the case to an ALJ. 29 CFR § 1980.107(b). The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges apply to ALJ proceedings. *See* 29 CFR § 1980.107(a). When those Rules are inconsistent with a statute or regulation, the latter controls. 29 CFR § 18.1(a). Further, an ALJ may take any appropriate action authorized by the Federal Rules of Civil Procedure. 29 CFR § 18.29(a)(8). Moreover, in *In re Slavin*, 2002-SWD-1, ARB 02-109 (ARB June 30, 2003), the ARB found that the standards enunciated in the rules of professional conduct applicable within the state of the proceedings apply to proceedings before the ALJ. The hearing before the ALJ is *de novo*, and the respondent may raise defenses before the ALJ that were not raised during the OSHA investigation. *Rowland v. Prudential Equity Group, LLC*, ARB No. 08-108, ALJ No. 2008-SOX-4 (ARB Jan. 13, 2010).

The Secretary of Labor may participate as *amicus curiae* before the ALJ or ARB. 29 CFR § 1980.108(a)(1). The SEC also may participate as *amicus curiae* in SOX cases. 29 CFR § 1980.108(b).

At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing to permit settlement negotiations. 29 CFR § 18.9. The parties have the option of using the OALJ settlement judge program for such negotiations. 29 CFR § 18.9(e).

b. Stay of Preliminary Reinstatement Order

If, after the investigation, OSHA determines there is reasonable cause to believe the complaint has merit, "it shall issue" a preliminary order reinstating the complainant. 49 U.S.C. § 42121(b)(3)(B). Reinstatement orders are immediately effective and under DOL's interim SOX rule could not have been stayed pending appeal. However, the DOL's Final Rule provides a procedure for a respondent to file a motion with the OALJ for a stay of a preliminary order requiring immediate reinstatement, which requires a showing of "exceptional circumstances." *See* 29 CFR § 1980.106(b) (ALJ); 29 CFR § 1980.110(b) (ARB).

When evaluating a respondent's motion to stay a preliminary order of reinstatement, the ARB considers four factors: "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the Board grants a stay; and (4) the public interest in granting a stay." *Welch v. Cardinal Bankshares Corp.*, ARB 06-062, 2003-SOX-15 (June 9, 2006).

c. Discovery

In general, standard discovery methods are available during ALJ proceedings; including depositions, written interrogatories, production of documents, and requests for admissions. 29 CFR § 18.13. *See also Davis v. United Airlines, Inc*., 2001-AIR-5 (ALJ Apr. 24, 2002) (*citing* 29 CFR §§ 18.22) (deposition discovery permitted). However, the ALJ has broad discretion to limit discovery in order to expedite the proceeding. 29 CFR § 1980.107(b).

The scope of discovery in SOX whistleblower cases is broadly construed. *Leznik v. Nektar Therapuetics, Inc.,* 2006-SOX-93 (ALJ Feb. 9, 2007). As the ALJ in that case noted, "[u]nless it is clear that the information sought can have no possible bearing on a party's claims or defenses, requests for discovery should be permitted." To allow the complainant to establish discrimination through inferences and circumstantial evidence, the complainant must have access to the employer's records.

Protective orders are not routinely granted. Instead, the movant must demonstrate good cause with specificity. 29 CFR § 18.15. In *Thomas v. Pulte Homes, Inc*., 2005-SOX-9 (ALJ Aug. 9, 2005), the complainant moved to seal the record, and the respondent consented to the motion. The ALJ denied this request on the ground that the complainant failed to identify a specific need for confidentiality, such as "a privacy interest or potential harm or embarrassment that could result from disclosure of the record . . . ." The ALJ noted that "[a]s the whistleblower provision in the Sarbanes-Oxley Act is involved, there is a public interest in the protection of investors, employees, and members of the public by improving the accuracy and reliability of financial disclosures by publicly traded corporations." *Id*. at 3 (*citing* S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002)). In *Koeck v. Gen. Elec. Consumer & Indus*., ARB 08-068, 2007-SOX-073 (ARB Aug. 28, 2008), the respondent moved to seal the record of the proceedings before the ALJ. The ARB denied the motion to seal, holding that "there is no authority permitting the sealing of a record in a whistleblower case because the case file is a government record subject to disclosure pursuant to the Freedom of Information Act." *Id*. at 3. In *Cantwell v. Northrop Grumman Corp*., 2004-SOX-75 (ALJ Feb. 9, 2005), the ALJ granted a protective order covering the salary amounts and performance reviews of employees, but denied a requested protective order for compensation policies and procedures.

Sanctions, including dismissal of the complaint, are available for failure to participate in discovery. *See Harnois v. American Eagle Airlines*, 2002-AIR-17 (ALJ Sept. 9, 2002) (dismissing complaint due to complainant's failure to comply with discovery order and repeated requests to withdraw his objections and request for a formal hearing); *Powers v. Pinnacle Airlines, Inc.*, 2003-AIR-12 (ALJ Apr. 23, 2003) (ordering complainant to show cause why her complaint should not be dismissed for her failure to cooperate in discovery); *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ May 21, 2003) (disqualifying counsel based on conduct before the ALJ); *Reid v. Niagara Mohawk Power Corp*., 2002-ERA-3 (ALJ Dec. 26, 2002) (failure to appear at depositions without good cause warranted dismissal). In *Matthews v. LaBarge, Inc*., ARB 06-121, 2007-SOX-056 (ARB Nov. 26, 2008), the ALJ dismissed the complaint due to the complainant's failure to comply with discovery and pre-hearing orders, including complainant's failure to index and organize thousands of documents contained on a CD that he produced in discovery. The ARB affirmed the ALJ's decision, concluding that the ALJ had given the complainant adequate opportunity to comply with the discovery orders.

In *Leznik v. Nektar Therapuetics, Inc.,* 2006-SOX-93 (ALJ Nov. 16, 2007), the ALJ imposed an adverse instruction concerning the results of any investigation conducted by the employer regarding the complainant's allegations. After the ALJ granted complainant's motion to compel a response to an interrogatory concerning the investigation, the employer failed to respond to the interrogatory and did not explain with specificity why the information requested was protected by the work product doctrine.

Although SOX is silent regarding an ALJ's authority to issue subpoenas and despite the fact that the Administrative Procedures Act, 5 U.S.C. § 555(d) (agency subpoenas "authorized by law shall be issued to a party on request"), and the OALJ Rules of Practice, 29 CFR § 18.24, both allow agencies to issue subpoenas only where authorized by statute or law, the ARB has found that ALJs have the authority to issue subpoenas, even in the absence of an express statutory authorization. *See Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001) (ALJs have inherent power to issue subpoenas when a statute requires a formal trial-like proceeding). However, in *Bobreski v. EPA*, 284 F. Supp. 2d 67, 76-77 (D.D.C. 2003), the court held that there is no subpoena power under the whistleblower provisions of six environmental statutes where the relevant statutes (like SOX) did not explicitly provide for subpoena power.

Both SOX and the OALJ Rules of Practice are silent as to the geographic scope of an ALJ's subpoena power, if any; however it generally has been considered nationwide. *See, e.g., Taylor v. Express One Int'l, Inc*., 2001-AIR-2 (ALJ Dec. 6, 2001). Nonetheless, the scope of a subpoena is limited by the following principles: (1) it must be issued for a lawful purpose within the statutory authority of the issuing agency; (2) the documents requested must be relevant to that purpose; and (3) the subpoena demand must be reasonable and not unduly burdensome. *See generally Peck v. Island Express*, 2001-AIR-3 (ALJ Aug. 20, 2001); *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Dec. 6, 2001).

The rules do not address whether applications for subpoenas may be made *ex parte*. However, the Manual For Administrative Law Judges (available at www.oalj.dol.gov) states that "to prevent evasion of service, the subpoena usually is granted *ex parte* and its signing is not disclosed until either service has been accomplished or the party who obtained the subpoena chooses to disclose it." OSHA Manual, at 43.

d. Addition of Claims or Parties

One difficult issue that has arisen is whether a complainant is permitted to amend a complaint to add claims or additional respondents in federal court, or before the ALJ, after OSHA has issued its initial determination. In light of the differences in evidentiary restrictions and pleading requirements between federal district court and agency adjudications, a complainant's choice of forum could affect his or her ability to add claims or additional respondents and, therefore, could ultimately have substantive impact on a case.

(i) Additional Claims

The scope of a SOX complaint filed in federal court after the expiration of 180 days without a final decision generally must be limited to the claims identified in the initial OSHA complaint.

For example, in *Willis v. Vie Financial Group, Inc*., 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004), the district court held that the administrative exhaustion requirement of the SOX whistleblower provision precluded recovery for a discrete act of retaliation which was never presented to OSHA for investigation. The court reasoned that the SOX administrative scheme, unlike Title VII's, "is judicial in nature and is designed to resolve the controversy on its merits . . . ." *See also McClendon v. Hewlett-Packard Co*., 2005 WL 2847224 (D. Idaho Oct. 27, 2005) (declining to adjudicate claims that had not been filed with OSHA).

The addition of claims in an ALJ proceeding after OSHA has issued its initial determination has been both rejected and allowed by ALJs.

CASES ALLOWING ADDITION: *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002) (although "the substance of the [new claims was] based on the same core of operative facts that form[ed] the basis of [the original OSHA complaint]," OSHA was not given the opportunity to investigate the allegations "under the two-tiered scheme Congress provided for handling whistleblower claims"); *Kingoff v. Maxim Group LLC*, 2004-SOX-57 (ALJ July 21, 2004) (constructive discharge claims were of a drastically different type from those contained in the initial complaint and were deemed untimely); *Roulett v. American Capital Access*, 2004-SOX-78 (ALJ Dec. 22, 2004) (refusing to permit amendment to complaint after the expiration of the statute of limitations period to include an unfavorable compensation claim where the claim was not reasonably related to complainant's termination claim in original complaint); *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004) ("the scope of an OSHA investigation does not establish boundaries of the factual inquiry permitted in the subsequent adjudication," finding no transgression of the "two tiered" administrative scheme for handling whistleblower claims where an ALJ considers evidence not raised at the OSHA investigation phase).

CASES REJECTING ADDITION: *Hooker v. Westinghouse Savannah River Co*., ARB 03-036, 2001- ERA-16 (ARB Aug. 26, 2004) (allowing amendment where *pro se* complainant failed to allege refusal-to-rehire claim in initial ERA discrimination complaint and respondent did not contest the motion).

(ii) Additional Parties

In *Hanna v. WCI Communities, Inc.*, 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. 2004), the court held that the plaintiff could not add new defendants to a federal district court complaint which were not named in the initial OSHA complaint. The court reasoned that the plaintiff "failed to afford OSHA the opportunity to resolve [plaintiff's] allegations [against the newly-named defendants] through the administrative process. . . [and] never afforded the DOL the opportunity to issue a final decision within 180 days of filing his administrative complaint." *See also Bozeman v. Per-Se Tech., Inc*., 456 F. Supp. 2d 1282 (N.D. Ga. 2006); *Bridges v. McDonald's Corp.*, 2009 U.S. Dist. LEXIS 118597 (N.D. Ill. Dec. 21, 2009).

In contrast, complainants' attempts to add new respondents before the ALJ, subsequent to an initial determination by OSHA, have met with mixed results. In *Powers v. Pinnacle Airlines, Inc*., 2003-AIR-12 (ALJ Mar. 5, 2003), the complainant attempted to add the parent company of the originally named respondent, Pinnacle, to the ALJ complaint after OSHA

dismissed her complaint on the basis that Pinnacle was not a publicly traded company. The ALJ ruled the complainant could not add the parent as a respondent because, *inter alia*, the complaint against the parent was untimely as it had been filed outside the statute of limitations. *But see Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 17, 2004) (permitting complainant to amend initial OSHA complaint to include as a respondent the publicly held parent company of employer); *Gallagher v. Granada Entertainment USA*, 2004-SOX-74 (ALJ Oct. 19, 2004) (stating that "[i]ndividuals and entities may be added as parties when they were not joined below through error").

A complainant may not add a party following the conclusion of an evidentiary hearing. *Kalkunte v. DVI Financial Services, Inc*., 2004-SOX-56 (ALJ July 18, 2005) (denying complainant's motion to amend the complaint to name an individual as a respondent).

e. Motions

29 CFR § 18.6 of the OALJ Rules of Practice authorizes the filing of motions with the ALJ. Answers to motions must be filed within ten (10) days of service of the motion, or 15 days if the motion is served by mail. 29 CFR § 18.6(b); 29 CFR § 18.4(c)(3); *Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB 03-048, 2002-CAA-5 (ARB Aug. 31, 2004).

At least 20 days before the hearing date, parties may file motions for summary decision. 29 CFR § 18.41. Once a party that has moved for summary decision "has demonstrated an absence of evidence supporting the non-moving party's position, the burden shifts to the non-moving party to establish the existence of an issue of fact that could affect the outcome of the litigation. The non-moving party may not rest upon mere allegations, speculation, or denials of his pleadings, but must set forth specific facts on each issue upon which he would bear the ultimate burden of proof." *See Rockefeller v. U.S. Dept. of Energy, Carlsbad Area Office*, ARB 03-048, 2002-CAA-5 (ARB Aug. 31, 2004) (granting summary decision where complainant responded with "little more than conclusory statements").

The ARB has held that ALJs must give *pro se* complainants "fair notice" of the requirements of the summary decision rule and the right to file affidavits or "other responsive materials" when opposing a motion for summary decision. *Galinsky v. Bank of America, Corp.*, ARB No. 08-014, ALJ No. 2007-SOX-76 (ARB Jan. 13, 2010).

f. Bench Trial Before ALJ

If a timely objection to OSHA's determination is made, a full hearing before an ALJ must be held "expeditiously." 29 CFR § 1980.107. The term "expeditiously" is not defined. Objections are heard *de novo* before the ALJ. 29 CFR § 1980.107(b); OSHA Manual, at 4-8.

29 CFR § 18.27(c) provides that "[u]nless otherwise required by statute or regulation, due regard shall be given to the convenience of the parties and the witnesses in selecting a place for the hearing." ALJs are required to issue findings on all contested issues. *Klopfenstein v. PCC Flow Technologies Holdings, Inc.*, ARB 04-149, 2004-SOX-11 (ARB May 31, 2006).

g. Evidence

Formal rules of evidence do not apply, but ALJs will apply rules or principles designed to assure production of the most probative evidence. 29 CFR § 1980.107(d). The OALJ has adopted rules of evidence that are substantially similar to the Federal Rules of Evidence. *See* 29 CFR § 18.101 *et seq.*

In *Dolan v. EMC Corp*., 2004-SOX-1 (ALJ Mar. 24, 2004), the complainant sought to introduce into evidence a letter from the employer's counsel in which the employer refused to remove a negative performance evaluation in order to show that a retaliatory act had occurred within the SOX limitations period. The letter was written in response to complainant's counsel's letter arguing that the evaluation was false and defamatory and suggesting the employer should settle. The employer contended that complainant's counsel's letter was inadmissible as part of settlement negotiations under FRE 408. The ALJ disagreed, finding that the policy favoring exclusion of settlement documents was to prevent chilling of non-litigious solutions to disputes, and that exclusion is not required where the evidence is offered for a purpose other than to prove liability or damages. The ALJ ruled the letter was proffered to establish the final retaliatory act against the complainant and was, therefore, admissible. In any event, the ALJ found the letter was not, in fact, an offer of settlement or compromise.

In *Leznik v. Nektar Therapeutics, Inc.,* 2006-SOX-93 (ALJ Feb. 9, 2007) (Order Granting Motion to Compel), the ALJ noted that "[u]nlike matters that may ultimately proceed to a jury trial, evidence is broadly admissible at Sarbanes-Oxley hearings under the Secretary's aegis, where formal rules of evidence play no role. The presiding administrative law judge may exclude only what is 'immaterial, irrelevant, or unduly repetitious,' taking care to see that 'the most probative evidence' is produced." *Id.* at 5 (citing 29 C.F.R. § 1980.107(d)).

h. Reconsideration

The SOX regulations suggest that ALJs have the authority to reconsider within ten days following issuance of the initial decision and order, and that a timely filed motion to reconsider tolls the time for appeal. 29 CFR § 1980.110(c). *See also Allen v. EG & G Defense Materials, Inc.*, 1997-SDW-8 & 10 (ALJ Aug. 21, 2001); *Macktal v. Brown & Root, Inc*., ARB 98-112, 86-ERA-23 (ARB Nov. 20, 1998). However, in *Negron v. Vieques Air Link, Inc*., ARB 04-021, 2003-AIR-10 (ARB Jan. 8, 2004), the ARB found that once a party files a petition for review with the ARB, the ALJ lacks jurisdiction to reconsider or amend his or her order. In *Steffenhagen v. Securitas Sverige, AR*, 2003-SOX-24 (ALJ Aug. 13, 2004), the ALJ found she lacked jurisdiction to rule on a motion to reconsider when the complainant also filed an appeal to the ARB on the same day.

The ARB employs the same principles that federal courts employ in deciding requests for reconsideration, including "(i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision." *McCloskey v. Ameriquest Mortgage Co*., ARB 06-033, 2005-SOX-093 (ARB Mar. 26, 2008) (denying reconsideration where complainant failed to meet provisions of the Board's

four-part test for reconsideration, but instead rehashed arguments that the Board already considered); *Halpern v. XL Capital, Ltd.*, ARB 04-120, 2004-SOX-54 (ARB Apr. 4, 2006) (citations omitted). *See also Getman v. Southwest Securities, Inc*., ARB 04-059, 2003-SOX-8 (ARB Mar. 7, 2006) (applying same factors and denying reconsideration because complainant's motion for reconsideration did not raise new factual or legal arguments).

In *Henrich v. Ecolab, Inc*., ARB No. 05-030, ALJ No. 2004-SOX-51 (ARB May 30, 2007), the ARB held that a motion for reconsideration must be filed within a "reasonable time," and that 60 days is not a reasonable time. While the ARB did not set a specific deadline for filing a motion for reconsideration, it suggested that 14 to 30 days might be sufficiently short a time.

13. Appeal to Administrative Review Board

Within 10 business days following the ALJ's decision, either party may file a petition for review with the ARB. 29 CFR § 1980.110(a). *See Gooding v. ABB, Ltd.*, ARB No. 11-059, ALJ No. 2011-SOX-18 (ARB Dec. 12, 2011) (petition for review must be filed within 10 business days of the date of the decision of the ALJ, not within 10 days of the date upon which the decision was served upon a party). Review is discretionary.

A petition must specifically identify the findings, conclusions, or orders to which exception is taken. 29 C.F.R. § 1980.110(a). A "blanket objection to all of the ALJ's findings and conclusions clearly fails to satisfy the specificity requirement for a petition to the Board for review." *Brookman v. Levi Strauss & Co.*, 2006-SOX-036, ARB 07-074 (ARB July 23, 2008) (*pro se* complainant made blanket objection though ARB granted review, likely due to *pro se* status). If no petition is filed, the ALJ's decision becomes final within 10 days. If a petition for review is filed, but the ARB does not issue an order accepting the case for review within 30 business days of the ALJ's decision, the ALJ decision becomes final. 29 CFR § 1980.110(b). *See also Walker v. Aramark Corp*., 2003-SOX-22, ARB 04-006 (ARB Nov. 13, 2003). The ARB has been delegated the authority to act for the Secretary and issue final decisions under SOX and acts with all the powers the Secretary would possess in rendering a decision. 29 CFR § 1980.110(a). If the ARB accepts a case for review, the ALJ's decision becomes "inoperative," except that a preliminary order of reinstatement remains effective while review is conducted. 29 CFR § 1980.110(b). Unlike the Federal Rules of Appellate Procedure, the procedural regulations governing SOX claims do not provide for the filing of a cross-petition. Accordingly, a party that prevails before the ALJ but may later wish to appeal a portion of the decision must file a protective appeal within 10 days of the issuance of the ALJ's decision. *Henrich v. Ecolab, Inc*., ARB 05-036, 2004-SOX-51 (ARB Mar. 31, 2005).

The ARB acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing. *Carter v. Champion Bus, Inc*., ARB 05-076, 2005-SOX-23 (ARB Sept. 29, 2006) (the ARB will not consider legal arguments or evidence raised for the first time on appeal). No discovery is available. *See Reid v. Constellation Energy Group, Inc*., ARB 04-107, 2004-ERA-8 (ARB Oct. 13, 2004); *Halpern v. XL Capital, Ltd*., ARB 04-120, 2004-SOX-54 (ARB Oct. 13, 2004); *Cummings v. USA Truck, Inc*., ARB 04-043, 2003-STA-47 (ARB Sept. 15, 2004).

While a party's failure to present an argument on an issue or contest an element of a claim will generally result in a waiver of the issue, the ARB will not enforce that rule where it would result in a manifest injustice. In *Avlon v. American Express Co.*, ARB No. 09-089, ALJ No. 2008-SOX-51 (ARB Sept. 14, 2011), the ARB held that it has the authority to review an ALJ ruling on the timeliness of complaint even though the complainant failed to file an exception on this issue. The ARB stated: "Indeed, not reviewing that claim would render a manifest injustice as it would possibly cause her entire case to be dismissed as it is the central issue on which the ALJ's decision rests. Moreover, because no additional fact-finding is required and the parties fully litigated this issue before the ALJ …, we are well within the bounds of our discretion to address that issue on Avlon's petition for review." USDOL/OALJ Reporter at 5-6 (footnote omitted). The ARB has also held that it is not bound by the legal theories of the parties. *Funke v. Federal Express Corp*., ARB No. 09-004, ALJ No. 2007-SOX-43 (ARB July 8, 2011) (As long as an issue is adequately litigated below and part of the record, the ARB is not necessarily bound by the legal theory of any party in determining whether a violation has occurred.).

The ARB holds its proceedings in Washington, D.C., unless for good cause the ARB orders that proceedings in a particular matter be held in another location. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). The ARB reviews the ALJ's findings of fact under a substantial evidence standard (29 CFR § 1980.110(b)) and conclusions of law *de novo*. *Barron v. ING North America Insurance Corp*., ARB 06-071, 2005-SOX-051 (ARB Aug. 29, 2008); *Negron v. Vieques Air Link, Inc*., ARB 04-021, 2003-AIR-10 (ARB Jan. 8, 2004); *Hasan v. J.A. Jones, Inc*., ARB 02-123, 2002-ERA-5 (ARB June 25, 2003). An ALJ's recommended grant of summary decision, however, is reviewed *de novo*. *Reddy v. Medquist, Inc*., ARB 04-123, 2004-SOX-35 (ARB Sept. 30, 2005) (*citing Honardoost v. Peco Energy Co*., ARB 01-030, 00-ERA-36, (ARB Mar. 25, 2003)). Dismissals for failure to prosecute or to comply with the federal rules or any order of the court are reviewed under an abuse of discretion standard. *Howick v. Campbell-Ewald Co*., ARB 03-156 & 04-065, 2003-STA-6 & 7 (ARB Nov. 30, 2004).

Within 120 days of conclusion of the hearing (generally 130 days from ALJ decision), the ARB must issue a final decision. 29 CFR § 1980.110(c); 49 U.S.C. § 42121(b)(3)(A). The ARB has opined this 120-day period is directory and not jurisdictional. *Welch v. Cardinal Bankshares Corp*., ARB 04-054, 2003-SOX-15 (ARB May 13, 2004). A complainant can remove a SOX action to district court while an appeal of the ALJ's decision is pending before the ARB (as long 180 days have passed since the filing of the complaint). *Heaney v. GBS Properties LLC*, ARB 05-039, 2004-SOX-72 (ARB May 19, 2005); *Allen v. Stewart Enterprises, Inc*., ARB 05-059, 2004-SOX-60 (ARB Aug. 17, 2005).

However, there is district court precedent for returning fully-tried administrative cases to the ARB with an order of mandamus directing the ARB to issue a prompt decision. *See* "Removal to Federal Court on or after 180 days," *infra*.

a. Timeliness of Appeal

In *Svendsen v. Air Methods, Inc*., ARB 03-074, 2002-AIR-16 (ARB Aug. 26, 2004), the ARB decided that it is the date that the decision "was issued," not the date the ALJ signed his Recommended Decision and Order, that triggers the period for appealing the ALJ's

decision.

The limitations period for filing a petition for review with the ARB is considered an internal procedural rule that is subject to equitable tolling. *See Stoneking v. Avbase Aviation*, ARB 03-101, 2002-AIR-7, at 2 (ARB July 29, 2003); *Herchak v. America West Airlines, Inc*., ARB 03-057, 2002-AIR-12, at 5 (ARB May 14, 2003).

In *Patino v. Birken Manufacturing Co.*, ARB 09-054, 2005-AIR-023, at 3 (ARB Nov. 24, 2009), the ARB held that "[I]t is within the ARB's discretion, under the proper circumstances, to accept an untimely-filed petition for review." Regarding reasons for tolling, "the ARB has consistently held that attorney error does not support equitable tolling because '[u]ltimately, clients are accountable for the acts and omissions of their attorneys.'") *Id.* at 4 (alternation in original) (citation omitted). Further, "'[absence of prejudice] is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.'" *Id*. at 4 (citing *Baldwin County Welcome Ctr v. Brown*, 446 U.S. 147, 152 (1984)) (alteration in original).

In *Romero v. The Coca Cola Co.*, ARB No. 10-095, ALJ No. 2010-SOX-21 (ARB Sept. 30, 2010), the ARB declined to apply equitable tolling where the complainant's attorney received the ALJ's decision two days before a petition for review was due and failed to request an enlargement of time to file the petition

b. Interlocutory Appeals

The ARB has "discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute." Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct 17, 2002). However, the ARB, citing "a strong policy against piecemeal appeals," generally does not accept interlocutory appeals of non-final ALJ orders. *See, e.g., Jordan v. Sprint Nextel Corp*., ARB 06-105, 2006-SOX-41 (ARB June 19, 2008); *Welch v. Cardinal Bankshares Corp.*, ARB 04-054, 2003-SOX-15 (ARB May 13, 2004) (denying interlocutory appeal of ALJ order finding that respondent retaliated against claimant where the ALJ had bifurcated consideration of liability and damages and had not yet ruled on damages); *Hibler v. Exelon Generation Co., LLC*, ARB 03-106, 2003-ERA-9 (ARB Feb. 26, 2004) (denying interlocutory appeal of order denying respondent's motion to dismiss on basis that claimant failed to timely serve respondent with his hearing request); *Walton v. Nova Information*, ARB 06-100, 2005-SOX-107 (ARB Sept. 29, 2006) (denying interlocutory appeal of ALJ's order denying motion to dismiss).

To obtain review of an ALJ's interlocutory order, a party seeking review is generally required first to obtain certification of the interlocutory questions from the ALJ. *Somerson v. Mail Contractors of America*, ARB 02-118, 02-STA-44 (ARB Feb. 13, 2003); *Puckett v. Tennessee Valley Auth*., ARB 02-070, 2002-ERA-15 (ARB Sept. 26, 2002). The ARB has held that it will apply the procedure for interlocutory review set forth at 28 U.S.C. § 1292(b). *Jordan v. Sprint Nextel Corp.*, ARB 06-105, 2006-SOX-041 (ARB June 19, 2009). Under 28 U.S.C. §1292(b), a district judge may certify an interlocutory order for appeal when: (1) the order "involves a controlling question of law as to which there is substantial ground for difference of opinion"; and (2) "an immediate appeal from the order may materially advance the

ultimate termination of the litigation."

In *Hibler v. Exelon Generation Co., LLC*, ARB 03-106, 2003-ERA-9 (ARB Feb. 26, 2004), and *Welch v. Cardinal Bankshares Corp*., ARB 04-054, 2003-SOX-15 (ARB May 13, 2004), the ARB held that even if the ALJ certifies an issue for appeal under 28 U.S.C. §1292, the ARB will evaluate whether interlocutory appeal is appropriate under the collateral order exception. In *Welch*, the ARB declined to decide whether the failure to obtain certification is fatal to a request for interlocutory review.

In *Gloss v. Marvell Semiconductor, Inc.*, ARB No. 10-033, ALJ No. 2009-SOX-11 (ARB Jan. 13, 2010), the ARB denied interlocutory review of an ALJ's decision that the respondent waived attorney-client privilege and work product doctrine objections base on the Supreme Court's holding in *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 606 (2009). *See also Fernandez v. Navistar Int'l Corp.*, ARB No. 10-035, ALJ No. 2009-SOX-43 (ARB Mar. 4, 2010) (declining to review an ALJ's order finding that respondent waived any privilege that may have attached to a report summarizing an internal investigation and finding that "exercising jurisdiction over the issue. . . would not. . . expedite the litigation and resolution of this case").

In *Johnson v. U.S. Bancorp*, ARB No. 11-018, ALJ No. 2010-SOX-37 (ARB Mar. 14, 2011), the ALJ denied a motion requesting that the ALJ certify to the ARB for interlocutory review the issue of whether the respondent waived the attorney-client privilege when it relied on an internal investigation as an affirmative defense. The respondent then filed a petition for interlocutory review with the ARB, and the ARB denied the petition, citing *Mohawk Indus. Inc. v. Carpenter*, *supra*, and noting the availability of protective, in camera, and other orders to preserve potentially privileged material.

c. Sanctions

Failure to adhere to ARB orders, such as briefing schedules, may be grounds for dismissal. *See Cunningham v. Washington Gas Light Co*., ARB 04-078, 2004-SOX-14 (ARB Apr. 21, 2005) (dismissing appeal for failure to file a brief and failure to file a response to the ARB's show cause order); *Reid v. Niagara Mohawk Power Corp*., ARB 04-181, 2000-ERA-23 (ARB Dec. 8, 2004) (dismissing appeal for failure to file a petition for review of ALJ's recommended decision within 10 business days of the date on which the ALJ issued the recommended decision and failing to respond to show cause order); *Reid v. Constellation Energy Group, Inc.*, ARB 04-107, 2004-ERA-8 (ARB Dec. 17, 2004) (dismissing appeal for failure to comply with briefing schedule); *Powers v. Pinnacle Airlines, Inc*., ARB 04-035, 2003-AIR-012 (ARB Sept. 28, 2004) (Board dismissed Powers' appeal for failure to file a conforming brief), *cert. denied,* 579 U.S. 917 (2006); *Melendez v. Exxon Chemical Americas*, ARB 03-153, 1993-ERA-6 (ARB Mar. 30, 2004); *Gass v. Lockheed Martin Energy Systems, Inc*., ARB 03-093, 2000-CAA-22 (ARB Jan. 29, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB 03-139, 2003-SOX-24 (ARB Jan. 13, 2004). In *Rowland v. NASD*, ARB 07-098, 2007-SOX-006, at 8 (ARB Sept. 25, 2009), the ARB held that while 29 C.F.R. § 18.6(b) allows for the discretionary filing of an answer in support or in opposition of a motion, it "does not negate the discretion given the ALJ. . .[to] call for the submission of briefs [in a briefing schedule] or to rule that a decision be rendered against a party who does not comply with an order." A party claiming extraordinary hardship as a reason for delayed filing or failure to comply with a briefing schedule should be

prepared to show evidence of the hardship and should request an extension prior to the deadline. *Id*. at 7 (complainant blamed computer hacking for delay in submitting response to motions to dismiss).

d. Enforcement of a Final Order

Proceedings to compel compliance with the Secretary's final order may be brought by a party in federal district court. 49 U.S.C. § 42121(b)(6)(A); 29 CFR § 1980.113. The court has jurisdiction without regard to the amount in controversy or citizenship of the parties. Additionally, the Secretary may file a civil action in federal district court to enforce a final order. 49 U.S.C. § 42121(b)(5).

14. Appeal to Court of Appeals

Within 60 days of issuance of the DOL's final decision, an aggrieved party may file a petition for review to the United States Court of Appeals in the circuit in which the alleged violation occurred, or the circuit in which the complainant resided on the date of the alleged violation. 49 U.S.C. § 42121(b)(4)(A); 29 CFR § 1980.112(a).

SOX does not set forth the standard of review for appeals to the Court of Appeals. Accordingly, the default standards provided in the Administrative Procedures Act ("arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law") should apply. *See Alaska Dep't of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461 (2004). Under the APA, the court is bound by the ARB's factual findings if they are supported by substantial evidence. 5 U.S.C. § 706(2). *See UPS v. Administrative Review Bd*., No. 97-3544, 1998 U.S. App. LEXIS 24978 (6th Cir. 1998). In *Roadway Express, Inc. v. Admin. Review Bd*., 2004 U.S. App. LEXIS 25578 (6th Cir. Nov. 22, 2004), the Sixth Circuit stated the legal conclusions of the ARB are to be reviewed "*de novo*, with the proper deference due an agency interpreting the statute it is charged with administering."

15. Removal to Federal Court On or After 180 Days

If the DOL has not issued a *final* decision within 180 days and the delay is not a result of the complainant's bad faith, the complainant may withdraw his or her administrative complaint and file an action for *de novo* review in federal district court. 18 U.S.C. §1514A(b)(1)(B). *See Kelly v. Sonic Auto. Inc*., ARB 08-027, 2008-SOX-003 (ARB Dec. 17, 2008) (affirming ALJ's decision that the DOL was deprived of jurisdiction over the complainant's SOX complaint once the complainant filed his action in district court seeking *de novo* review). The district court has jurisdiction without regard to the amount in controversy. Moreover, the same burdens of proof that apply before the ALJ apply in the district court. 18 U.S.C. § 1514A(b)(2)(C).

a. Issues Relating To Removal

The right to *de novo* review after a complaint has been pending before the DOL for over 180 days without a final decision is absolute. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009). In *Stone*, the Fourth Circuit defined "*de novo*" and found "the plain

language of § 1514A(b)(1)(B) unambiguously establishes a Sarbanes-Oxley whistleblower complainant's right to *de novo* review in federal district court if the DOL has not issued a "final decision" and the statutory 180-day period has expired." *Id.* at 9. The *Stone* decision makes it clear that if the administrative process at the DOL does not move quickly, a whistleblower has an unwavering right to start afresh in district court. Deferring to an administrative agency is in direct conflict with the language of SOX which provides for *de novo* review.

In *Trusz v. UBS Realty Investors, LLC*, 2010 WL 1287148 (D. Conn. Mar. 30, 2010), the court held that amending a SOX complaint to include additional acts of retaliation does not reset the 180-day period that a complainant must wait before removing the complaint from DOL to federal court.

In *Nixon v. Stewart & Stevenson Servs., Inc*., 2005-SOX-1 (ALJ Feb. 16, 2005), complainant's delay constituted "bad faith," and his motion to withdraw his complaint and stay the proceedings was denied. First, complainant requested that the proceeding be delayed for financial reasons. The ALJ granted that request over respondent's objections, explaining to complainant the 180-day limitations period would be tolled. Complainant was granted another delay for incomplete discovery. The ALJ again explained the tolling of the limitations period. Respondent then delayed the proceeding because of the unavailability of a witness, and again the limitations period was tolled. Complainant asked to withdraw his complaint to file the action in district court and filed a motion to stay the proceeding, pending the filing with the district court. The ALJ refused both motions stating, "his attempt to invoke the 180 limit after having informed the parties he waived such a right and obtaining a delay based on that representation, constitutes bad faith under the regulations."

In *Murray v. TXU Corp*., 279 F. Supp. 2d 799 (N.D. Tex. 2003), a federal district court in Texas held that the defendant bears the burden of showing that the Secretary's failure to timely issue a final decision was due to the claimant's bad faith. *See also Collins v. Beazer Homes USA, Inc*., 334 F. Supp. 2d 1365 (N.D. Ga. 2004) (evidence that plaintiff did not fully cooperate with OSHA investigators and that delay in issuance of OSHA's final determination was due in some part to settlement negotiations alone was insufficient to defeat federal court jurisdiction based on plaintiff's bad faith; plaintiff's ability to file in federal court is not premised on showing of good faith, but on a failure to show that delay in OSHA's final determination was a result of bad faith).

Within seven days after filing filing an action in district court, the complainant must file a copy of the file-stamped complaint notice with the ALJ or ARB, and serve such notice upon various divisions in DOL. 29 CFR § 1980.114(b).

Standard pleading requirements apply in district court actions. For instance, in *Stone v. Duke Energy Corp*., No. 3:03-CV-256, slip op. (W.D.N.C. Feb. 11, 2004), the court dismissed the plaintiff's SOX complaint for failure to contain "a short and plain statement of the claim" and failure to present claims in separate counts for clear presentation of the matters set forth. The court reasoned that it would "not waste its time searching through Plaintiff's disorganized and indefinite Complaint for a *prima facie* case."

Complainants must exhaust their administrative remedies before filing a

complaint in federal court. 18 U.S.C. § 1514A(b)(1)(A). Being an attorney does not exempt a plaintiff from this requirement. *Curtis v. Century Sur. Co.*, 320 F.App'x 546 (9th Cir. 2009). In *McClendon v. Hewlett-Packard Co*., No. 05-Civ-087, 2005 WL 2847224 (D. Idaho Oct. 27, 2005), the district court determined that plaintiff's complaint alleging that defendant took away his job duties was untimely under OSHA's administrative filing period. Plaintiff opted out of the DOL forum and filed an action in the district court, alleging he was not time-barred from asserting other adverse employment actions. The court stated each discriminatory act starts the clock for filing an OSHA complaint. Since plaintiff's additional adverse employment actions were not asserted in his OSHA complaint, the court could not review them.

Where a party withdraws an appeal pending before the ARB, the ALJ's decision becomes the final decision of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). *Lowe v. Terminix Int'l Co., L.P.*, ARB 07-004, 2006-SOX-89 (ARB Aug. 23, 2007); *Hagman v. Washington Mutual Bank, Inc.*, ARB 07-039, 2005-SOX-73 (ARB May 23, 2007). A withdrawal is not the same as removal to federal court. *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009).

b. Jury Trial

Prior to the enactment of the Dodd-Frank Act in 2010, it was unclear whether SOX allowed for a jury trial. Its legislative history reflects that at least some of its drafters intended that a jury trial be available for whistleblower actions. *See* 148 Cong. Rec. § 7418, 7420 (comments by Sen. Leahy). The Dodd-Frank Act expressly clarifies that Section 806 plaintiffs have the right to try their claims before a jury.

In *Schmidt v. Levi Strauss & Co*., No. 04-Civ-01026, 2008 U.S. Dist. LEXIS 58322 (N.D. Cal. Mar. 28, 2008), the court granted defendant's motion to strike plaintiffs' demand for jury trial, concluding that the statutory text of Section 806 does not imply a statutory right to jury trial.

In *Mahony v. KeySpan Corp.*, No. 04 CV 554, 2007 WL 805813 (E.D.N.Y. Mar. 12, 2007), the court, without explanation, assumed that a SOX plaintiff is entitled to a trial by jury. Denying the employer's motion for summary judgment, the court held that it would defer to a jury's judgment whether plaintiff met his burden and the employer established by clear and convincing evidence that plaintiff's termination was non-retaliatory.

16. Burdens of Proof

SOX provides that a whistleblower action "shall be governed by the legal burdens of proof set forth in [AIR21]." 18 U.S.C. § 1514A(b). The burden-shifting framework of *McDonnell Douglas* and other cases decided under federal anti-discrimination statutes applies generally to SOX cases, but the quantum of proof imposed on the parties is changed. Under SOX and AIR21, a complainant may prevail merely by showing that an improper motive was a "contributing factor" in the employment decision. Once this relatively low quantum of proof is established by the complainant, a respondent seeking to avoid liability using a "mixed motive" analysis must show by "clear and convincing evidence" (rather than a simple "preponderance of the evidence") that it would have taken the same employment action even in the absence of

complainant's protected activity.

For example, in *Collins v. Beazer Homes USA, Inc*., 334 F. Supp. 2d 1365 (N.D. Ga. 2004), the federal district court explained that "[t]he evidentiary framework to be applied in Sarbanes-Oxley is an analysis different from that of the general body of employment discrimination law." 334 F. Supp. 2d at 1374, n.11. Under the SOX framework, a plaintiff in federal court must show by a preponderance of the evidence that the plaintiff's protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. In particular, the plaintiff must show by a preponderance of the evidence that: (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel action; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. Once the plaintiff has met this burden, the defendant employer may avoid liability if it can demonstrate by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of [protected] behavior." *Id.* at 1376.

In *Kalkunte v. DVI Financial Services, Inc.*, ARB 05-139, 2004-SOX-056 (ARB Feb. 27, 2009), the ARB articulated the burdens of proof that apply to SOX cases. A SOX complainant need not show that her protected conduct was a motivating or determinative factor in the decision to take an adverse action; rather she must only show that it was a contributing factor. Once the complainant has established by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action, the employer can avoid liability only by proving by a clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protect activity. *Id.* at 8. In *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1004 (9th Cir. 2009), the court held that "'causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.'" Thus, close temporal proximity is sufficient to avoid Summary judgment.

In *Williams v. Administrative Review Board*, 376 F.3d 471 (5th Cir. 2004), the Fifth Circuit held that the *Ellerth/Faragher* standard applies in an ERA hostile work environment case where the employee suffered no adverse employment action. Therefore, a defendant can avert vicarious liability for a hostile work environment by showing that: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the harassed employee unreasonably failed to take advantage of any preventive opportunities provided by the employer. The court reasoned that "[i]f the *Ellerth/Faragher* standard applies in a race discrimination case, there is no reason not to apply the same standard in a whistle-blower case." *Id.* at 478. There appears to be no reason to believe the *Williams* reasoning would not apply to SOX whistleblower actions.

Temporal proximity between the protected conduct and the adverse action is sufficient to create a genuine issue of material fact on causation. *Vannoy v. Celanese Corp.*, ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011). In *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, -003, ALJ No. 2007-SOX-5 (ARB Sept. 13, 2011), the ARB clarified that lack of retaliatory motive does not preclude a finding of causation: "Nothing in Section 806 requires a showing of retaliatory intent. The statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer. Proof of 'retaliatory motive' is not necessary to a determination of causation. McCollum's breach of

confidentiality, however well meaning, nonetheless demonstrates a lack of understanding of its foreseeable consequences and does not absolve Halliburton of responsibility. The ALJ thus erred as a matter of law in deciding that lack of retaliatory motive precluded a finding of causation." ARB Nos. 09-002, -003, at 31-32.

17. Confidentiality

SOX itself does not address confidentiality. However, the regulations state that "[i]nvestigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of this title." 29 CFR § 1980.104(d). Although this general policy may shield some materials from public disclosure, it has very significant limitations, especially as it applies to settlement agreements (discussed *infra*).

According to the December 5, 2003 *DOL OALJ Notice Regarding Public Access to Court Records and Publication of Decisions* ("Notice"), to protect personal privacy and other legitimate interests, parties should refrain from including (or should redact) social security numbers and financial account numbers from all pleadings filed with the court, including exhibits. Unredacted documents may be filed under seal.

In *Jordan v. Sprint Nextel Corp*., ARB 06-105, 2006-SOX-041, at 2 (ARB Sept. 30, 2009), the ARB held that in-house counsel could pursue his SOX claim even though prosecuting the claim would entail using attorney-client privileged information. The ARB concluded that Section 307 of SOX, which requires an attorney to report a material violation, should be read in conjunction with the whistleblower protections provided in Section 806. Similarly, in *Van Asdale v. Int'l Game Tech*., 577 F.3d 989, 994 (9th Cir. 2009), the court held that SOX "expressly authorizes any 'person' alleging discrimination based on protected conduct to file a complaint with the Secretary" *Id.* at 996 (permitting in-house counsel to pursue complaint despite potential disclosure of attorney-client privileged information).

In *Thomas v. Pulte Homes, Inc*., 2005-SOX-9 (ALJ Aug. 9, 2005), the ALJ refused complainant's request that the entire record be sealed. "A request for the record to be sealed may be made by requesting a protective order pursuant to 29 C.F.R. §§ 18.15 and 18.46 or requesting a designation of confidential commercial information pursuant to 29 C.F.R. § 70.26." Complainant failed to support the need for confidentiality by failing to identify a privacy interest, potential harm or embarrassment that could result from disclosure and failed to identify confidential commercial information. The ALJ, however, noted that confidential information can be subject to disclosure through FOIA requests. Thus, even if the record were sealed, in responding to FOIA requests, the DOL would determine whether or not to withhold the information and, if there were no applicable exemptions, it would be disclosed.

B. Retroactivity

In an issue of decreasing relevance, ALJs consistently have held that SOX whistleblower provisions do not apply retroactively. *See, e.g., McIntyre v. Merrill. Lynch, Pierce, Fenner & Smith, Inc*., 2003-SOX-23 (ALJ Jan. 16, 2004). However, evidence of pre-SOX conduct may be admissible to prove a violation of the Act. *See Taylor v. Express One*

International, Inc., 2001-AIR-2 (ALJ Dec. 5, 2001).

C. ADR

Prior to the enactment of Dodd-Frank Act, the Department of Labor and federal courts consistently held that Section 806 claims are subject to mandatory arbitration. *Guyden v. Aetna, Inc*., 544 F.3d 376 (2nd Cir. 2008) (granting the employer's motion to compel mandatory arbitration of a SOX claim). The Dodd-Frank Act amended SOX by making unenforceable any predispute arbitration agreement or other attempt to condition employment on the employee's waiver of her rights and remedies under SOX.

Where there is an enforceable arbitration agreement, the Department of Labor may defer to the arbitration process. *Boss v. Salomon Smith Barney*, 263 F. Supp. 2d 684 (S.D.N.Y. 2003). In *Roganti v. Metlife Financial Services*, 2005-SOX-2 (ALJ Nov. 23, 2004), the complainant asked the ALJ to permit him to withdraw his claim because he decided to pursue his SOX matter before an arbitration panel at the NASD, but requested the opportunity to reinstate the matter before the ALJ. The ALJ advised the complainant that he was not aware of any procedure that would allow the reinstatement of his complaint once it was withdrawn.

D. Settlement Agreements

1. General

At any time before issuance of a final order, a SOX proceeding may be terminated on the basis of a settlement agreement entered into by the parties and approved by the ALJ. 29 CFR § 1980.111(d)(2). It is OSHA's policy to seek settlement in all cases determined to be meritorious prior to completing the investigation. OSHA Manual 3-2, 3..

However, the possibility of settlement in any given case is often complicated by factors such as the possibility of subsequent or parallel litigation between the parties. Another consideration impacting settlement is that any settlement agreement between the parties must be approved by DOL. 49 U.S.C. § 42121 (b)(3)(A); 29 CFR § 1980.111(d); *DOL Memorandum of Review of Whistleblower Settlements* (July 10, 2003) (settlements reached during the investigative stage must be reviewed and approved by OSHA and settlements reached after OSHA issues its findings must be approved by the ALJ or ARB).

Employers have an incentive to settle SOX claims where a general release of other existing and potential claims between the parties can be obtained from the complainant. In furtherance of its policy to seek settlement in all cases, the DOL has generally approved settlement agreements containing a general release of claims. *See Moore v. Cooper Cameron,* 2004-SOX-37 (ALJ July 21, 2004) (ALJ accepted settlement agreement containing general release as fair and reasonable).

However, in *Coker v. Wal-Mart Stores, Inc*., 2004-SOX-33 (ALJ June 4, 2004), an ALJ opined that a settlement agreement containing a general release including unstated claims under other laws for which the DOL lacked jurisdiction and potential claims arising in the future should be rejected as not fair, reasonable or in the public interest. The ALJ reasoned

that the DOL's authority over settlement agreements "is limited to such statutes as are within the Secretary's jurisdiction and is defined by the applicable statute."

In *Michaelson v. OfficeMax, Inc*., 2004-SOX-17 (ALJ June 21, 2004), an ALJ rejected a settlement agreement because it contained an overly broad general release and confidentiality provision and proposed modification of those provisions. Regarding the general release, the ALJ found that to the extent the provision could be interpreted to include a waiver of complainant's rights based upon future actions, the provision was contrary to public policy. Although the ALJ noted that the DOL's authority over settlement agreements is limited to those statutes which are within the Secretary's jurisdiction, he did not (unlike the ALJ in *Coker*) find that the waiver of claims involving multiple other state and federal laws necessarily rendered the agreement unfair or unreasonable, but he did explain that his review of the agreement was limited to a determination whether the terms of the agreement represented a fair, adequate and reasonable settlement of the complainant's allegations concerning the SOX violations.

Parties sometimes may seek to circumvent the DOL settlement approval requirement. For example, in *Wallace v. Routeone, LLC*, 2005-SOX-4 (ALJ Jan. 25, 2005), the complainant had filed claims against respondent under both SOX and state law. The parties settled the state law claim and executed a written settlement and release agreement. The complainant, satisfied with the relief obtained, then moved to dismiss as moot his objections to OSHA's determination. While 29 CFR §1980.111 requires an ALJ's approval of settlements if a complainant seeks to withdraw his or her objections because of a settlement, the ALJ held that this provision refers only to a settlement of the SOX case, not the settlement of a contemporaneous state claim. Therefore, the complainant was permitted to dismiss the SOX case as moot.

Another issue to consider regarding settlement is confidentiality. In *Doherty v. Hayward Tyler, Inc*., ARB 04-001, 2001-ERA-43 (ARB May 28, 2004), the ARB found that the parties' submissions, including a settlement agreement, may become part of the record of the case and may be subject to disclosure under FOIA. Therefore, the ARB denied a joint motion requesting an order that the settlement agreement not be disclosed, except as set forth in the agreement. Likewise, in *Michaelson v. OfficeMax, Inc*., 2004-SOX-17 (ALJ June 21, 2004), the ALJ found that the agreement's confidentiality provision could not prevent disclosure to governmental agencies, and that the agreement could be subject to disclosure pursuant to a FOIA request. *See also Jacques v. Competitive Technologies, Inc*., 2005-SOX-34 (ALJ June 14, 2005); *Bahr v. Mercury Marine and Brunswick Corp*., 2005-SOX-18 (ALJ June 13, 2005); *Hogan v. Checkfree Corp*., 2005- SOX-7 (ALJ May 10, 2005).

Parties settling at the appellate stage before the ARB may be able to avoid submitting a settlement agreement to the Labor Department and risking disclosure of settlement terms under FOIA by withdrawing the appeal. As a practical matter, however, it should be noted that the ALJ's decision then becomes the Labor Department's final (and enforceable) order. In *Concone v. Capital One Financial Corp*., ARB 05-038, 05-SOX-6 (ARB May 13, 2005), respondent's attorney sent the ARB a letter stating the parties had reached a settlement. The parties filed a Joint Stipulation of Dismissal agreeing to dismiss the action with prejudice and the ARB issued an Order Requiring Clarification ordering the parties to either (1) withdraw their objections or (2) submit a copy of the settlement for the Board's approval. The parties

filed a Joint Motion to Withdraw Joint Stipulation of Dismissal and complainant filed a Notice of Withdrawal of Objections which the Board approved and dismissed the appeal.

In *Walker v. Pacificare Health Systems, Inc*., 2005-SOX-43 (ALJ July 15, 2005), the ALJ approved the settlement agreement and agreed to place it in a separate envelope marked confidential. The court reasoned the agreement contained confidential commercial information which could be exempt from disclosure under FOIA requests.

2. Enforcement

In any case where the employer fails to comply with the terms of a settlement agreement, OSHA opines that it may treat such failure as a new instance of retaliation and require the opening of a new case. Alternatively, direct enforcement of the agreement may be sought in court. OSHA Manual 6-14, 16.

In *Chao v. Alpine, Inc*., No. 04-Civ-102, 2004 WL 2095732 (D. Me. Sept. 20, 2004), the DOL had filed a complaint seeking to enforce backpay, interest and attorney fees awarded by the ARB. While pending before the district court, the attorneys for the employee and the defendant entered into a verbal settlement agreement, the defendant sent a check to the employee's attorney to hold, and the employee's attorney sent a settlement agreement to the defendant for signature and return for signing by the employee. Upon return, however, the employee refused to sign. The check was not returned to the defendant. The defendant then sought enforcement of the settlement agreement by the district court. The court granted enforcement, reasoning that the employee was bound by the agreement of her counsel to the settlement, the counsel having not expressly conditioned the agreement on the employee's signature or on the employee's acceptance of the terms of the agreement.

E. Effect of Bankruptcy Proceedings

In *Davis v. United Airlines, Inc*., ARB 02-105, 2001-AIR-5 (ARB May 30, 2003), the ARB held that whistleblower actions brought pursuant to AIR21 are subject to the automatic stay of the Bankruptcy Code, 11 U.S.C.A. § 362(a)(1), and are not exempt from the stay pursuant to § 362(b)(4), which applies to actions and proceedings by a governmental unit to enforce its police and regulatory authority. In contrast, in *Briggs v. United Airlines*, 2003-AIR-3 (ALJ Feb. 13, 2003), the ALJ held that a DOL proceeding pursuant to AIR21 was exempt from the automatic stay provision under the regulatory and police powers exception.

In *Bettner v. Crete Carrier Corp*., 2004-STA-18 (ALJ Oct. 1, 2004), the complainant filed a voluntary petition in bankruptcy. Earlier, he had filed objections to the Secretary's determination denying him relief under the STAA whistleblower provision. The ALJ held that the automatic stay provision of the Bankruptcy Act does not apply to suits by the debtor in the Seventh Circuit, and therefore the STAA proceeding would proceed.

VII. REMEDIES

A. Introduction

The text of the Sarbanes-Oxley Act provides for the following remedies:

> (1) IN GENERAL. – An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.
>
> (2) COMPENSATORY DAMAGES. Relief for any action under paragraph (1) shall include –
>
> > (A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;
> >
> > (B) the amount of back pay, with interest; and
> >
> > (C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
> >
> > (D) RIGHTS RETAINED BY EMPLOYEE.--Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

18 U.S.C. § 1514A(c). This language is comparable to the remedies provisions found in other whistleblower statutes administered by the DOL. *See, e.g.,* the Consumer Product Safety Improvement Act, 15 U.S.C. § 2087(b)(3)(B); the National Transit Systems Security Act, 6 U.S.C. § 1142(d); and the Federal Railroad Safety Act, 49 U.S.C. § 20109(e).

In addition to civil liability, the Act contains criminal penalties for those interfering with the employment of certain whistleblowers. 18 U.S.C. § 1513(e). The criminal provision is discussed in Section III.G, *supra.*.

B. Back Pay

1. Basic Entitlement

The general rule regarding back pay awards for SOX violations has been stated:

> [T]he back pay award should therefore be based on the earnings the employee would have received but for the discrimination. A complainant bears the burden of establishing the amount of back pay that a respondent owes. However, because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, unrealistic exactitude is not required in calculating back pay, and

> uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating party.

Platone v. Atlantic Coast Airlines Holdings, Inc., 2003-SOX-27 (ALJ July 13, 2004), *rev'd on other grounds sub nom. Platone v. FLYi, Inc.*, ARB 04-154 (ARB Sept. 29, 2006), *aff'd sub nom. Platone v. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008) (internal citations omitted).

In *Barrett v. e-Smart Technologies*, 2010-SOX-31 (ALJ Sept. 9, 2011), the ALJ held that where the complainant had been removed from his management responsibility for technology, he was thus deprived of the opportunity to meet specified production goals that were linked to the company's incentive pay program. Accordingly, the ALJ held that "the effect was to excuse Complainant from meeting that condition; [and] it entitled him to the incentive pay." This holding increased the complainant's back pay award by over $130,000.

2. Promotions and Salary Increases

Back pay awards for SOX violations may include all promotions and salary increases the complainant would have received in the absence of retaliation. *See, e.g., Welch*, 2003-SOX-15 at 17 (ALJ Feb. 15, 2005) (holding that a prevailing complainant "is entitled to all promotions and salary increases that he would have obtained but for the illegal discharge"). In calculating the amount of a salary increase which the complainant would have received in *Welch*, the ALJ noted that "the average raise for employees at [the employer] for [the relevant year] is shown to be 2.25%," and held that "[w]hile [the complainant] could have, in fact, received a greater or lesser raise, it is reasonable to conclude that the average raise awarded to other employees is the best approximation of what [the complainant] would have received."

3. Accrued Vacation

Back pay awards for SOX violations can under some circumstances include the value of accrued vacation lost as a result of the employer's discrimination. The standard for recovering accrued vacation has been stated as follows:

> the purpose of the Act is to make the Complainant whole. In determining whether a complainant is entitled to be paid for accrued vacation that she lost as a result of her employer's discrimination, the Administrative Review Board (ARB) has found that, where it is the practice of the employer to pay an employee for vacation time not taken, it is equitable for the complainant to receive both wages and vacation pay for the same period.

Platone, 2003-SOX-27 at 5-6 (ALJ July 13, 2004). *See also Kalkunte v. DVI Fin. Servs.*, 2004-SOX-56 (ALJ July 18, 2005), *aff'd but modified*, 05-139, 05-140 (ARB Feb. 27, 2009).

4. Bonuses

In *Barrett v. E-Smart Technologies, Inc.*, 2010-SOX-31 (ALJ Sept. 9, 2011), the ALJ found that, where bonuses were discretionary, complainant's contention that he should be

awarded a performance-based bonus, was too speculative as his employment agreement lacked any mandatory language or quantifiable basis for a bonus award.

5. Valuing Fringe Benefits

Back pay awards include the value of fringe benefits lost as a result of an unfavorable personnel action. *Hobby v. Ga. Power Co.,* ARB No. 98-166, ALJ No. 1990-ERA-30 (ARB Feb. 9, 2001)*, aff'd sub nom. Ga. Power Co. v. Dep't of Labor,* 52 Fed. Appx. 490 (11th Cir. 2002); *Kalkunte*, 2004-SOX-56 (ALJ July 18, 2005). Uncertainties in calculating the amount of back pay are to be resolved in favor of the complainant. *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002).

The valuation of fringe benefits as part of the back-pay award to a successful plaintiff can be both controversial and complicated. Courts that have faced the valuation of fringe benefits have placed the burden on the plaintiff to prove that a fringe benefit existed, and the value of the benefit. Generally, this has resulted in the use of experts who employ complex formulas to demonstrate the values of lost benefits.

For an example of a SOX case in which expert witnesses for both parties debated the issue of complainant's entitlement to fringe benefits, *see Hagman v. Washington Mutual Bank, Inc.*, 2005-SOX-00073 (ALJ Dec. 19, 2006), *appeal withdrawn by employer and dismissed*, 07-039 (ARB May 23, 2007).

For a recent example of a case in which the complainant was awarded reimbursement for a variety of fringe benefits, *see, e.g., Fort*, 4-1760-08-017 (OSHA Mar. 17, 2010) (ordering that employer reimburse SOX complainant for, among other things, a bonus, seven board meeting fees, stock options, medical expenses, car allowance, insurance, and job hunting expenses).

a. Loss of Health Insurance Coverage

Prevailing employees are entitled to damages for health care costs incurred as a result of loss of coverage caused by termination. This may include the value of health insurance premiums or out-of-pocket medical expenses. *See, e.g.,* the following cases:

- *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 54 (ALJ Jan. 15, 2010) ("Health, pension, and other related benefits are terms, conditions and privileges of employment to which a successful complainant is entitled from the date of a discriminatory layoff until reinstatement or declination, and these compensable damages include medical expenses incurred because of termination of medical benefits, such as insurance premiums.").

- *Hobby,* ARB No. 98-166 at 37 (ARB Feb. 9, 2001) (upholding ALJ's award of the actual cost of health and life insurance premiums since the date of complainant's unlawful termination, as well as interest on those amounts,

because complainant "would have enjoyed the use of these monies if [he] had not been terminated").

- *Platone*, 2003-SOX-27 at 6 (ALJ July 13, 2004) (holding that a successful SOX complainant is entitled to reimbursement "for medical expenses she incurred that would have been covered under the company [health insurance] plan").

- *Kalkunte*, 2004-SOX-56 at 54 (ALJ July 18, 2005) (holding that back pay and benefit considerations may include lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked).

- *Welch*, 2003-SOX-15 at 18 (ALJ Feb. 15, 2005) (awarding successful SOX complainant reimbursement for health insurance premiums, as he would not have had to purchase health insurance if he had not been unlawfully discharged).

In *Kalkunte I*, 2004-SOX-56 (ALJ July 18, 2005), the ALJ held that back pay and benefit considerations may include lost overtime, lost vacation and other chargeable pay remedies such as compensatory time and sick time, and may include lost pension and health benefits and contributions to those plans for hours that would otherwise have been worked. However, the complainant failed to request reinstatement of fringe benefits.

In *Welch*, 2003-SOX-15 (ALJ Feb. 15, 2005), the complainant lost his life and health insurance benefits when fired by the respondent. While he was employed by a subsequent employer, the complainant was not entitled to either life or health insurance coverage, and he purchased health insurance through his wife's employer. The ALJ found the expense recoverable because complainant would not have had to purchase health insurance benefits if he had not been unlawfully discharged.

In *Tipton v. Ind. Mich. Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-30 (ARB Sept. 29, 2006), *aff'd sub nom. Ind. Mich. Power Co. v. Dep't of Labor*, 278 Fed. Appx. 597 (6th Cir. May 20, 2008), the ARB ruled that a complainant may recover the value of health insurance fringe benefits paid by his former employer or the cost of purchasing substitute coverage, but not both.

In *Jackson v. Butler & Co.*, ARB No. 03-116, ALJ No. 2003-STA-26 (ARB Sept. 2, 2004), the complainant was awarded recovery of lost health insurance benefits, valued as the actual and direct expenses resulting from his loss of respondent's health plan. This included both the costs of premiums for replacement health insurance and out-of-pocket medical expenses.

6. Stock Options

The value of stock options is recoverable in whistleblower cases before the Department of Labor. *See, e.g.*, *Hobby,* ARB No. 98-166 at 37 (ARB Feb. 9, 2001). In *Jayaraj*

v. Pro-Pharmaceuticals, Inc., 2003-SOX-32 (ALJ Feb. 11, 2005) the ALJ explicitly stated that the economic loss recoverable by the plaintiff may include the value of lost stock options. However, because the complainant raised her request for recovery of the lost stock options for the first time in a post-hearing submission, rather than during the hearing itself, recovery was denied.

In *Barrett v. E-Smart Technologies, Inc.*, 2010-SOX-00031 (ALJ Sept. 9, 2011), while complainant had the option to buy 10,000,000 shares of stock in the company, neither the stock option agreement nor the company's option policy was in the record, and thus the ALJ found any award to be entirely speculative. The ALJ did allow him to exercise his vested options as if his last date of employment was the date of the ALJ's decision.

7. Tax Bump Relief

Although the author is not aware of any cases directly on point under SOX, the ARB has suggested that the tax consequences of an award may be considered if there is sufficient evidentiary groundwork. *Doyle v. Hydro Nuclear Servs.*, ARB No. 99-041, ARJ No. 89-ERA-22 (ARB May 17, 2000). The issue of "tax bump up" has been addressed by the courts in employment discrimination cases arising under other statutes. In *Blaney v. Int'l Ass'n of Machinists*, 87 P.3d 757 (Wash. 2004), in an action under the state anti-discrimination law, the Supreme Court of Washington allowed for an offset of the tax consequences to the plaintiff flowing from the lump sum payment of damages. However, the court refused to characterize the offset of additional federal income tax consequences as "actual damages" because the tax consequences were too attenuated. Instead, the court characterized the offset as "any other appropriate remedy authorized by [Title VI]."

The federal courts are split as to whether tax bump relief is available under the 1991 Civil Rights Act. *Compare Fogg v. Gonzales*, 492 F.3d 447 (D.C. Cir. 2007) (absent an agreement between the parties, "gross up" relief was not appropriate relief); *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536 (4th Cir. 2003) (district court did not abuse its discretion in refusing to enhance the plaintiff's back pay award to compensate for the higher income tax burden incurred as a result of receiving the payment in a lump sum) *with Sears v. Acheson, Topeka & Kansas City Ry. Co*., 749 F.2d 1451, 1456 (10th Cir. 1984) (allowing an increase in award for back pay in order to compensate for the resultant tax burden from receiving a lump sum of more than 17 years in back pay); *O'Neill v. Sears Roebuck & Co.*, 108 F. Supp. 2d 443 (E.D. Pa. 2000) (plaintiff was entitled to "an award for negative tax consequences, but limit[ed] the award to the increased tax liability on the award of front and backpay, only"); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089 (3d Cir. 1995) (in order to fulfill the make-whole purpose of remedies in ADEA cases the plaintiff was entitled to prejudgment interest to compensate the plaintiff for the lost time value of money).

8. Mitigation of Damages

Under the Act, a victim of employment discrimination is not specifically required to mitigate damages. However, the ARB has found such a requirement to be implicit, following

the general common law rule of "avoidable consequences." *Kalkunte I*, 2004-SOX-56 at 55-56 (ALJ July 18, 2005). This standard has been stated as follows:

> Although the SOX employee protection provision does not explicitly require victims of employment discrimination to attempt to mitigate damages, the ARB has consistently imposed such a requirement, in keeping with the general common law "avoidable consequences" rule and the parallel body of damages law developed under other anti-discrimination statutes. The respondent bears the burden of proving that the complainant did not properly mitigate. . . .
>
> To meet this burden, the respondent must show that (1) there were substantially equivalent positions available; and (2) the complainant failed to use reasonable diligence in seeking these positions. The benefit of the doubt ordinarily goes to the complainant.

Kalkunte I, 2004-SOX-56 at 55-56 (ALJ July 18, 2005) (internal marks and citations omitted).

If an employee refuses an offer by the employer to return to a past position, this fact alone may support the employer's failure to mitigate claim. In addition, an offer of a position that previously was denied often will toll the back-pay liability of an employer who is charged with employment discrimination. The employee's rejection of the offer will end the employer's back pay liability. *See Kalkunte*, 2004-SOX-56 at 55-57 (ALJ July 18, 2005).

In *Barrett v. e-Smart Technologies*, 2010-SOX-31 (ALJ Sept. 9, 2011), the ALJ found that, following her termination, the complainant founded a company from which he took no salary but rather was compensated in stock. The ALJ concluded that "by making this choice, he has ceased to function in the economy as an employee and has instead become a business owner. As of the time he exited the labor market, he failed to mitigate his lost wages." Accordingly, the ALJ ruled that the complainant was not entitled to back pay or front pay for that preiod of time.

The amount of any back pay award may be reduced by the total amount of wages received by the complainant during any interim employment the complainant held since his termination from the respondent employer. *See, e.g., Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 54 (ALJ Jan. 15, 2010); *Barrett v. e-Smart Technologies*, *supra* ("Were I to disregard this alternate employment, it would afford Complainant a double recovery; it would go beyond the make-whole relief that the statute affords").

9. Right to Jury Trial

The Dodd-Frank Act expressly clarifies that Section 806 plaintiffs have the right to a jury trial. Under pre-Dodd-Frank law, it was unsettled whether plaintiffs were entitled to a jury trial. *See, e.g., Walton v. Nova Info. Sys.*, 514 F. Supp. 2d 1031 (E.D. Tenn. 2007); *Schmidt v. Levy Strauss & Co.*, 2008 U.S. Dist. LEXIS 58332 (N.D. Cal. Aug. 1, 2008); *Murray v. TXU*, 2005 U.S. Dist. LEXIS 10945 (N.D. Tex. June 7, 2005); *Fraser v. Fiduciary Trust Co. Int'l*, 417

F. Supp. 2d 310 (S.D.N.Y. 2006); *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004).

C. Interest

Plaintiffs prevailing under Section 806 are entitled to interest as part of their back pay award. As in other employment cases wherein the plaintiff is awarded back pay, the interest is determined in accordance with Section 6621 of the Internal Revenue Code, 26 U.S.C. § 6621. Interest is not awarded on compensatory damages. *See, e.g., Kalkunte*, 2004-SOX-56 at 65 (ALJ July 18, 2005) (citing *Smith v. Littenberg,* 92-ERA-52 at 5 (Sec'y Sept. 6, 1995)). The ALJ in *Welch*, 2003-SOX-15 (ALJ Feb. 15, 2005), stated the appropriate standard for awarding interest as follows:

> Given the remedial nature of the employee protection provisions of Sarbanes-Oxley, and the "make whole" goal of back pay, prejudgment interest on Complainant's back pay award is appropriate. *See, e.g., Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042 (ARB May 17, 2000), *slip op*. at 18, n.18. Such interest should be compounded quarterly. Id. With respect to computing such interest, the ARB, in Doyle, wrote that the interest rate is that charged on the underpayment of Federal income taxes, which consists of the Federal short-term rate determined under 26 U.S.C. §6621(b)(3) plus three percentage points. The Federal short-term interest rate to be used is the so-called "applicable federal rate" (AFR) for a quarterly period of compounding. *See, e.g.*, Rev. Rul. 2000-23, Table 1. Id. at 18-19 (citations omitted). Since the total amount of the back pay award will depend on the date upon which Welch is reinstated, the parties will be required to follow the procedures outlined by the ARB in *Doyle* for computing prejudgment interest owed on Complainant's back wages owed in this case.

Id. at 21-22.

The court retains the discretion to determine the applicable prejudgment interest rate. *See, e.g., Loesch v. City of Phila*., 2008 U.S. Dist. LEXIS 48757 (E.D. Pa. June 19, 2008). Interest on back pay and benefits continue to the date of reinstatement or other remedy, and are usually calculated at the rate then in effect under 26 U.S.C. 6621(a)(2), the underpayment rate. *See, e.g., Clinchfield Coal Co. v. Federal Mine Safety and Health Comm'n*, 895 F.2d 773, 778-780 (D.C. Cir. 1990); 26 CFR 301.6621-1(a)(3) (rate compounded daily). The IRS publishes these rates in Revenue Rulings, which are in turn published in the Internal Revenue Bulletin.

At least one district court used the rate contained in the federal post-judgment interest rate statute, 28 U.S.C. § 1961(a). *Parexel Intern. Corp. v. Feliciano*, 2008 WL 5194299 (E.D. Pa. Dec. 4, 2008). That statute provides that "such interest shall be calculated from the date of the entry of the judgment, at a rate equal to weekly 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding." The court noted that many other courts had used the same method for calculating prejudgment interest in Title VII cases, and reasoned that this method of calculation is also appropriate in SOX cases because it adequately "serves to compensate a plaintiff for the

loss of the use of money that the plaintiff otherwise would have earned had he not been unjustly discharged." *Id.*

In *Barrett v. E-Smart Technologies, Inc.*, *supra*, the ALJ awarded over $108,000 in interest using the IRC §1274(d) rate plus three percent.

D. Special Damages

One court has suggested that "special damages," *e.g.*, reputation loss, must be specifically stated in the complaint. *Murray v. TXU Corp*., 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003). However, it is unlikely the Labor Department would require this kind of specificity in its pleading requirements.

1. Emotional Distress/Pain and Suffering

Complainants may recover for emotional pain and suffering, mental anguish, embarrassment, and humiliation in DOL whistleblower cases. *See, e.g.*, *Kalkunte v. DVI Financial Services, Inc.*, ARB Nos. 05-139, 05-140, ALJ No. 2004-SOX-56 (ARB Feb. 27, 2009), *remanded to ARB for settlement approval*, No. 09-2221, 09-2233 (3rd Cir. 2009), *settlement approved and case dismissed,* 05-139, 05-140 (ARB Oct. 15, 2009); *Waechter v. J.W. Roach & Sons Logging and Hauling*, 04-STA-43, ARB 04-183 (ARB Dec. 29, 2005). Expert medical or psychiatric testimony is not strictly necessary, but such damages must be supported by evidence of the physical or mental consequences caused by the adverse employment actions proven by the employee. *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 54-55 (ALJ Jan. 15, 2010) (*citing Thomas v. Arizona Public Service Co.*, 1989-ERA-19 (Sec'y Sept. 17, 1993)).

In *Kalkunte,* ARB Nos. 05-139, 05-140 (ARB Feb. 27, 2009), the ARB affirmed the ALJ's award of $22,000 in damages for "pain, suffering, mental anguish, the effect on [plaintiff's] credit [due to losing her job], and the humiliation she suffered."

In *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 (ALJ Jan. 15, 2010), the ALJ awarded $75,000 in compensatory damages for "emotional pain and suffering, mental anguish, embarrassment, and humiliation," despite the fact that plaintiff provided no medical evidence to support such a claim. The ALJ found the claim credible based on testimony of plaintiff, her son, and others. Specifically, the ALJ stated:

> Complainant has testified that she suffered from depression and loss of self-esteem during and following her employment and constructive discharge from Respondent. Although no medical evidence has been presented in support, Complainant's son testified in confirmation of Complainant's emotional distress and depression with the resulting effects on both the family and their economic situation. Moncallo, Asbury, and Colditz all confirmed the Complainant's distress over what the undersigned has found to be unlawful discriminatory employment actions while in Respondent's employ. Accordingly, I find Complainant's testimony regarding her emotional pain and suffering, mental anguish, embarrassment, and humiliation to be generally credible.

Like claims for emotional distress in other employment litigation, proving the extent of emotional distress and its causal relationship to the unlawful conduct can be problematic. For example, in *Kalkunte*, 2004-SOX-56 (ALJ July 18, 2005), the ALJ observed that "compensatory damages may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation," but found that some elements of the plaintiff's alleged emotional distress injury were not proved to be causally related to the respondent's conduct.

2. Reputation Damages

The Act does not expressly provide for an award of damages for loss of reputation, but the ARB routinely has sustained awards for reputational damage under whistleblower statutes. *See Leveille v. New York Air Nat'l Guard*, ARB 98-079, ALJ 94-TSC-3 (ARB Dec. 16, 2003); *Van Der Meer v. Western Kentucky Univ.*, ARB 97-078, 95-ERA-38 (Apr. 20, 1998).

In one SOX case, *Hanna v. WCI Communities., Inc*., 348 F. Supp. 2d 1332 (S.D. Fla. 2004), a district court held that reputation damages are allowed under the Act, finding that a plaintiff's reputation is damaged by termination, therefore diminishing their future earning capacity, and that accordingly plaintiff must be compensated for this loss in earnings in order to be made whole as the statute requires. The court relied on the Seventh Circuit's decision in *Williams v. Pharmacia, Inc.*, 137 F.3d 944 (7th Cir. 1998) in which that court held that Title VII's remedies, as amended by the Civil Rights Act of 1991, allowed for an award for reputation damages. *See Mahony v. Keyspan Corp.*, 2007 U.S. Dist. LEXIS 22042 (E.D.N.Y. Mar. 12, 2007) (adopting the reasoning of *Hanna* and denying the defendant's request to strike the plaintiff's demand for damages to his reputation).

In contrast, in *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003), a district court held that nonpecuniary damages such as reputational injury are not allowable under SOX, finding the remedies under SOX analogous to the remedies under Title VII prior to the passage of the 1991 amendments. Similarly, in *Walton v. Nova Information Systems*, 514 F. Supp. 2d 1031 (E.D. Tenn. 2007), the court, relying on the Court's Title VII decision in *United States v. Burke*, 504 U.S. 229 (1992), held that non-pecuniary remedies including "injury to reputation, emotional, mental and physical distress and anxiety, or punitive damages" were not recoverable under SOX.

3. Damage to Credit Rating

In *Kalkunte,* ARB Nos. 05-139, 05-140 at 16 (ARB Feb. 27, 2009), the ARB noted that the ALJ had awarded the complainant damages for, among other things, "the effect on her credit [because of her loss of employment] and the humiliation that she suffered." The ARB continued: "[a]lthough we agree with [the employer] that the damage to credit may not be legally compensable, the balance of the award is supported by the evidence, is not clearly erroneous, and within the ALJ's discretion. Accordingly, we affirm it."

E. Punitive Damages

The statute also does not authorize punitive damages as they are not considered "relief necessary to make the employee whole." *Murray v. TXU Corp.*, 279 F. Supp. 2d 799 (N.D. Tex. 2003) (punitive damages not allowed as the statutory omission of punitive damages is clear and unequivocal, and, in any event, the fact that the original draft of the Act explicitly provided for punitive damages and subsequent drafts removed that language, reinforced the court's conclusion decision to read the statute "as written"). *See also Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (plaintiff conceded that punitive damages are unavailable under SOX). Additionally, the ARB has held that the Labor Department cannot award exemplary or punitive damages without express statutory authorization. *See Berkman v. U.S.Coast Guard Academy*, ARB 98-056, 1997-CAA-2 (ARB Feb. 29, 2000).

Due to the unavailability of punitive damages, the Oregon District Court has found that "SOX does not provide an adequate statutory remedy to preclude" a common law wrongful discharge claim. *Willis v. Comcast of Oregon II*, 2007 U.S. Dist LEXIS 79927 (D. Or. Oct. 25, 2007) (denying defendant's motion to dismiss plaintiff's wrongful discharge claim). However, in *Repetti v. Sysco Corp.*, 730 N.W.2d 189 (Wis. 2007) the Wisconsin Court of Appeals held that SOX affords adequate relief to employees wrongfully discharged because the Act entitles employees to "all relief necessary to make the employee whole."

F. Reinstatement

The Act expressly includes reinstatement with the same seniority as a remedy available to a prevailing SOX claimant. 18 U.S.C. § 1514A(c)(2)(A). Reinstatement is a standard component of a "make whole" remedy. *Hobby,* ARB No. 98-166 at 7-8 (ARB Feb. 9, 2001); *Hagman,* 2005-SOX-00073 (ALJ Dec. 19, 2006); *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 at 51-52 (ALJ Jan. 15, 2010).

In addition to mandating reinstatement, the Act (through its incorporation of AIR21's procedural provisions) and the SOX implementing regulations empower OSHA to require the reinstatement of a complainant-employee even prior to the *de novo* hearing on the merits before an ALJ. 29 C.F.R. § 1980.105(a)(1). The regulations further provide that an employer's request for a hearing before an ALJ does not stay the preliminary reinstatement order. 29 C.F.R. § 1980.105(b)(1). Additionally, the regulations provide that a preliminary order of reinstatement is to remain effective while the ALJ's recommended decision is reviewed by the ARB. 29 C.F.R. § 1980.110(b).

In *Stroupe v. Branch Banking & Trust Co.*, 2008-SOX-00047 (ALJ Apr. 1, 2010), the ALJ ordered BB&T to reinstate a former BB&T corporate investigator who claimed that she had been fired after she had uncovered and reported a $100 million Ponzi scheme, which had been funded in part by fraudulent BB&T loans. Stroupe was also awarded approximately three years of back pay. BB&T argued that Stroupe had been terminated for missing work without permission, for being insubordinate, and for discussing the investigation of the development scam with other employees. The ALJ rejected BB&T's defense, holding that BB&T had failed

to prove by clear and convincing evidence that Stroupe would have been terminated absent her protected activities.

"Preliminary reinstatement" under Section 806 has been contested and ignored by some employers, who have refused to reinstate complainant employees before the exhaustion of the administrative process. Such actions by employers have led affected employees to file suit in district courts seeking injunctions to enforce OSHA's preliminary orders of reinstatement. In two prominent decisions, courts have held they do not have the power to enforce OSHA's preliminary orders of reinstatement.

In 2006, a divided panel of the Second Circuit vacated a district court injunction to reinstate a complainant employee and ordered the district court to dismiss the complainant. *Bechtel v. Competitive Techs., Inc.*, 448 F.3d 469 (2d Cir. 2006). The court reasoned that the district court lacked jurisdiction to enforce a preliminary order. Judge Jacobs observed there are three provisions of § 1514A that provide for federal power to enforce actions related to complaints under the Act, but none of the provisions authorizes enforcement of preliminary orders. Furthermore, Judge Jacobs found that none of the provisions of § 1514A that authorize judicial enforcement refer to AIR21's subparagraph (b)(2)(A), the source of the Secretary's power to issue a preliminary order of reinstatement. Judge Jacobs observed that 18 U.S.C. § 1514A(b)(1)(B) provides for *de novo* review in the district court if the Secretary has not issued a final decision within 180 days, thereby reducing the need for a judicial order, that preliminary orders of reinstatement are based on no more than "reasonable cause to believe that the complaint has merit," and immediate enforcement at each level of review could cause a rapid sequence of reinstatement and discharge, and a "generally ridiculous state of affairs."

Judge Leval concurred, but expressed the view that the court should vacate the district court's injunction because the employer was denied due process. Judge Straub, in dissent, noted that the failure to enforce a preliminary reinstatement order negated congressional intent to provide a quick remedy for whistleblowers.

Subsequently, in *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006), *vacated and appeal dismissed*, 2008 U.S. App. LEXIS 28045 (4th Cir. 2008), a district court adopted Judge Jacobs' opinion in *Bechtel* and granted the defendant employer's motion to dismiss. The court concluded that the regulations conflicted with the plain language of the statute, which did not grant judicial authority to enforce preliminary orders. The court also noted that the efficient administration of justice requires that the administrative process be final before federal courts begin adjudication. This ensured that appeals go through "all levels of the administrative process before reaching federal court." Later, the ALJ's decision in the complainant's favor, ALJ No. 2003-SOX-15 (ALJ Feb. 15, 2005), was reversed by the ARB, No. 05-064 (ARB May 31, 2007), and the Fourth Circuit thereafter vacated the district court's order and dismissed the appeal.

The Sixth Circuit recently considered, but did not rule upon, the issue of the enforceability of such preliminary reinstatement orders, in a case involving a charge filed against Tennessee Commerce Bank by its former CFO. On March 18, 2010, OSHA announced that it had "ordered Tennessee Commerce Bank in Nashville to reinstate the CFO, [Mr. Fort] and pay

more than $1 million in back wages, interest, attorney's fees, compensatory damages, and other relief." *Fort v. Tennessee Commerce Bancorp, Inc.*, 4-1760-08-017 (OSHA Mar. 17, 2010). In total, the bank was ordered to (1) reinstate Fort as CFO immediately; (2) pay Fort's backpay; (3) pay for a bonus which Fort missed; (4) pay interest; (5) pay for seven missed Board meeting fees; (6) reinstate Fort's stock options; (7) pay Fort's medical expenses, car allowance, insurance, and job hunting expenses; (8) pay attorneys' fees; (9) expunge Fort's employment records; (10) refrain from further retaliation; and (11) post a notice to employees about their SOX rights.[11]

After the bank refused to reinstate Fort, both Fort and the Secretary of Labor filed separate actions in the Middle District of Tennessee, seeking a preliminary injunction, requiring the bank to comply with OSHA's order. The Secretary of Labor was successful in obtaining injunctive relief, *Solis v. Tennessee Commerce Bancorp. Inc. ("Solis I")*, 713 F. Supp. 2d 701 (M.D. Tenn. 2010), and the court denied the bank's motion to stay enforcement of the injunction. *Solis v. Tennessee Commerce Bancorp., Inc. ("Solis II")*, 2010 U.S. Dist. LEXIS 49827 (M.D. Tenn. 2010). Five days later on appeal, the Sixth Circuit stayed enforcement of the injunction, pending expedited briefing on the issue of whether the district court had authority to issue the preliminary injunction. *Solis v. Tennessee Commerce Bancorp, Inc. ("Solis III")*, 2010 U.S. App. LEXIS 15302 (6th Cir. May 25, 2010). In so ruling, the Court stated:

> We find that the defendant's motion for a stay raises a substantial question as to the authority of the district court to issue the preliminary injunction. The defendants assert that they will suffer irreparable harm if Fort is physically reinstated immediately. They argue that Fort's reinstatement will cause disruption to the bank's personnel and operations that cannot be undone if this court finds the district court lacked authority to issue the injunction. By contrast, if the reinstatement order was properly issued, Fort can be made whole with compensatory damages, back pay, and interest. A balancing of the harms supports the issuance of a stay.

The Sixth Circuit did not rule on the matter, because the case which Fort brought separately in district court was dismissed, Fort subsequently terminated the underlying administrative proceedings, and the case brought by the Secretary of Labor was therefore dismissed as moot. *See Solis v. Tennessee Commerce Bancorp, Inc. ("Solis IV")*, 2010 U.S. Dist. LEXIS 114071 (M.D. Tenn. Oct. 26, 2010).

G. Front Pay in Lieu of Reinstatement

The ARB has indicated that reinstatement – and not front pay – is the favored remedy under the whistleblower statutes enforced by the Department:

[11] http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=17283 (last accessed Jan. 13, 2011); http://www.whistleblowers.org/storage/whistleblowers/documents/blogdocs/fortsigned%20secretarys%20findings%20and%20order%20fort%20v%20tncc2.pdf (last accessed Jan. 13, 2011).

> "whistle-blower" provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes . . . . If the regulatory scheme is to effectuate its substantial goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute. Quite simply, reinstatement is important not only because it vindicates the rights of the complainant who engaged in protected activity, but also because the return of a discharged employee to the jobsite provides concrete evidence to other employees that the legal protections of the whistleblower statutes are real and effective.

Hobby, ARB No. 98-166 at 7-8 (ARB Feb. 9, 2001) (citations omitted). *See also Hagman,* 2005-SOX-00073 (ALJ Dec. 19, 2006), in which the ALJ noted the following in connection with awarding front pay as opposed to reinstatement:

> Although reinstatement is the preferred and presumptive remedy to make whole employees who have been discharged in violation of the Act, front pay may be awarded instead where reinstatement would be inappropriate. Front pay may be awarded as a substitute when reinstatement is inappropriate due to: (1) an employee's medical condition that is causally related to her employer's retaliatory action; (2) manifest hostility between the parties; (3) the fact that claimant's former position no longer exists; or (4) the fact that employer is no longer in business at the time of the decision. Thus, while front pay exists as a potential remedy in a SOX case, it must be determined whether it is an appropriate remedy to which Complainant is entitled.

As noted in *Hagman*, where the employer is no longer in business at the time of the decision, a plaintiff-employee who is awarded back pay or front pay, or both, will only be entitled to such compensation up to the point in time when the employer went out of business – the rationale being that, in any event, the employee would have been out of a job by that time. *See Kalkunte II,* ARB Nos. 05-139, 05-140 at 15 (ARB Feb. 27, 2009), (holding that "dissolution of the company is a superseding intervening cause that cuts off [complainant's] entitlement to back or front pay"). The ALJ in *Hagman* expounded upon that point as follows:

> Under whistleblower case law, it may be appropriate to award front pay in lieu of reinstatement where the employer has closed or restructured its business such that it cannot offer Complainant a comparable position. However, because reinstatement is generally the favored remedy, the ARB and the courts have generally required employers to find a comparable position.

In *Brown v. Lockheed Martin Corp.*, 2008-SOX-49 (ALJ Jan. 15, 2010), the ALJ refused to order front pay in lieu of reinstatement. The ALJ indicated a strong inclination towards reinstatement instead of front pay, even though the complainant tried to avoid being reinstated. While the ALJ found some hostility between the parties, he held that it did not rise to the level of "irreparable animosity" under which "a productive and amicable working relationship would be impossible" as required to justify a front pay award:

> [T]he presence of some hostility between parties, which is attendant to many lawsuits, should not normally preclude a plaintiff from receiving reinstatement. Defendants found liable of intentional discrimination may not profit from their conduct by preventing former employees unlawfully terminated from returning to work on the grounds that there is hostility between the parties.

The ALJ also rejected the complainant's argument that she was entitled to front pay because she had suffered emotional distress during her employment which would make her unable to resume her prior employment. The ALJ noted that the complainant had not submitted any medical records which would substantiate a claim that she was medically unable to perform her job. Finally, the ALJ rejected the complainant's argument that reinstatement was not possible because there was no longer a position in the company comparable to the one which she once held, because reinstatement does not require placement in the exact position the complainant once held.

In *Barrett v. E-Smart Technologies, Inc.*, 2010-SOX-00031 (ALJ Sept. 9, 2011), for the same reasons that the ALJ denied back pay, front pay was also denied because "Complainant chose a vocational path as an entrepreneur at some unspecified time prior to trial." The ALJ went on to state: "Complainant, however, chose to take himself out of the labor market to engage in business venture with little or no current remuneration but with the potential for very large future profits. That is his right and his choice, but where, as here, it occurred prior to the date of this Order, which is when front pay otherwise would take, it precludes front pay.

H. Abatement Orders

The Department of Labor has broad authority to issue abatement orders, which can include, among other things, the power to (1) order that respondent take all reasonable "affirmative action" to abate discrimination which may discourage employees from raising concerns; (2) require the respondent to officially inform all employees of their right to contact the relevant authorities; (3) require the sealing of documents and an expungement of all negative information; and (4) require that orders of administrative law judges be prominently posted. *See, e.g., Chase v. Buncombe County, N.C.*, 85-SWD-4 (Nov. 3, 1986); *Simmons v. Florida Power Corp.*, 89-ERA-28/29 (Dec. 13, 1989).

I. Attorneys' Fees and Costs

SOX expressly allows complainant recovery of expert witness fees and litigation costs, including attorney fees. 18 U.S.C. § 1514(c)(2)(C). The ALJ in *Hagman* stated the applicable standard for calculating recoverable attorneys' fees as follows:

> "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Hours not "reasonably expended" or which are excessive, redundant or otherwise unnecessary should be

> excluded, according the principle that "[h]ours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority." *Id*. at 434. A petition for attorney's fees must specify the date on which the attorney's time was expended, the amount of hours expended, and a specific description of the tasks undertaken by the attorney during that time.

The ARB applies the "lodestar" method for calculating reasonable attorney fees. *See Negron v. Vieques Air Link, Inc.*, ARB 04-021, 2003-AIR-10 (Mar. 7, 2006). The "lodestar" figure is the reasonable rate multiplied by the reasonable number of hours expended. *See Hensley*, 461 U.S. at 433. This figure may then be adjusted in accordance with other factors; however there is a "strong presumption" in favor of the lodestar figure and upward adjustments are allowed only in exceptional cases that are supported by specific evidence.

A reasonable hourly rate, or rate of compensation, is equivalent to the market rate of attorneys, within the community where the case is tried, of reasonably comparable skill, experience, and reputation. *See Murray v. Air Ride, Inc.*, ARB 00-45, 99-STA-34 (Dec. 29, 2000); *Platone*, 2003-SOX-27 (ALJ July 13, 2004). In *Hagman, supra*, the ALJ awarded $305,748 of the requested $500,000 in attorney fees and costs. The ALJ in *Hagman* refused to consider New York rates in its determination of the fee award, stating that the plaintiff could have found representation within the locality of Southern California. In so holding, the ALJ stated:

> At the outset, I note that the relevant geographic market or legal community for purposes of determining the appropriate hourly rate for attorney's fees is normally the locality of the hearing. The specialized nature of the case and the unavailability of local counsel may be grounds for exception to that rule. However, I do not find special circumstances exist in this case to warrant changing the relevant legal market from the Los Angeles area, the proper location of the hearing and witnesses, to New York, the location of only Complainant's counsel. (citations omitted).

The second step in the calculation of the lodestar figure is to ascertain the reasonable number of compensable hours. A reasonable amount of compensable hours is equivalent to the reasonable amount of time that complainant's counsel should have expended to reach a positive result, given the nature and circumstances of the case. *See Platone*, 2003-SOX-27 (ALJ July 13, 2004). A judge has discretion in determining the reasonableness of the compensable hours. *Id*.

Attorneys litigating SOX cases should be careful to ensure that their billable time entries are described in adequate detail, and should avoid the practice of block billing. *See, e.g.*, the following discussion from *Hagman, supra*:

> Entries such as "review documents," "depositions," "trial preparation," or "legal research" are too vague to provide a meaningful opportunity for review of whether the hours were reasonably expended. Where the billing descriptions do not afford a meaningful opportunity to determine the reasonableness of the time

> expenditures, an ALJ need not engage in an item by item reduction of the hours, but rather, may make reductions based upon a percentage basis. (citations omitted).

A prevailing employer may be awarded up to $1,000 in attorneys' fees if the complaint is found to be frivolous or brought in bad faith. 49 U.S.C. § 42121(b)(3)(C). *Cf. Pittman v. Siemans AG,* 2007-SOX-15 (ALJ July 26, 2007) (denying respondents' request for attorney fees, even though *pro se* complainant's case was not strong, because case was not completely frivolous and complainant had demonstrated a deep belief in his claims).

In *Greene v. Omni Visions, Inc.*, 2009-SOX-44 (ALJ March 9, 2011), the respondent moved for an award of $1,000 in attorney's fees under 29 C.F.R. § 1980.110(e). The Board denied the request, stating that "[w]hile we agree that there is some merit to Omni's position given that Greene filed her complaint 3 years after the period for such filing had expired, with no recognized basis for doing so, given Green's pro se status, we are not prepared to find that the complaint was totally baseless or brought in bad faith."

In *Reamer v. Ford Motor Co*., 2009-SOX-3 (ALJ July 21, 2011), a panel of ALJs denied the company's request for attorney's fees and costs, which the company made based on its allegations that the complaint and appeal were frivolous or brought in bad faith. The panel noted that the complaint "contains at least an arguable basis in law because it is based on [the complainant's] contention that Ford Credit retaliated because of SOX-protected activity."

J. Sanctions

In *Windhauser v. Trane*, ARB 05-127, 2005-SOX-17 (ARB Oct. 31, 2007), the ARB held that an ALJ did not have the power to sanction an employer who declined to obey the Judge's order to reinstate the plaintiff in a SOX case. According to the ARB, without statutory authority, DOL has no power to impose monetary sanctions. Rather, this enforcement remedy must be imposed by the federal district court.