**Recent Developments in Whistleblower Law from a Whistleblower Lawyer’s Perspective**

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Introduction

In recent years, there has been a proliferation of whistleblower protection and reward laws. As many of these laws are relatively new, administrative tribunals and federal courts are grappling with key issues such as the scope of protected conduct, the burden of proof, the causation standard, the right to a jury trial, and the scope of available remedies. In general, recent decisions and other developments have been very favorable to whistleblowers. This paper surveys the following recent developments in whistleblower law from a whistleblower attorney’s perspective.

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Sarbanes-Oxley Developments

Supreme Court Holds that SOX Protects Employees of Privately-Held Contractors and Subcontractors of Publicly-Traded Companies

Section 806 of the Sarbanes-Oxley Act of 2002 (“SOX”), as amended by the Dodd-Frank Act, prohibits an “officer, employee, contractor, subcontractor or agency” of a publicly-traded company from retaliating against “an employee” for disclosing reasonably perceived potential or actual violations of the six enumerated categories of protected conduct in Section 806 (mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders).[[2]](#footnote-2) Until recently, there was a split of authority as to whether SOX protects employees of contractors providing services to public companies. In March 2014, the Supreme Court clarified that employees of contractors of public companies, including the attorneys and accountants that prepare the SEC filings of public companies, are covered under Section 806. *See Lawson v. FMR*, 134 S. Ct. 1158, 188 L. Ed. 2d 158 (2014).

Lawson worked for Fidelity Brokerage Services, a private subsidiary of the private company FMR Corp., which manages the day-to-day operations of publicly-traded Fidelity mutual funds.[[3]](#footnote-3) *Id*. at 1159. As is common in the mutual industry, the Fidelity investment company that files reports with the SEC (and is covered under Section 806) does not direct the personnel that operate the funds on a day-to-day basis. She brought a SOX claim alleging retaliation for disclosing securities violations, including improper retention of advisory fees. *Id*.  The district court held that Lawson is a covered employee under Section 806,[[4]](#footnote-4) but the First Circuit reversed, holding that SOX protects only employees of publicly-traded companies. *See Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012), *rev'd and remanded*, 134 S. Ct. 1158, 188 L. Ed. 2d 158 (U.S. 2014).

The First Circuit relied in part on the title and caption of Section 806, both of which refer to “employee of publicly traded companies,” and to references in the legislative history suggesting that Section 806 was intended to protect employees of public companies. In addition, the First Circuit construed the plain meaning of Section 806 as prohibiting a contractor of a public company, such as FMR, from retaliating against an employee of a public company.

In a 6-3 decision, the Supreme Court reversed, holding that SOX protects employees of contractors, subcontractors, and agents of public companies. *Lawson*, 134 S. Ct. at 1176. The majority relied primarily on the plain meaning of the statute, but also based its decision on an extensive examination of the legislative history and purpose of SOX. In particular, the Court focused on references in the legislative history to outside auditors and attorneys who suffered retaliation after blowing the whistle on accounting fraud at Enron, and concluded that protecting employees of contractors of public companies is essential to preventing another Enron.

A [recent ruling](http://scholar.google.com/scholar_case?q=Gibney+v.+Evolution+Mktg.+Research,+LLC&hl=en&as_sdt=20006&as_vis=1&case=911191479497512732&scilh=0) by the U.S. District Court for the Eastern District of Pennsylvania suggests a limiting principle for SOX coverage of employees of contractors and subcontractors. *See Gibney v. Evolution Mktg. Research, LLC*, 2014 WL 2611213 (E.D. Pa. June 11, 2014). Leo Gibney was employed by Evolution Marketing Research, a private consulting company that contracted its services out to many publicly-traded companies, including the pharmaceutical giant Merck. *Id* at \*1. Evolution terminated Gibney’s employment after he reported to his supervisor that Evolution was fraudulently overbilling Merck for its services. *Id*. at \*2. Gibney brought a SOX claim, and the district court held that even though Gibney was a protected employee and had reported securities fraud, SOX did not apply because it protects only disclosures aimed at preventing fraud perpetrated by, rather than against, publicly-traded companies. *Id*. The court expressed concern that permitting Gibney’s claim to proceed would transform SOX into a general retaliation statute that would apply to any private company that transacts business with a public company. *Id*. While *Lawson* will probably generate an increase in SOX claims, *Gibney* suggests that courts will likely adopt limiting principles that narrow the scope of SOX coverage for employees of contractors and subcontractors of public companies.

SOX Whistleblowers Obtain Large Verdicts

Although SOX was enacted twelve years ago, very few SOX claims have been tried before juries and until recently, SOX whistleblowers has not obtained large verdicts. This is due in part to the ambiguity that existed prior to 2010 as to whether SOX whistleblowers are entitled to a jury trial. The Dodd-Frank Act amendments to Section 806 of SOX clarify the right to try to a SOX whistleblower claim before a jury. *See* 18 U.S.C. 1514A(b)(2)(E) (“A party to an action brought under [Section 806] shall be entitled to trial by jury.”). Some recent verdicts suggest that SOX whistleblowers can obtain large verdicts, which may prompt more SOX whistleblowers to remove their claims from DOL to district court.

On March 5, 2014, a California jury awarded $6 million to Catherine Zulfer in her SOX whistleblower retaliation against Playboy, Inc. (“Playboy”).[[5]](#footnote-5) Zulfer, a former accounting executive, alleged that Playboy had terminated her in retaliation for raising concerns about executive bonuses to Playboy’s Chief Financial Officer and Chief Compliance Officer. *Zulfer v. Playboy Enterprises Inc.*, JVR No. 1405010041, 2014 WL 1891246 (C.D.Cal. 2014). She contended that she had been instructed by Playboy’s CFO to set aside $1 million for executive bonuses that had not been approved by the Board of Directors. *Id*. Zulfer refused to carry out this instruction, warning Playboy’s General Counsel that the bonuses were contrary to Playboy’s internal controls over financial reporting. *Id*. After Zulfer’s disclosure, the CFO retaliated by ostracizing Zulfer, excluding her from meetings, forcing her to take on additional duties, and eventually terminating her employment. *Id*. After a short trial, a jury awarded Zulfer $6 million in compensatory damages, and additionally ruled that Zulfer was entitled to punitive damages. *Id*. Zulfer and Playboy reached a settlement before a determination of punitive damages. The $6 million compensatory damages award represents the highest award to date in a SOX anti-retaliation case. *Id*.

And the Ninth Circuit recently affirmed a SOX jury verdict awarding $2.2 million dollars, plus $2.4 million for attorneys’ fees, to two former in-house counsel. *Van* *Asdale v. Int'l Game Tech.*, 549 F. App'x 611, 614 (9th Cir. 2013). The plaintiffs, both former in-house counsel at International Game Technology, alleged that they had been terminated in retaliation for disclosing shareholder fraud related to International’s merger with rival game company Anchor Gaming. *Id*. Specifically, plaintiffs alleged that Anchor had withheld important information about its value, which caused International to commit shareholder fraud by paying above market value to acquire Anchor. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 992 (9th Cir. 2009). When the plaintiffs discovered the issue, they brought their concerns about the potential fraud to their boss, who before the merger had served as Anchor’s general counsel. *Id*. at 993. International terminated both plaintiffs shortly thereafter. *Id.*

In addition, a former financial planner at Bancorp Investments, Inc. who alleged that his employment was terminated for disclosing trade unsuitability obtained a $250,000 jury verdict in the Eastern District of Kentucky in late 2013.[[6]](#footnote-6) *Rhinehimer v. Bancorp Investment, Inc.*, 2013 WL 9235343 (E.D.Ky. Dec. 27, 2013).

*Zulfer*, *Van Asdale*, and *Rhinehimer* highlight the importance of the removal or “kick out” provision in SOX that authorizes SOX whistleblowers to remove their claims from the Department of Labor (“DOL”) to federal court for *de novo* review 180 days after filing the complaint with OSHA.  Although SOX does not authorize punitive damages, a SOX complainant in federal court can add other claims for which punitive damages can be recovered. For example, when Zulfer and the Van Asdales removed their SOX claims to district court, they added a common law claim of wrongful discharge in violation of public policy. While the ability to add claims can make a SOX claim more valuable after removal, that interest should be balanced against the increased time commitment and cost of litigating in the courts as opposed to the more streamlined DOL administrative process.

Prior to removing a SOX claim to federal court, plaintiff’s counsel should carefully assess whether the jurisdiction to which the claim would be removed has adopted or deferred to the current ARB’s broad construction of protected conduct as articulated in [*Sylvester v. Parexel Int’l*](http://whistleblower-protection-law.com/wp-content/uploads/2014/02/Sylvester-v.-Parexel.pdf), ARB 07-123, 2007-SOX-039, 2007-SOX-042 (ARB May 25, 2011). Not all circuits have adopted or deferred to *Sylvester* and instead may apply the decisions of the prior ARB narrowly construing SOX.

Federal Courts Deferring to ARB’s Broad Interpretation of SOX Protected Conduct

In May of 2011, the ARB issued a seminal decision in [*Sylvester v. Parexel*](http://www.law.du.edu/documents/corporate-governance/sarbanes-oxley/sylvester/ARB-Order.PDF), broadly construing SOX protected conduct and rejecting prior ARB decisions that created substantial barriers for SOX whistleblowers. *See Sylvester v. Parexel International LLC*, ARB 07-123, 2007-SOX-039, 2007-SOX-042 (ARB May 25, 2011). In particular, the ARB held the following in *Sylvester*:

* Under the plain language of SOX, “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.” *Id*. at \*14.
* An employee need not wait until the illegal conduct occurs to make a protected disclosure, so long as the employee “reasonably believes that the violation is likely to happen.” *Id*. at \*16.
* A complaint need not allege shareholder fraud in order to be protected under SOX. The ARB found that SOX was enacted, not solely to address securities fraud, but “corporate fraud generally.” It is sufficient for an employee to form a reasonable belief that a violation of “any rule or regulation of the Securities and Exchange Commission” could lead to fraud, even if the violation itself is not fraudulent. For example, SOX would protect a disclosure about deficient or inadequate internal controls over financial reporting, even though there is no allegation that fraud has actually taken place. *Id*. at \*19.
* The reasonable belief standard requires an examination of the reasonableness of a complainant’s beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities. *Id*. at \*42.
* The ARB overruled prior authority that had required a complainant to establish that the protected disclosure “definitively and specifically” related to one or more of the laws listed under Section 806(a). *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 the conduct she believed constituted fraud). *Id*. at \*41.
* A SOX complainant has engaged in protected activity if he or she simply has an objectively reasonable belief that a violation of the laws in Section 806 has occurred – the complainant does *not* need not establish the various elements of criminal fraud. The ARB found that requiring a complainant to allege, prove, or approximate the elements of fraud (that the reported conduct was “material,” intentional, relied upon by shareholders, and caused a loss to shareholders) would be contrary to the purpose of the whistleblower protection provision. *Id*. at \*47.
* The *Iqbal/Twombly* plausibility pleading standard does not apply to SOX claims. *Id*. at \*10. Instead, a SOX complainant must simply provide “a full statement of the acts and omissions…which are believed to constitute the violations.” *Id.* at \*9.

*Sylvester* was a significant victory for SOX whistleblowers in that it reduces the risk of summary dismissal.

Post-*Sylevster,* employers have tried to persuade federal courts to ignore the decision and instead defer to the ARB’s prior *Platone* decision. Fortunately, that effort has been largely unsuccessful*. See, e.g., Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013) (holding that *Sylvester* is entitled to *Chevron* deference); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 443 (S.D.N.Y. 2013); *Stewart v. Doral Fin. Corp.*, CIV. 13-1349 DRD, 2014 WL 661587 (D.P.R. Feb. 21, 2014). In *Lockheed Martin Corp. v. Admin. Review Bd.,* the Tenth Circuit declined to apply *Platone,* noting that the ARB “explicitly disavowed the ‘definitive and specific’ evidentiary standard for Sarbanes–Oxley complainants.” *Lockheed*, 717 F.3d 1121, 1132 n.7 (2013). And in August 2014, the Second Circuit held that *Sylvester* should be granted *Skidmore* deference. *Nielsen v. AECOM Tech. Corp.*, 2014 WL 3882488 (2d Cir. Aug. 8, 2014). Note though that some jurisdictions continue to apply *Platone*. *See, e.g., See, e.g., Riddle v. First Tenn. Bank,* 2012 WL 3799231 at \*7 (6th Cir. Aug. 31, 2012) (“an employee’s complaint must ‘definitively and specifically relate’ to one of the six enumerated categories found in 18 U.S.C. § 1514A.”); *Gauthier v. Shaw Group, Inc.*, 2012 WL 6043012 (W.D.N.C. Dec. 4, 2012) (dismissing SOX complaint because the alleged protected conduct did not relate specifically to shareholder fraud).

As federal courts continue to adopt or defer to the ARB’s construction of SOX protected conduct as articulated in *Sylvester,* SOX whistleblowers are more likely to be able to survive summary judgment and establish protected conduct at trial.

DOL ARB Sets a High Bar for Employers to Establish Dual Motive Defense

The whistleblower provisions of SOX, the Energy Reorganization Act (“ERA”),[[7]](#footnote-7) and several other whistleblower protection statutes enforced by OSHA employ a burden-shifting framework that is favorable to whistleblowers.

Under the burden-shifting framework, once the complainant has demonstrated by a preponderance of the evidence that his or her protected conduct was a contributing factor[[8]](#footnote-8) in the adverse action, the employer can avoid liability only by demonstrating by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. *See Menendez*, ARB Case Nos. 09-002, 09-003, ALJ Case No. 2007-SOX-05, at \*11 (ARB Sept. 13, 2011).

The ARB recently issued a critical decision defining the burden an employer must meet to establish the mixed motive defense. In [*Speegle v. Stone & Webster Construction*](http://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/ERA/13_074.ERAP.PDF),[[9]](#footnote-9) the ARB defined the “clear and convincing evidence” standard, and it is indeed an onerous burden, especially in comparison to the burden-shifting framework of most other anti-discrimination laws.

Speegle worked as a journeyman painter for Stone & Webster (“S&W”) to repair the paint at a nuclear power plant in Alabama. *Id*. at \*1. Speegle complained that many of the other employees hired by S&W for journeyman paint work were inexperienced apprentice painters, and that using apprentice painters was a safety risk and violates federal regulations. *Id*. S&W ignored Speegle's concerns, leading to a heated confrontation between Speegle and his supervisor. *Id*. at \*3. Two days after that confrontation, S&W terminated Speegle’s employment for insubordination. *Id*.

Speegle filed a complaint with OSHA, alleging that he was fired in retaliation for raising nuclear safety concerns. *Id*. After a hearing, the ALJ held that Speegle had engaged in protected activity, but his protected activity was not a contributing factor to S&W’s decision to terminate his employment. *Id*. On appeal, the ARB held that Speegle’s protected conduct was a contributing factor in his termination. *Id*. S&W appealed to the Eleventh Circuit, which held that the ARB erred in its analysis of the ALJ’s factual findings, and failed to consider additional arguments from Speegle that his termination was pretextual. *Id*. The case was remanded back to the ARB, which found that Speegle’s protected conduct was a contributing factor in S&W’s decision to fire him, and remanded the case to the ALJ to determine whether S&W had demonstrated, by clear and convincing evidence, that it would have terminated Speegle in the absence of his protected activity. *Id*. On remand, the ALJ again dismissed the complaint, and Speegle appealed to the ARB. *Id*.

In April 2014, the ARB issued a decision establishing a three-part framework that ALJs must apply in determining whether an employer can meet the mixed motive defense: (1) whether the employer’s evidence meets the plain meaning of “clear” and “convincing”; (2) whether the employer’s evidence indicates subjectively that the employer “would have” taken the same adverse action; and (3) whether facts that the employer relies on would change in the “absence of” the protected activity.” *Id*. at \*7.

In the first prong of the analysis, the employer must present: (1) an unambiguous explanation for the adverse action in question, and (2) evidence demonstrating that a proposed fact is “highly probable.” *Id.* at \*8. Adopting a 1984 Supreme Court definition[[10]](#footnote-10) of “clear and convincing evidence”, the ARB found that evidence is only clear and convincing if it “’immediately tilts’ the evidentiary scales in one direction.” *Speegle*, ARB 13-074 at \*6.

In the second prong of the *Speegle* framework, an employer must prove that it would have taken the same decision, as opposed to just proving that it could have taken the same decision. *Id*. at \*8. For S&W, that meant proving that it would have fired Speegle due to just one heated oral confrontation, as opposed to proving merely that a heated or insubordinate oral complaint by an employee can justify termination.

Finally, the ARB analyzed what is required for an employer to show that it would have acted similarly “in the absence of” the protected activity. *Id*. The ARB held that in assessing what would have happened in the absence of protected activity, the ALJ should consider what facts would have been different in the absence of the that activity. *Id*. For example, Speegle’s repeated internal disclosures that using apprentice painters was unsafe engendered tension with management and therefore the ALJ erred by considering Speegle’s poor working relationship with management as evidence supporting the mixed motive defense (absent the protected conduct, Speegle would have had a better working relationship with management).

Consistent with the plain meaning and legislative history of SOX and similar statutes that employ a mixed motive defense, the ARB has clarified in *Speegle* that the defense can be established only where the protected activity had no influence on the employer’s decision to take the adverse action.

Duty Speech Defense Inapplicable to SOX Claims

A popular defense for employers in whistleblower cases is to assert that disclosures made while performing routine job duties are outside the ambit of protected conduct. The defense became increasingly popular in the wake of the Supreme Court’s 2006 decision in [*Garcetti v. Ceballos*](http://www.oyez.org/cases/2000-2009/2005/2005_04_473)*[[11]](#footnote-11)* holding that government employees cannot not bring First Amendment whistleblower retaliation claims based on work-related speech if the speech is part of their job duties. *Id*. at 422.

Most DOL ALJs addressing this issue have declined to apply *Garcetti* to SOX claims. For example, Judge Lee Romero concluded that “one’s job duties may broadly encompass reporting of illegal conduct, for which retaliation results” and “[t]herefore, restricting protected activity to place one’s job duties beyond the reach of the Act would be contrary to congressional intent.” *Deremer v. Gulfmark Offshore Inc.*, 2006-SOX-2, at 59-60 (ALJ June 29, 2007). And the ARB has declined to apply the duty speech defense to SOX claims. *See Robinson v. Morgan–Stanley*, Case No. 07–070, 2010 WL 348303, at \*8 (ARB Jan. 10, 2010) “[Section 1514A] does not indicate that an employee’s report or complaint about a protected violation must involve actions outside the complainant’s assigned duties”).

Recently, a New York district court held that the “duty speech” defense is inapplicable to SOX claims. *See Yang v. Navigators Group, Inc.*, 2014 WL 1870802 (S.D.N.Y. May 8, 2014). Yang worked as the chief risk officer for Navigators Group, an insurance company. *Id*. at \*1. Yang alleged that Navigators terminated her employment for disclosing deficient risk management and control practices to her supervisor. *Id*. at \*4. Navigators moved to dismiss Yang’s SOX claim in part on the basis that Yang’s disclosures about “risk issues were ‘part and parcel of her job.’” *Id*. at \*8. Judge Roman rejected the duty speech argument, relying on a 2012 district court decision holding that “whether plaintiff's activity was required by job description is irrelevant.” *Barker v. UBS AG*, 888 F. Supp. 2d 291, 297 (D. Conn. 2012). These recent decisions suggest that employers are unlikely to successfully assert a duty speech defense in a SOX case.

SOX Authorizes Front Pay

A prevailing SOX whistleblower can recover “all relief necessary to make the employee whole,” including reinstatement, back pay, attorney’s fees, and costs. 18 U.S.C. § 1514A(c). “Special damages” includes damages for impairment of reputation, personal humiliation, mental anguish and suffering, and other non-economic harm resulting from retaliation. *See Kalkunte v. DVI Fin. Servs*., ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009). Although reinstatement is the preferred and presumptive remedy to make an employee whole, some ALJs have awarded front pay in lieu of reinstatement. *See, e.g., Hagman v. Washington Mutual Bank, Inc.,* 2005-SOX-00073, at 26-30 (ALJ Dec. 19, 2006), *appeal withdrawn by employer and dismissed,* 07-039 (ARB May 23, 2007) (awarding $640,000 in front pay to a banker whose supervisor became verbally and physically threatening when Hagman disclosed concerns about the short funding of construction loans). But until recently, there was some ambiguity as to whether district courts would award front pay.

In October 2013 Judge Payne held that front pay is an appropriate remedy in lieu of reinstatement in SOX actions. *See Jones v. SouthPeak Interactive Corp. of Delaware*, 986 F. Supp. 2d 680 (E.D. Va. 2013). Jones had worked at Southpeak as its CFO, and SouthPeak terminated his employment two days after he disclosed accounting irregularities to the SEC. *Id*. at 681. Following a four-day trial, a jury found for Jones and awarded nearly $700,000 in damages. *Id*. at 682. Jones then filed a motion seeking front pay in lieu of reinstatement in addition to compensatory damages. Judge Payne’s decision to award front pay under SOX was based on DOL regulations implementing SOX that authorize the award of front pay in lieu of reinstatement and Fourth Circuit precedent affirming district court awards of front pay in lieu of reinstatement under similar remedial statutes, such as the ADEA and FMLA.

SouthPeak appealed Judge Payne’s decision and DOL has filed an *amicus curiae* brief arguing that front pay is an appropriate remedy under SOX. Assuming Jones prevails on appeal, other circuits will likely hold that SOX authorizes front pay in lieu of reinstatement. Although SOX does not authorize punitive damages, large awards of front pay to highly compensated employees, such as corporate officers, could result in very large recoveries under SOX.

Courts Affirming Large Compensatory Damage Awards in Whistleblower Retaliation Cases Based Solely on Whistleblower’s Testimony

Most of the whistleblower retaliation statutes adjudicated at DOL, including SOX, authorize compensatory damages. Until recently, compensatory damages awards at DOL were fairly nominal absent expert witness testimony concerning the whistleblower’s emotional distress damages or the whistleblower’s diminished career prospects. However, two recent decisions, one from the Eighth Circuit and the other from the ARB, indicate that a whistleblower can obtain substantial compensatory damages based solely on his or her testimony.

In [*Maverick Transportation v. U.S. Department of Labor*](http://caselaw.findlaw.com/us-8th-circuit/1655089.html), the Eighth Circuit affirmed an ARB decision holding that Maverick, a trucking company, had retaliated against Canter, one of its drivers, for refusing to drive a truck that he believed was unsafe.  *Maverick Transp., LLC v. U.S. Dep't of Labor, Admin. Review Bd.*, 739 F.3d 1149, 1157 (8th Cir. 2014). The truck in question had a chaffing brake hose and leaked steering fluid, conditions that substantially increased the likelihood of a catastrophic failure of the service brakes. *Id*.

Canter sued Maverick Transportation under the whistleblower protection provision of the Surface Transportation Assistance Act, which protects truck drivers who refuse to drive due to a reasonable apprehension that a vehicle is unsafe and may cause serious injury to himself or the public. *Id*. at 1152. The ALJ awarded Canter $75,000 in compensatory damages for emotional distress, despite the fact that Canter offered no corroborating expert testimony, noting that “the ARB has awarded damages for emotional and mental distress where the claims were unsupported by medical evidence.” [*Canter v. Maverick Transp. LLC*](http://whistleblower-protection-law.com/wp-content/uploads/2014/01/CANTER-ALJ-decision.pdf), No. 2009-STA-054, slip op. at 15 (ALJ Oct. 28, 2010). The opinion indicates that Canter's testimony regarding his emotional distress was quite compelling:

* Canter experienced a loss of appetite and suicidal thoughts so severe that, on one occasion, he put a pistol to his head and, as he started pulling the trigger, moved his head out of the way and put a bullet hole through the ceiling and roof.
* Cantor’s receipt of debt collection notices and calls from collection agencies caused him great distress.
* His checking accounts were closed due to insufficient funds, and he owed bank fees and charges for overdrafts.
* Canter was forced to vacate his home in Alabama and move in with his sister in Colorado in July 2008
* He could not visit his stepchildren because he could not afford to travel.

*Id*. On appeal, Maverick argued that the award of compensatory damages for emotional distress was excessive because it was supported only by Canter’s testimony.  The court affirmed the ALJ, holding that “a plaintiff’s own testimony can be sufficient for a finding of emotional distress, and medical evidence is not necessary.” *Maverick*, 739 F.3d at 1157.  In addition, the court held that the ARB properly awarded compensatory damages based on the severity of the harm, rather than the method by which the harm is proved. *Id*.

The ARB also recently affirmed a substantial compensatory damages award based solely on the whistleblower’s testimony. In [*Fink v. R&L Transfer, Inc.*](http://whistleblower-protection-law.com/wp-content/uploads/2014/04/Fink-v.-RL-Transfer-Inc.pdf)*,* the ARB affirmed the ALJ’s award of $100,000.00 in compensatory damages and $50,000 in punitive damages to a truck driver who was terminated for refusing to drive in unsafe winter weather conditions. *Fink v. R&L Transfer, Inc.*, No. 13-018 (ARB Mar. 19, 2014). In awarding compensatory damages, the ALJ relied on Fink’s testimony that:

* He had to seek public assistance to pay basic living expenses;
* His family ultimately lost their home;
* He had to borrow money from family members; and
* He had difficulty sleeping, wondering how he would be able to support his family.

*Id*. The ARB also affirmed the $50,000 award of punitive damages, finding that “[a]n award of punitive damages may be warranted where there has been ‘reckless or callous disregard for the plaintiff’s rights, as well as intentional violations of federal law.’” *Id*.

In addition to obtaining large compensatory damages awards at the ALJ level and keeping those awards on appeal, some whistleblowers are also obtaining substantial compensatory damages awards from OSHA. For example, in September 2013, OSHA issued an [order](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=24915) requiring Clean Diesel Technologies Inc. to pay $1.9 million to its former CFO who was fired for warning the board of directors about ethical and financial concerns raised by a proposed merger. In addition to awarding $486,000 in lost wages, bonuses, stock options and severance pay, OSHA awarded the complainant over $1.4 million in compensatory damages for pain and suffering, damage to career and professional reputation and lost 401(k) employer matches and expenses.

Dodd-Frank and SEC Whistleblower Reward Program Developments

Majority of District Courts Construing Dodd-Frank to Cover Internal Whistleblowing

A split of authority has emerged regarding whether internal disclosures are protected under Section 929A of the Dodd-Frank Act, 15 U.S.C. § 78u-6(h) (“Section 929A” or “Dodd-Frank”). The split stems from what appears to have been a drafting error. Under § 78u-6(a)(6), the term “‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” The anti-retaliation provision in Section 929A, however, defines protected conduct as lawful actions taken by a whistleblower:

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

While the definition of “whistleblower” in Section 926A appears to require a disclosure to the SEC, the plain meaning of the anti-retaliation provision includes a “catch-all” provision encompassing conduct protected by SOX, which includes internal disclosures. *See Nollner v. S. Baptist Convention, Inc*., 852 F. Supp. 2d 986, 994 (M.D. Tenn. 2012). The SEC’s regulations implementing the whistleblower reward provision of Dodd-Frank also state that the anti-retaliation provision protects internal reporting. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, SEC Release No. 34-64545 at 257 (Aug. 12, 2011).

In *Asadi v. G.E. Energy(USA), LLC*, the Fifth Circuit became the first circuit court to address the apparent ambiguity in the definition of “whistleblower.” *Asadi*, 720 F.3d 620, 629 (5th Cir. 2013). The court held “that the whistleblower-protection provision unambiguously requires individuals to provide information relating to a violation of the securities laws to the SEC to qualify for protection from retaliation under § 78u–6(h).” *Id*.. The Fifth Circuit refused to give deference to the SEC’s implementing regulations, holding that Section 926A only protects individuals who are “whistleblowers” within the meaning of § 78u-6(a)(6), and that the plain language of § 78u-6(a)(6) requires a disclosure to the SEC. *Id*. at 630.

Post-*Asadi*, the majority of district courts that have considered the issue have rejected the Fifth Circuit's restrictive analysis and held that Section 929A protects internal disclosures. For example, in an October 2013 decision, the Southern District of New York disagreed with *Asadi* and found that the differing statutory definitions of “whistleblower” created an ambiguity that was best resolved by deferring to the SEC’s implementing regulations. *Rosenblum v. Thomson Reuters (Markets) LLC*, 984 F. Supp. 2d 141, 148 (S.D.N.Y. 2013). The U.S. District Court for the District of New Jersey took a similar approach in *Khazin v. TD Ameritrade Holding Corp.*, No. 13-4149, 2014 WL 940703 (D.N.J. Mar. 11, 2014). In that case, the employee, an investment oversight officer at a securities firm, was terminated after reporting a compliance violation to his supervisors. *Id.* at \*1. The court held found that the statute was ambiguous, and it was therefore appropriate to defer to the SEC’s interpretive guidance. *Id*. at \*6.

Other district courts that have declined to follow the Fifth Circuit’s decision in *Asadi* include the U.S. District Court for the Southern District of New York (*Yang v. Navigators Group, Inc.*, 2014 WL 1870802 (S.D.N.Y. May 8, 2014)), the U.S. District Court for the District of Massachusetts (*Ellington v. Giacoumakis*, 977 F. Supp. 2d 42 (D. Mass. 2013)), the U.S. District Court for the District of Kansas (*Azim v. Tortoise Capital Advisors, LLC*, 2014 WL 707235 (D. Kan. Feb. 24, 2014)), and the U.S. District Court for the District of Nebraska (*Bussing v. COR Clearing, LLC*, 2014 WL 2111207 (D. Neb. May 21, 2014).

However, while a majority of district courts have embraced a broader definition of “whistleblower”, several courts have expressly followed the Fifth Circuit’s precedent in *Asadi*. In *Englehart v. Career Education Corp.*, the U.S. District Court for the Middle District of Florida held that an employee of an education services company who disclosed material misrepresentations in budget forecasts to her supervisor was not a whistleblower within Dodd-Frank’s statutory definition. *Englehart v. Career Education Corp.*, 2014 WL 2619501, at \*9 (M.D. Fla. May 12, 2014). The court found that the restrictive statutory definition of “whistleblower” was unambiguous, and therefore gave no weight to the SEC’s guidance, agreeing with *Asadi* that only an employee who complains to the SEC can be a whistleblower under the law. *Id*.

The U.S. District Court for the Northern District of California also followed the Fifth Circuit’s lead when deciding *Banko v. Apple Inc.*, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013). Banko was an Apple engineer who reported to his supervisors that a fellow engineer was embezzling money, an allegation that was later confirmed by an internal investigation. *Id*. at \*1. Apple then terminated Banko, who responded by bringing a claim for whistleblower retaliation under Dodd-Frank, as well as several state law employment claims. *Id*. The district court granted Apple’s motion for summary judgment on the Dodd-Frank claim, citing *Asadi* and dismissing Banko’s claim on grounds that he never reported his concerns to the SEC. *Id*. at \*6.

The Second Circuit recently declined to address the split of authority over Dodd-Frank’s definition of “whistleblower”. *See Liu Meng-Lin v. Siemens AG*, 2014 WL 3953672 (2d Cir. Aug. 14, 2014). In October of 2013, the U.S. District Court for the Southern District of New York decided *Liu v. Siemens AG*, 978 F. Supp. 2d 325 (S.D.N.Y. 2013). Liu was a compliance officer for Siemens, stationed in China. *Id*. at 326. On multiple occasions, Liu reported to his supervisors that Siemens was in violation of internal procedures designed to maintain compliance with the Foreign Corrupt Practices Act (“FCPA”). *Id*. Liu was subsequently fired, at which point he reported the potential FCPA violations to the SEC and brought a Dodd-Frank retaliation claim against Siemens. *Id*. at 327. The district court noted the split of authority following *Asadi*, and that Liu’s status as a whistleblower would be at issue if the case went forward; however, it ultimately dismissed Liu’s complaint on the grounds that Dodd-Frank’s retaliation provision does not apply extraterritorially. *Id*. at 333.

Liu appealed the decision to the Second Circuit, and the SEC filed an [amicus brief](http://www.sec.gov/litigation/briefs/2014/liu-siemens-0214.pdf) arguing that internal whistleblowing is protected under Dodd-Frank. *Liu v. Siemens AG*, No. 13-4385 (2d Cir.), Brief of the SEC, *Amicus Curiae* in Support of the Appellant (ECF No. 50) (2d Cir. Feb. 20, 2014). In August 2014, the Second Circuit affirmed the district court’s decision, holding that there is no indication that Congress intended Dodd-Frank’s whistleblower protection provisions to apply extraterritorially. *Liu Meng-Lin v. Siemens AG*, 2014 WL 3953672 (2d Cir. Aug. 14, 2014). In its decision, the Second Circuit noted the split of authority on whether internal disclosures are protected, but declined to rule on that issue. *Id*.

The Eight Circuit will soon weigh in on the scope of protected conduct under Dodd-Frank in a case captioned *Bussing v. COR Clearing, LLC*, 2014 WL 3548278 (D. Neb. July 17, 2014). Bussing worked as a private contractor for COR, a private investment management company, performing due diligence related to COR’s acquisition of a company that provided clearing services to brokerage clients. *Bussing v. COR Clearing, LLC*, 2014 WL 2111207, at \*1 (D. Neb. May 21, 2014). In the course of her duties, Bussing discovered violations of the Bank Secrecy Act and anti-money laundering regulations and, over the objections of COR, cooperated with a FINRA investigation of the violations. *Id*. at \*3. In ruling that Section 929A protected Bussing's activities, the court rejected the restrictive statutory definition of “whistleblower” and instead applied the everyday definition of a “whistleblower” as “a person who tells police, reporters, etc., about something (such as a crime) that has been kept secret.” *Id*. at \*7. This more expansive definition of “whistleblower” is preferable, explained the court, because legal protections should not be limited to employees who are “savvy enough to know that they should take the counter-intuitive step of first reporting to the SEC if they want any protection for internal reporting.” *Id*. at \*11. In July 2014, the district court certified an interlocutory appeal to the Eighth Circuit on the issue of whether the statutory or plain language definition of “whistleblower” should control for purposes of Dodd-Frank whistleblower retaliation claims.

Important Procedural Distinctions Between Dodd-Frank and SOX Emerge

Assuming *Asadi* is not adopted by other circuits, Section 929A of Dodd-Frank will likely provide a remedy that overlaps with SOX, but offers a much longer statute of limitations,[[12]](#footnote-12) double back pay, and the opportunity to proceed directly in federal court without exhausting administrative remedies. Recent decisions about procedural aspects of Section 929A claims, however, suggest that Section 929A could be a weaker remedy than SOX in some respects. In particular, Section 929A claims are not exempt from mandatory arbitration agreements and Section 929A does not expressly provide for the right to a jury trial.

In January of 2014, the Southern District of New York held in [*Murray v. UBS Securities*](http://www.financialservicesemploymentlaw.com/files/2014/03/Murray-v.-UBS-Secs.-LLC-S.D.N.Y.-No-Arbitration-Provision-In-Exchange-Act.pdf) that Section 929A claims are not exempt from mandatory arbitration agreements. *Murray v. UBS Sec., LLC*, 2014 WL 285093 (S.D.N.Y. Jan. 27, 2014). Murray was a former mortgage analyst at UBS who alleged that UBS terminated his employment because he refused to modify his research to report more favorable market conditions for commercial mortgage-backed securities in which UBS was heavily invested. *Id*. at \*1. Murray filed a Dodd-Frank retaliation claim in federal court and also filed a SOX claim with OSHA.

Murray’s employment agreement contained an arbitration clause covering any claim arising out of his employment. *Id*. Consistent with SOX, the arbitration clause had a carve-out for SOX claims. *See* 18 U.S.C. § 1514A(e)(2). UBS moved to compel arbitration of Murray’s Dodd-Frank claim. *Murray*, 2014 WL at \*2. Murray argued that because his complaints to his supervisor were protected conduct under SOX, his claims arose under SOX and therefore his claim should proceed in court as a SOX claim. *Id*.at \*3. The court disagreed, holding that Section 929A claims are not exempt from mandatory arbitration, and therefore Murray can proceed with his Section 929A claim only through arbitration. *Id*. at \*14.

The availability of a jury trial is another important procedural distinction between SOX and Dodd-Frank whistleblower retaliation claims. As amended by Dodd-Frank, Section 806 of SOX includes an express right to a jury trial. 15 U.S.C. § 1514A(b)(2)(E). Section 929A of Dodd-Frank, however, does not contain an express right to jury trial. In late 2013, a Georgia district court held that Section 929A plaintiffs are not entitled to trial by jury. *Pruett v. BlueLinx Holdings, Inc.*, 2013 WL 6335887, slip op. at \*7 (N.D. Ga. Nov. 12, 2013).

When Congress enacted Section 929A approximately four years ago, Section 929A appeared at first glance to provide a stronger remedy than SOX. Recent decisions highlighting important procedural differences between the statutes, however, suggest that SOX might offer a stronger remedy than Section 929A. And if courts apply “but for causation” to Section 929A claims, SOX will certainly be stronger remedy in that a SOX plaintiff can prevail by showing that protected conduct was a contributing factor to the adverse action. In light of the ambiguity about whether internal disclosures are protected under Section 929A and recent decisions highlighting important procedural distinctions between SOX and Section 929A claims, whistleblower counsel should be careful to comply with the short 180-day SOX statute of limitations.

SEC Takes Enforcement Action for Whistleblower Retaliation

A recent SEC enforcement order signals to companies that retaliating against a whistleblower can result not only in a private suit brought by the whistleblower, but can also result in a unilateral SEC enforcement action. On June 16, 2014, [the SEC announced](#.U-otlPldWSp) that it was taking enforcement action against Paradigm Capital Management, a hedge fund advisory firm, for engaging in prohibited principal transactions and for retaliating against the whistleblower who disclosed the unlawful trading activity to the SEC.  This is the first case where the SEC has exercised its authority under the Dodd-Frank Act to bring enforcement actions based on retaliation against whistleblowers.

According to [the order](https://www.sec.gov/litigation/admin/2014/34-72393.pdf), Paradigm retaliated against its head trader for disclosing internally and to the SEC prohibited principal transactions with an affiliated broker-dealer while trading on behalf of a hedge fund client. The transactions were a tax avoidance strategy under which realized losses were used to offset the hedge fund’s realized gains.

When Paradigm learned that the head trader disclosed the unlawful principal transactions to the SEC, it retaliated against him by removing him from his head trader position, changing his job duties, placing him on administrative leave, and permitting him to return from administrative leave only in a compliance capacity (not as head trader). *See In the Matter of Paradigm Capital Mgmt.*, Inc., Exchange Act Release No. 72393 (June 16, 2014). The whistleblower ultimately resigned his position. *Id*.

Paradigm settled the SEC charges by consenting to the entry of an order finding that it violated the anti-retaliation provision of Dodd-Frank and committed other securities law violations, agreeing to pay over one million dollars to shareholders, agreeing to hire a compliance consultant to overhaul their internal procedures, and entering into a cease-and-desist order.

The SEC’s press release accompanying the order includes the following statement by Andrew J. Ceresney, director of the SEC Enforcement Division:  “Those who might consider punishing whistleblowers should realize that such retaliation, in any form, is unacceptable.” The Paradigm enforcement action suggests that whistleblower retaliation can result in liability far beyond the damages that a whistleblower can obtain in a retaliation action and that retaliation can invite or heighten SEC scrutiny.

SEC Whistleblower Reward Program Gains Traction

Since its implementation in August of 2011, the SEC’s [Whistleblower Reward Program](http://www.sec.gov/whistleblower) has steadily gained momentum. Under Section 922(a) of Dodd-Frank, a whistleblower that provides original information to the SEC that results in monetary sanctions exceeding $1 million shall be paid an award of ten to thirty percent of the amount recouped. *See* 78 U.S.C. § 78u-6. The SEC Whistleblower Reward Program has generated over 6,500 tips, nearly half of which were submitted in FY2013. *See U.S. Sec. & Exch. Comm’n., 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2014).

Recently, the SEC issued several whistleblower awards, including [an award of $14 million](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.VAU7qkjdM74) to a whistleblower who disclosed a scheme to dupe Chinese investors by promising that investments in a hotel and conference center would boost their chances of obtaining green cards. The whistleblowers’ disclosures led to the return of $147 million to investors. Subsequent awards have been have been much lower, averaging approximately $500,000.

The two most recent whistleblower awards confirm that the SEC made the right decision when it rejected strenuous lobbying from the business community urging the SEC to adopt a rule requiring whistleblowers to make internal disclosures before disclosing securities violations to the SEC. On [July 31, 2014](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542578457#.VAU86EjdM74), the SEC announced an award of $400,000 to a whistleblower who “did everything feasible to correct the issue internally” before disclosing the fraud to the SEC. And on [August 29, 2014](http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542799812#.VAUtTEjdM74), the SEC announced an award of approximately $300,000 to a whistleblower who performed audit and compliance functions and disclosed wrongdoing to the SEC only after the company failed to act on the employee’s internal disclosures. The circumstances giving rise to these two recent awards belie the assurances of the business community that internal compliance programs are adequate to address securities law violations.

SEC Scrutinizes “Gag Clauses” in Settlement and Severance Agreements

Some employers have responded to the proliferation of whistleblower reward and protection laws by using severance or settlement agreements to dissuade employees from reporting fraud or other wrongdoing to the government. For example, an employer may require a departing employee to waive the right to recover any whistleblower reward as a condition to receiving severance. Or an employer may require employees to sign broad confidentiality agreement barring the disclosure to any entity outside the employer of any non-public information.

In formulating the regulations implementing the Dodd-Frank whistleblower award provisions, the SEC recognized the chilling effect of confidentiality agreements and included a rule that prohibits companies from taking “any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement.” 17 C.F.R. § 240.21F-17(a).

Recently, Sean McKessy, the Chief of the SEC Office of the Whistleblower has made several public statements indicating that the SEC intends to vigorously enforce this prohibition against impeding disclosures to the SEC. And the SEC’s [2013 Annual Report on the Dodd-Frank Whistleblower Program](https://www.sec.gov/about/offices/owb/annual-report-2013.pdf) notes that the Office of the Whistleblower is “coordinating actively with Enforcement Division” to identify cases where an employer “utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing.” *See* U.S. Sec. & Exch. Comm’n., 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program (2014), at 2. Employers should review their confidentiality and severance agreements to ensure that they are not imposing duties on current or former employees that would violate the SEC’s prohibition against gag clauses.

Developments in Whistleblower Protection for Government Contractors

Government Contractor Employees Afforded Enhanced Whistleblower Protections

The 2013 National Defense Authorization Act (“NDAA”) contained two robust whistleblower protection provisions that apply to employees of government contractors, with the exception of employee disclosures that relate to an activity of any element of the intelligence community. *See* 10 U.S.C. § 2409(e)(2)(A).

Section [827](http://www.law.cornell.edu/uscode/text/10/2409) of the NDAA protects employees of contractors and subcontractors of the Department of Defense (“DoD”) and National Aeronautics and Space Administration (“NASA”), while Section [828](http://www.law.cornell.edu/uscode/text/41/4712) applies to employees of contractors, subcontractors, and grantees of other agencies. Both provisions protect disclosures evidencing:

* gross mismanagement of a Federal contract or grant;
* a gross waste of Federal funds;
* an abuse of authority  relating to a Federal contract or grant; or
* a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract.

*See* 10 U.S.C. § 2409, National Defense Authorization Act for Fiscal Year 2013 § 827-28.

Disclosures are protected only if made to a Member of Congress or Congressional committee, an Inspector General, the GAO, a federal employee responsible for contract or grant oversight or management at the relevant agency, an authorized official of the DOJ or other law enforcement agency, a court or grand jury, or a management official or another employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct. *See* 10 U.S.C. § 2409(a)(2); 41 U.S.C. § 4712(a)(2).

The burden of proof and causation standard in NDAA whistleblower cases is very favorable to employees. A complainant need only demonstrate that the protected disclosure was a contributing factor in the personnel action, which can often be met by showing knowledge and temporal proximity. Remedies include reinstatement, back pay, compensatory damages and attorney fees and costs. Compensatory damages are uncapped. *See* 10 U.S.C. § 2409(c)(1); 41 U.S.C. § 4712(c)(1).

An NDAA reprisal claim must be filed initially with the Office of Inspector of General of the agency that awarded the contract or grant about which the employee disclosed wrongdoing. The statute of limitations is three years after the date of the reprisal. The OIG will investigate the complaint and make a recommendation to the agency head, who can order the contractor to provide relief to the NDAA complainant, including reinstatement. If the agency head fails to provide requested relief within 210 days, the whistleblower may bring an action in federal district court and try the case before a jury.

Section 827 of the NDAA is a permanent amendment to 10 U.S.C. § 2409, which previously provided far narrower protections to employees of DoD contractors and did not protect internal disclosures. Section 828, however, is a pilot program that could expire in four years if it is not renewed by Congress.

The enactment of the 2013 NDAA has resulted in a substantial increase in whistleblower retaliation complaints brought by employees of government contractors. Before August 2013, the Department of Defense averaged just four to six whistleblower complaints per month. Since the 2013 NDAA went into effect, those numbers have jumped considerably. Between January and July 2014, over 200 whistleblower complaints were filed.[[13]](#footnote-13)

States Enhance Whistleblower Protection Statutes

In addition to increased protections for whistleblowers at the federal level, several states recently enhanced their whistleblower protection laws.[[14]](#footnote-14) For example, California enacted amendments to its whistleblower protection statute that substantially broaden the scope of protected conduct:

* Prior to enactment of California Senate Bill 496 (“SB 496”), codified in [section 1102.5](http://www.leginfo.ca.gov/cgi-bin/displaycode?section=lab&group=01001-02000&file=1101-1106) of the labor code, disclosures were protected only if made to a governmental entity or law enforcement. Under the amended whistleblower protection statute, a disclosure to a coworker or supervisor with “the authority to investigate, discover, or correct” the alleged violation is protected.
* SB 496 clarifies that employees are protected “regardless of whether disclosing the information is part of the employee’s job duties.” Accordingly, compliance officers, auditors, and in-house counsel are protected against retaliation.
* SB 496 also prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of or noncompliance with a local rule or regulation.

In addition to California’s substantial enhancement of its whistleblower protection statute, the following states strengthened whistleblower protections:

* Arkansas added an incentive or reward provision to its whistleblower law under which whistleblowers can obtain an award of up to $12,500 if their disclosures lead to a savings of state funds. *See* Ark. Code Ann. § 21-1-601 *et seq.*
* Similarly, Virginia amended its whistleblower protection statute to provide a reward for any disclosure leading to state savings. *See* Va. Code Ann. § 2.2-3009 *et seq.*
* Utah overhauled its anti-retaliation laws, broadening the scope of protected conduct, creating an administrative review process, and enacting harsher penalties for employer’s caught retaliating. *See* Utah Code Ann. § 67-21-1 *et seq.*

Conclusion

The proliferation of whistleblower protection laws and favorable administrative and judicial decisions construing SOX and similar remedial statutes provide whistleblowers with strong remedies to combat retaliation. But to effectively navigate the patchwork of claims available to whistleblowers, it is critical to focus on the significant differences in the scope of protected conduct, burden of proof, remedies, and procedural requirements. In addition, whistleblower counsel should carefully evaluate forum selection, potential whistleblower reward claims (and the impact of pursuing a retaliation claim while a reward clam is pending), and take steps to avoid potential counterclaims (including claims arising from “self-help discovery”).

1. The author acknowledges the assistance of Carl Vernetti and Erik Snyder in preparing this paper. [↑](#footnote-ref-1)
2. For purposes of SOX, a publicly-traded company is defined as a company that has securities registered under § 12 of the Securities Exchange Act or is required to file reports under section 15(d) of the same Act, or “any subsidiary whose financial information is included in the consolidated financial statements of such company.” *See* 18 U.S.C. § 1514A. [↑](#footnote-ref-2)
3. Fidelity mutual funds are a collection of publicly-traded companies that have no employees. *Lawson*, S. Ct. at 1164. All operations of the funds are performed by FMR. *Id*. [↑](#footnote-ref-3)
4. *Lawson v. FMR LLC*, 724 F. Supp. 2d 141 (D. Mass. 2010) *rev'd in part*, 670 F.3d 61 (1st Cir. 2012) *rev'd and remanded*, 134 S. Ct. 1158, 188 L. Ed. 2d 158 (U.S. 2014). [↑](#footnote-ref-4)
5. Zulfer also brought claims for age discrimination under the California Fair Employment and Housing Act (Cal. Gov. Code §§ 12940(a)) and for wrongful termination in violation of public policy. [↑](#footnote-ref-5)
6. The plaintiff had sent an email to Bancorp’s Chief Compliance Officer raising concerns about a series of transactions that an executive had executed on the account of an elderly client. Plaintiff was worried that his boss, a Bancorp executive, had induced a wealthy man with diminished capacity to conduct his own financial affairs into authorizing transactions that were not in his interest. The plaintiff’s email triggered a FINRA investigation into Bancorp. [↑](#footnote-ref-6)
7. Section 211 of the ERA protects whistleblowers in the nuclear power industry. *See* [42 U.S.C. §5851](http://www.whistleblowers.gov/acts/era_2005.html). [↑](#footnote-ref-7)
8. The ARB defines a contributing factor as “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” *Allen v. Stewart Enterprises, Inc.*, ARB No. 06-081, *slip op.* at 17 (July 27, 2006). This standard is “intended to overrule existing case law, which requires a whistleblower to prove that her protected conduct was a “significant,” “motivating,” “substantial,” or “predominant” factor in a personnel action in order to overturn that action.” *Id.* [↑](#footnote-ref-8)
9. *Speegle v. Stone & Webster Construction*, ARB 13-074, 2005-ERA-006 (ARB Apr. 25, 2014). [↑](#footnote-ref-9)
10. *See Colorado v. New Mexico*, 467 U.S. 310 (1984). [↑](#footnote-ref-10)
11. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). [↑](#footnote-ref-11)
12. SOX claims can be brought “not 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). Section 929A claims can be brought up to six years after the violation occurred or three years after the material facts become known to the employee, but never more than ten years after the date on which the violation occurred. 15 U.S.C. § 78u-6(h)(1)(B)(iii). [↑](#footnote-ref-12)
13. *See* Aitoro, Jill, “New law drove whistleblower complaints against DOD contractors up”, Washington Business Journal, (July 21, 2014), available at <http://www.bizjournals.com/washington/blog/fedbiz_daily/2014/07/new-law-drove-whistleblower-complaints-against.html>. [↑](#footnote-ref-13)
14. Public Employees for Environmental Responsibility (“PEER”), a public interest organization that assists public sector employees, has complied a detailed state-by-state comparison of whistleblower protection laws. PEER’s analysis of state whistleblower protection laws is available at <http://www.peer.org/assets/docs/wbp2/overview.pdf>. And Taxpayers Against Fraud (“TAF”), a non-profit organization dedicated to combatting fraud against the government, has complied a detailed survey of state False Claims Acts, most of which include an anti-retaliation provision. TAF’s survey is available at <http://www.taf.org/states-false-claims-acts>. [↑](#footnote-ref-14)