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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" or "the Act"), Pub. L. 107-204, 116 Stat. 802. 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, is in Title VIII of SOX, entitled the Corporate and Criminal Fraud Accountability Act of 2002. Section 806 creates a civil cause of action for employees who have been subject to retaliation for lawful whistleblowing. Senator Leahy, one of the authors of the Section, stated, "U.S. laws need to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." *See* 148 Cong. Rec. S7420 (daily ed. July 26, 2002) (statement of Senator Leahy). The provision addressed Congress's concern that corporate whistleblowers had hitherto been subject to the "patchwork and vagaries" of state laws, with a whistleblowing employee in one state being more vulnerable to retaliation than a similar whistleblowing employee in another state. *Id.* Section 806 is intended to set a national floor for employee protections and not to supplant or replace state law. *Id.*

Enforcement of SOX's civil whistleblower protection provision is entrusted, in the first instance, to the Secretary of Labor. The statute provides, however, that if the Secretary has not issued a final decision within 180 days of the filing of a complaint, and there has been no showing that the delay was due to the bad faith of the claimant, the claimant may bring a *de novo* action in district court. The United States Courts of Appeals have jurisdiction to review the Secretary of Labor's final decisions. *See* 18 U.S.C. § 1514A(b)(2).

Section 1107, SOX's criminal whistleblower provision, is in Title XI of the Act, entitled the Corporate Fraud Accountability Act of 2002. Section 1107 makes it a felony for anyone to knowingly retaliate against or take any action "harmful" to any person, including interfering with his employment, for providing truthful information to a law enforcement officer relating to the commission or possible commission of a federal offense. *See* 18 U.S.C. § 1513(e). As part of a criminal obstruction of justice statute, Section 1107 is enforced by the U.S. Department of Justice.

In addition to these civil and criminal whistleblower provisions, SOX contains two other mechanisms to encourage the disclosure of corporate fraud. Section 301 of the Act, codified at 15 U.S.C. § 78f(m)(4), requires that the audit committees of publicly traded companies establish procedures for the receipt, handling, and retention of anonymous complaints from employees relating to accounting or auditing matters. Section 307, which is codified at 18 U.S.C. § 7245, is another provision designed to encourage the reliability of corporate disclosures. Section 307 requires the Securities and Exchange Commission ("SEC") to issue a rule setting forth ethical standards for attorneys who practice before it that in turn requires them to report to their corporate clients certain breaches of fiduciary duty. Pursuant to this statutory provision, the SEC issued a rule requiring attorneys "appearing and practicing before the Commission" to

report "evidence of a material violation" to their client's chief legal officer or chief executive officer and, absent an "appropriate response," to the company's audit committee or board of directors. *See generally* 17 CFR Part 205 (2003).

II. OVERVIEW OF SOX'S CIVIL WHISTLEBLOWER PROVISION

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). The Section 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)), or to any officer, employee, contractor, subcontractor, or agent of such companies. See 18 U.S.C. § 1514A(a).

A broad range of activities relating to corporate fraud is protected under Section 806, including providing information to federal agencies, Congress or internally within the company, and filing, causing to be filed, testifying, participating in, or assisting in proceedings. *See* 18 U.S.C. § 1514A(a)(1)-(a)(2). Protected activity involves providing information that the employee "reasonably believes" constitutes a violation of federal mail, wire, bank or securities fraud (18 U.S.C. §§ 1341, 1343, 1344 and 1348), or a violation of any SEC rule or other provision of federal law relating to fraud against shareholders. *See* 18 U.S.C. § 1514A(a)(1).

Employees of covered companies who believe that they have been subject to adverse action for having engaged in such protected activity may file a complaint with the Secretary of Labor within 90 days of the alleged retaliatory act. *See* 18 U.S.C. § 1514A(b)(2)(D). Proceedings under Section 806 are governed by the rules and procedures, and by the burdens of proof, of the aviation safety whistleblower provisions contained in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21"), 49 U.S.C. 42121. *See* 18 U.S.C. § 1514A(b)(2)(A) and (C). As with AIR21, the Secretary of Labor has assigned responsibility for administering Section 806 to the Assistant Secretary for Occupational Safety and Health, bringing to 14 the total number of whistleblower statutes administered by the Occupational Safety and Health Administration ("OSHA"). *See* Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002).

OSHA has issued an interim final rule establishing procedures and time frames for the handling of retaliation complaints under Section 806. *See* 29 CFR Part 1980, 68 Fed. Reg. 31860 (May 28, 2003). The rule addresses complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to a U.S. Department of Labor ("DOL") administrative law judge ("ALJ") for a *de novo* hearing, hearings by ALJs, and review of ALJ decisions by DOL's Administrative Review Board ("ARB"), to which the Secretary has delegated authority to issue final agency decisions under SOX. *See* Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002). OSHA is considering eight timely comments that it received pursuant to a 60-day comment period on the interim final rule that ended on July 28, 2003. Issuance of a final rule is expected shortly.

Although to date DOL has issued relatively few final agency decisions under SOX, insight into how the agency is likely to interpret Section 806 is available from decisions issued under other OSHA enforced whistleblower statutes. In this regard, Section 806 is similar to, and contains the same statutory burdens of proof, as the whistleblower provision in the aforementioned AIR21, 49 U.S.C. 42121, as well as the whistleblower provision in the Energy Reorganization Act, 42 U.S.C. 5851 ("ERA"), which provides protection to employees who report nuclear safety violations. Moreover, as has happened with the other whistleblower statutes enforced by OSHA, DOL and the courts likely will borrow heavily from case law developed under Title VII and other discrimination statutes.

One notable distinction between Section 806 of SOX and the other whistleblower laws administered by OSHA is SOX's "kick out" provision that allows the whistleblower claimant to bring a *de novo* action at law or equity in district court, if the Secretary has not issued a final decision within 180 days of the filing of his or her complaint, and there has been no showing that the delay was due to the bad faith of the claimant. *See* 18 U.S.C. § 1514A(b)(1)(B). It is too soon to discern what percentage of claimants will avail themselves of this opportunity to seek relief in district court. Claimants must consider any number of factors in deciding whether to go to district court or continue with the administrative process. For instance, there are fewer evidentiary restrictions and less formal pleading requirements in agency adjudications. On the other hand, a claimant proceeding in district court will be able to subpoena witnesses and might be entitled to a jury trial. Regardless of where an action is adjudicated, however, the remedies available generally are the same. Section 806 provides that an employee subject to retaliation is "entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(C)(1). Claimants who proceed before DOL, however, are entitled to "interim reinstatement." *See* 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)(2)(A)).

III. COVERED EMPLOYERS

A. Companies

SOX whistleblower provisions apply to publicly traded companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. § 78l) or subject to the periodic reporting requirements of Section 15(d) (*e.g.*, required to file forms 10-K and 10-Q). (15 U.S.C. § 78o(d)). *See* 18 U.S.C. 1514A(a); *Getman v. Southwest Securities, Inc.,* 2003-SOX-8 (ALJ February 2, 2004). *But see Flake v. New World Pasta Co.,* ARB No. 03-126, 2003-SOX-18 (ARB Feb. 25, 2004) (employer's voluntary filing of reports under Section 15(d) does not subject it to SOX where it has fewer than 300 shareholders and is not required to file such reports or to register its securities with the SEC).

- **Domestic**

The Act applies to all companies that have obtained a listing in the United States or have registered securities with the SEC. However, coverage under the whistleblower provisions is narrower than coverage under SOX Section 402 (enhanced conflict of interest provisions) in that it does not cover companies that have filed a registration statement but do not

yet have a class of securities registered under Section 12 or report under Section 15(d) of the Exchange Act.

The requirement that the respondent be subject to the registration or reporting requirements of the Exchange Act has been strictly construed. For example, in *Flake v. New World Pasta Co.*, 2003-SOX-18 (ALJ July 7, 2003), an ALJ addressed the issue of whether the respondent was a company subject to jurisdiction under Section 806. It was undisputed that the respondent had no publicly traded securities. Therefore, the only issue was whether it was required to file reports under Section 15(d) of the Exchange Act. The ALJ found that the respondent fell within an exception to Section 15(d)'s reporting requirements because its public debt had been held by less than 300 persons in each year since its registration and offering. *Id.* at 3. According to the ALJ, the fact that the respondent voluntarily filed some reports required by Section 15(d) in order to comply with a contractual agreement did not transform it into an issuer "required to" make such filings. *Id.* at 4. Therefore, the ALJ granted the respondent's motion for summary decision.

In *Ionata v. Nielsen Media Research, Inc*., 2003-SOX-29 (ALJ Oct. 2, 2003), an employee filed a complaint pursuant to the whistleblower provisions of Section 806. The OSHA Regional Administrator denied the complaint based upon lack of jurisdiction because the respondents were not companies "with a class of securities registered under Section 12 of the Securities Exchange Act of 1934." *Id.* at 1. The employee initially objected to this determination but later withdrew her objections, so the ALJ affirmed.

- **Foreign**

The Act's whistleblower protections apply to foreign private issuers (as defined by Rule 36-4(c) of the Exchange Act) subject to SEC reporting and registration obligations. Thus, foreign issuers that are exempt from SEC filing requirements under Rule 12g3-2(b) of the Exchange Act also are excluded from coverage under SOX.

Foreign corporations doing business in the United States are subject to Section 806 whistleblower provisions. *See Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231, 232 (M.D. Ala. 1988).

Whether SOX whistleblower provisions apply to U.S. residents working abroad has been an open issue. Statutory whistleblower provisions generally do not apply extraterritorially absent clear language by Congress in the statute to extend the statute's protections abroad. *See, e.g.*, *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991); *Mendonca v. Tidewater, Inc*., 2001 U.S. Dist. LEXIS 3486, at *8 (E.D. La. Mar. 4, 2001).

In *Carnero v. Boston Sci. Corp.*, 2004 U.S. Dist. LEXIS 17205 (D. Mass. Aug. 27, 2004), the court refused to afford SOX whistleblower protection to a foreign national working for Argentinian and Brazilian subsidiaries. According to the court, "Nothing in Section 1514A(a) remotely suggests that Congress intended it to apply outside of the United States." *Id*. at *5. The court noted, as well, that application of Section 1514A overseas might conflict with foreign laws, particularly where a plaintiff seeks reinstatement. *See also Concone v. Capital One*

Finance Corp., 2005-SOX-00006 (December 3, 2004) (no applicability to persons employed outside the United States).

Still, courts have held that U.S. courts do, in certain circumstances, have jurisdiction over violations of the Exchange Act, although the violations take place outside the U.S. *See, e.g., Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336-37 (2d Cir. 1972).

In its August 24, 2004, Final Rule on Procedures for the Handling of Discrimination Complaints under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act 2002, 29 CFR Part 1980, 69 Fed Reg. 52104 ("Final Rule"), OSHA declined to clarify this issue, despite requests by commentators, on the ground that the purpose of the regulations is procedural and not to interpret the statute. 69 Fed. Reg. at 52107.

- **Agents/Contractors**

SOX whistleblower provisions cover not only publicly traded companies, but also "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C. § 1514A(a). Therefore, private companies that are not publicly traded, as well as other entities or individuals, that serve as "agents" or "contractors" of the publicly traded employer, are subject to the whistleblower provisions.

For example, OSHA specifies that a small accounting firm acting as a contractor of a publicly traded company could be liable for retaliation against an employee who provides information to the SEC regarding a violation of SEC regulations (*e.g.*, accounting irregularities). OSHA Whistleblower Investigations Manual (2003), at 14-1 ("OSHA Manual").

SOX also might be found to apply to publicly traded companies for acts committed by them against employees of their agents or contractors. In an environmental whistleblower case, the ARB held that a government agency could be subject to a discrimination charge filed by the employee of a private-sector government contractor when the agency banned the contractor's employee from entering the government workplace. *Stephenson v. NASA*, ARB No. 96-080 ALJ No. 94-TSC-5 (ARB Feb. 3, 1997, 1997 WL 65773. In its Final Rule, OSHA, citing *Stephenson*, confirmed that "a respondent may be liable for its contractor's or subcontractor's adverse action against an employee in situations where the respondent acted as an employer with regard to the employee of the contractor or subcontractor by exercising control of the work product or by establishing, modifying or interfering with the tems, conditions, or privileges of employment." "Conversely," OSHA added, "a respondent will not be liable for the adverse action taken against an employee of its contractor or subcontractor where the respondent did not act as an employer with regard to the employee." 69 Fed. Reg. at 52017.

The analysis used in *Stephenson* suggests that the scope of SOX may apply freely across contractual arrangements.

B. Subsidiaries

The Act's retaliation provisions have been applied to private subsidiaries of publicly traded companies, but not under all circumstances. The cases have addressed three distinct inquiries: (1) whether the employee of the subsidiary is a covered "employee" under SOX; (2) if so, and the employee names the subsidiary employer as a respondent, whether the subsidiary is a covered entity subject to suit; and (3) if the employee names the parent as a respondent, whether the existence of separate corporate identities insulates the parent from liability.

- **Whether The Employee Of The Subsidiary Is A Covered "Employee"**

The first inquiry – whether the employee of the subsidiary is a covered "employee" under SOX – has been consistently answered in the affirmative. For example, in *Platone v. Atlantic Coast Airlines Holdings Inc.,* 2003-SOX-27 (ALJ Apr. 30, 2004), an ALJ held that an employee of a non-publicly subsidiary was a covered "employee" where the company's parent/holding company was publicly traded. The ALJ in *Platone* reasoned that, under the facts of the case, the holding company was the alter ego of the subsidiary and that it certainly had the ability to affect the complainant's employment.

Similarly, in *Collins v. Beazer Homes USA, Inc*., 334 F. Supp. 2d 1365 (N.D. Ga. 2004), the first reported federal district court decision on point, a federal district court in Georgia held that where the officers of a publicly traded parent company had the authority to affect the employment of the employees of the subsidiary, an employee of the subsidiary was a "covered employee" within the meaning of the SOX whistleblower provision.

Both *Platone* and *Collins* looked to the interrelatedness of the corporate structures to ultimately conclude the employee of the subsidiary was a covered "employee." Going one step further, an ALJ in *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004), held that the Vice President-Finance of a non-publicly traded subsidiary of a publicly traded company was covered under SOX, regardless of the parent company's role in affecting the employment of the subsidiary's employees. The ALJ concluded that, based on the legislative intent and purpose of SOX, the term "employee of publicly traded company," within the meaning of SOX, "includes all employees of every constituent part of the publicly traded company, including, but not limited to, subsidiaries and subsidiaries of subsidiaries which are subject to its internal controls, the oversight of its audit committee, or contribute information, directly or indirectly, to its financial reports."

Similarly, in *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 20, 2004) (*Gonzalez III*), an ALJ concluded that Congress intended to provide whistleblower protection to employees of subsidiaries of publicly traded companies. Therefore, the ALJ held that the complainant, an employee of a non-publicly traded subsidiary of a publicly traded bank holding company, set forth a cause of action sufficient to withstand a motion for summary decision. The ALJ also reasoned that evidence reflected that the holding company's actions affected the complainant's employment and shared management and function with the subsidiary.

Finally, in *Klopfenstein v. PPC Flow Technologies Holdings, Inc*., 2004-SOX-11 (ALJ July 6, 2004), an ALJ, citing *Morefield*, agreed with the complainant that employees of non-public subsidiaries of publicly traded companies can be covered by the SOX whistleblower provisions.

- **Whether A Non-Publicly Traded Subsidiary Is A Covered Entity**

The second *inquiry* – whether a *subsidiary* of a publicly traded parent company is a covered entity subject to suit – has been consistently answered in the negative.

For instance, in *Klopfenstein*, 2004-SOX-11, an executive of a subsidiary of a non-publicly traded holding company that, in turn, was owned by a publicly traded parent company filed a complaint naming only the holding company and a vice president of the subsidiary as respondents. The ALJ held that the non-publicly traded subsidiary was not a proper respondent, because SOX does not "provide[] a cause of action directly against such subsidiary alone."

Notably, the ALJ in *Klopfenstein* specifically rejected complainant's argument that the holding company was a covered "agent" of the parent company. It was previously unclear what position the DOL would take on this issue, as the SOX whistleblower provision prohibits retaliation not only by publicly traded companies, but also by "any officer, employee, contractor, subcontractor or agent" of a covered company. 18 U.S.C. § 1514A(a). Therefore, private companies that are not publicly traded but serve as "agents" of a publicly traded employer, may, in certain instances, be subject to the whistleblower provision. The *Klopfenstein* ALJ found that the subsidiary/holding company did not fall within this category because the holding company was more than an "agent" of the parent within the meaning of SOX, rather it was an integral part of the publicly traded company with overlapping officers. The ALJ also found that the named vice president was not a proper respondent because he was not an officer, employee, contractor, subcontractor, or agent of the publicly traded parent company.

Similarly, an ALJ in *Powers v. Pinnacle Airlines Corp*., 2003-AIR-12 (ALJ Mar. 5, 2003), dismissed a complaint brought against the employer, a non-publicly traded subsidiary of a publicly traded airline, on the basis that the subsidiary was not a proper respondent under SOX. The appeal of this decision was dismissed in *Powers v. Pinnacle Airlines, Inc*., ARB No. 04-035, ALJ No. 2003-AIR-12 (ARB Sept. 28, 2004).

Citing *Klopfenstein* and *Powers*, the respondent in *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 17, 2004) (*Gonzalez II*), moved for summary decision on the ground that it was not a publicly traded company. However, the ALJ managed to avoid the issue by permitting the complainant to amend his complaint to include as a respondent the publicly traded holding company.

- **Whether The Existence Of Separate Corporate Identities Insulates The Parent From Liability**

The third inquiry – whether the existence of separate corporate identities insulates the parent corporation from liability for acts of the subsidiary – has proven a more difficult issue for ALJs, often requiring evaluation of specific facts to determine whether piercing the corporate veil or some other basis for ignoring corporate separateness is warranted.

For instance, in *Powers*, 2003-AIR-12, an ALJ dismissed a SOX complaint where the employee was employed by the non-publicly traded subsidiary of a publicly traded airline. The ALJ reasoned that the complainant's attempt to hold the parent liable "ignores the general principle of corporate law that a parent corporation is not liable for the acts of its subsidiaries. In other words, the mere fact of a parent-subsidiary relationship between two corporations does not make one company liable for the torts of its affiliate." The ALJ continued that the complainant had not alleged any facts that would justify piercing the corporate veil and ignoring the separate corporate entities. Specifically, the ALJ noted that the subsidiary's impact on the parent was "questionable at best."

Likewise, in *Hasan v. J.A. Jones-Lockwood*, 2002-ERA-5 (ALJ Sept. 17, 2002), an ALJ held that a parent company was not an "employer" under the analogous ERA retaliation provision merely because it was the parent of another company that employed a complainant. The ALJ reasoned that no evidence showed that the parent had the power to hire, promote, discipline or give raises or had input in those decisions.

In contrast, in *Platone*, 2003-SOX-27, an ALJ held that the parent/holding company was a proper respondent in an action by an employee of a non-publicly traded subsidiary where the ALJ found the subsidiary to be a "mere instrumentality" of the holding company. The ALJ reasoned that the holding company had no employees; the companies disregarded the separate identity of the subsidiary in its dealings with the public, the SEC, and its employees; there was a great degree of commonality between the senior management of the two corporate entities, including those responsible for labor relations within the subsidiary; and the holding company had the ability to affect the complainant's employment, including making the ultimate termination decision.

Likewise, in *Gonzalez III*, 2004-SOX-39, the complainant, an employee of a non-publicly traded subsidiary, amended his complaint to add the publicly traded holding company as a respondent. The ALJ denied summary decision for the holding company because evidence suggested that the holding company had shared management and function with the subsidiary and that the holding company's actions affected the complainant's employment.

C. Individual Liability

Section 806's prohibition of retaliation by "officers, employees, contractors, subcontractors or agents of covered companies" could be construed as providing for individual liability for wrongful retaliation. This issue has not yet been addressed by the DOL or any court. However, in *Williams v. Lockheed Martin Energy Systems, Inc.*, 1995-CAA-10 (ARB Jan. 31,

2001), a case dealing with liability under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610) and SDWA (Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)), the ALJ had dismissed individual supervisors from the case because they were not the complainant's employer despite statutory language providing that no "person" shall discriminate against whistleblowers. The complainant did not appeal, nor did the ARB decision address, this issue.

D. Former Employees, Applicants & Third Parties

29 CFR § 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 employment could be affected by the company. . . ." 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. There is no reason to believe this holding will not be adopted under SOX.

However, in *Harvey v. The Home Depot, Inc.*, 2004-SOX-36 (ALJ May 28, 2004), the ALJ refused to allow a complaint by a former employee to proceed. The complaint alleged that the employer had violated SOX's whistleblower provision in that, after the complainant had filed a professional responsibility complaint against the company's attorney, the attorney's representative filed a response to the state committee contending that the complainant's grievances were "part of an ongoing campaign by Mr. Harvey to harass Home Depot and its employees." The complainant no longer was employed by the company when this statement was made. The ALJ found that "with the exception of blacklisting or other active interference with subsequent employment, the SOX employee protection provisions essentially shelter an employee from employment discrimination in retaliation for his or her protected activities, <u>while</u> the complainant is an employee of the respondent." Slip op. at 405 (footnote omitted). Thus, the harassment comment was not an adverse personnel or employment action, nor was there any evidence that the comment adversely affected the terms or conditions of any subsequent employment by the complainant.

In *Davis v. United Airlines, Inc.*, 2001-AIR-5 (ALJ Apr. 23, 2002), an ALJ denied derivative protection to spouses of whistleblowers based solely upon their status as a spouse.

E. Criminal Provision

Section 1107 of the Act makes 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. 18 U.S.C. § 1513(e). Because "persons" generally includes individuals, corporations and other organizations, both employers and employees likely are subject to the criminal provision. Moreover, there is nothing limiting the criminal provision to the employment relationship. Criminal sanctions include fines and/or imprisonment of up to 10 years.

IV. PROTECTED CONDUCT

A. 18 U.S.C. § 1514A(a)(1)

The Act 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).

1. "Reasonable Belief"

The Act does not define "reasonable belief," nor does it suggest any source to define the term. The legislative history does provide some guidance. Specifically, from remarks submitted by Senator Leahy:

> In addition, a reasonableness test is also provided under the subsection (a)(1), which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts (See generally *Passaic Valley Sewerage Commissioners v. Department of Labor,* 992 F. 2d 474, 478).[1] 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.

As referenced in the legislative history, there are many statutes that use a "reasonable belief" standard when determining the validity of employee whistleblowing claims. Like SOX, other whistleblowing statutes typically are federal statutes that implement important public policies

[1] *Passaic Valley Sewerage,* 992 F.2d 474 (3rd Cir. 1993), addresses Section 507(a) of the Clean Water Act. In that case, the court found that an employee's "non-frivolous" "good-faith" complaint fell within the protection of the whistle-blower provision of the Act even if the complaint was misguided and unfounded.

such as Title VII, various environmental laws, the Whistleblower Protection Act, the False Claims Act, and OSHA.

The case law interpreting the validity of whistleblowing claims under these and other statutes shows that courts typically require both a subjective and objective component of the reasonable belief standard. 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.

a. Sarbanes-Oxley Act

The few SOX decisions addressing this issue are consistent with the case law developed in other contexts. In *Lerbs v. Buca Di Beppo, Inc*., 2004-SOX-8 (ALJ June 15, 2004), an ALJ granted the employer's motion for summary decision because the complainant, a "cash manager" for the restaurant, failed to show he engaged in protected activity, largely because he did not show he reasonably believed the employer engaged in illegal activity that misled investors or potential investors. The ALJ noted that a complainant's belief must be scrutinized under both subjective and objective standards, *e.g.*, he must have *actually* believed that the employer was in violation of the relevant laws or regulations and that belief must be *reasonable*. Moreover, the ALJ explained that the reasonableness of the complainant's belief is to be determined on the basis of the knowledge available to a reasonable person in the circumstances with the employee's training and experience.

Applying these principles, the *Lerbs* ALJ found that although the employee may have felt that certain practices "compromised the validity of the annual audit, which shareholders rely on to make investment decisions," he did not have an actual belief at the time of the complaint that the practice was *illegal*. The complainant also contended that the company inappropriately attempted to inflate the sales of one of its restaurants, which provided reduced-price lunches to employees at corporate headquarters, by increasing the prices of the lunches, thereby inflating its "same store sales" figures released to shareholders. The ALJ found that complainant failed to show it was reasonable to believe this practice was illegal, as "there is simply nothing unlawful or improper about a decision by Buca to adjust upward the amount it paid for employees' meals to bring the cost into line with the cost of meals for non-employee consumers." *Id.* at 13.

In contrast, in *Platone*, 2003-SOX-27, the ALJ ruled that a former airline labor relations manager engaged in protected activity by raising concerns about financial irregularities within the company. Specifically, the complainant complained of discrepancies in the "flight loss" pay system, an arrangement which effectively shifted the cost of paying pilots from the company to the union by requiring the union to reimburse the company for portions of a pilot's pay when the pilot was called away from flight duty to attend to official union business. Complainant reported that some members of the union leadership were improperly taking advantage of the flight loss system for their own monetary gain. After her reports went unheeded, complainant concluded that members of company management, who needed bargaining leverage to obtain concessions from the union in upcoming negotiations, had devised

a plan to improperly funnel the airline's money to members of the union through the flight loss compensation arrangement.

Despite an absence of evidence reflecting that the company was ever not reimbursed by the union or that this purported arrangement ever resulted in any financial loss to the company, the *Platone* ALJ determined that the complainant's "suspicions were reasonable, and that she had good grounds to believe that a fraud was being perpetrated" on the company and its stockholders. Curiously, the ALJ did not address the materiality requirement and did not specify which predicate federal fraud or securities provision may have been violated.

Similarly, in *Welch v. Cardinal Bankshares Corp*., 2003-SOX-15 (ALJ Jan. 28, 2004), an ALJ found that complainant had a reasonable belief that improper entries totaling $195,000 on the company's financial statements were improper, were material and could mislead potential investors.

b. Title VII

Courts routinely have applied the "reasonable belief" standard to Title VII's anti-retaliation provisions. Title VII's anti-retaliation provisions make it unlawful for an employer to discriminate against an employee because of the employee's opposition to any practice made unlawful by Title VII, or because the employee has made a charge under the statute. 42 U.S.C. §2000e-3(a). *See Holland v. Jefferson Nat'l Life Ins. Co.*, 883 F.2d 1307, 1314 (7th Cir. 1989); *Sisco v. J. S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982). An actual violation of Title VII by the employer is not a prerequisite for a retaliation claim; instead, the employee need only have a subjective "good faith" belief and objectively reasonable belief that he is challenging conduct that violates Title VII. *Sisco*, 655 F.2d at 150. Courts have required that the belief be both objectively and subjectively reasonable. *Little v. United Techs. Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir.1997); *Manoharan v. Columbia University College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988); *Bolt v. Norfolk Southern Corp.*, 22 F. Supp. 2d 512, 519 (E.D. Va. 1997).

Most recently, the U.S. Supreme Court in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 149 L. Ed. 2d 509, 121 S. Ct. 1508 (2001) analyzed the objective, reasonable belief standard when determining if a sexual harassment complaint was protected activity under the anti-retaliation provisions of Title VII. In *Breeden*, the employee alleged she had been transferred for reporting sexual harassment. The allegation arose when Breeden met with her supervisor and another employee to review psychological evaluations of four applicants they intended to hire. One of the evaluation reports disclosed that the applicant had once commented to a co-worker, "I hear making love to you is like making love to the Grand Canyon." Breedan's supervisor then commented, "I don't know what that means." The other employee responded, "Well, I'll tell you later," and they both chuckled. 532 U.S. 268, 269. The Court held that no reasonable person could believe that the single incident Breeden reported could violate Title VII. In reaching this conclusion, the Court referenced not only the statutory language of Title VII, but also case law requiring that sexual harassment must be so severe or pervasive that it alters the terms and conditions of employment. *Id.* Relying on *Breedan*, a New York federal district court went further and required that the employee's belief "must also be objectively reasonable, in the

sense that the asserted opposition must be grounded on sufficient evidence that the employee was the subject of discrimination and harassment at the time the protest to the offending conduct is registered." *Spadola v. N.Y. City Transit Auth.*, 242 F. Supp. 2d 284, 291 (S.D.N.Y. 2003) (citations omitted).

Other courts have distinguished *Breedan* when presented with more onerous facts. For instance, in *Schatzman v. Martin Newark Dealership, Inc.*, 158 F. Supp. 2d 392 (D. Del. 2001) the court held a co-worker's reference to African-Americas as "monkeys" was more reasonably derogatory than the interaction in *Breeden* and, thus, the complaint about the comment was objectively reasonable. *See also Martinez v. Cole Sewell Corp.*, 233 F. Supp. 2d 1097 (N.D. Iowa 2002) (court found employee met objective requirement that reasonable person could have believed discriminatory conduct violated Title VII when conduct was frequent and directly referenced her national origin); *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 60 P.3d 106 (2002) (complainant had reasonable, good faith belief that complained-of conduct violated Title VII where conduct was repeated, public and personal in nature).

c. Environmental Laws

As noted above, the remarks of Senator Leahy specifically reference *Passaic Valley Sewerage Commissioners v. Department of Labor,* 992 F.2d 474 (3rd Cir. 1993), which analyzes the whistleblower provisions of the Clean Water Act. In that case, the Court noted that the Clean Water Act mirrors that of several other federal environmental, safety and energy statutes.[2] The Court emphasized that it has afforded broad protection to employees making whistleblowing claims under environmental laws, noting that broad protection is necessary "'to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" (citations omitted). *Id.* at 479. Contrary to Senator Leahy's remarks, the Court did not actually define a reasonable person standard as suggested in the legislative history. Instead, it provided guidance by upholding a whistleblower claim even though the employee's complaint was substantively erroneous, misguided and disruptive to the company.

d. False Claims Act

The "reasonable belief" standard also arises in the context of the False Claims Act ("FCA"). The FCA is a whistleblower statute that protects employees who are "discharged . . . because of lawful acts done by the employee . . . in furtherance of [a civil action for false claims]." 31 U.S.C. § 3730(h). Under the statute, "an employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government." *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002).

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[2] These are statutes include: 42 U.S.C. § 7622 (Clean Air Act); 42 U.S.C. § 9610 (Comprehensive Environmental Response, Compensation, and Liability Act); 42 U.S.C. § 300j-9(i) (Safe Drinking Water Act); 42 U.S.C. § 6971 (Resource Conservation and Recovery Act); 15 U.S.C. § 2622 (Toxic Substances Control Act); 42 U.S.C. § 5851 (Energy Reorganization Act); 30 U.S.C. § 815(c)(1) (Federal Mine Safety and Health Act); 29 U.S.C. § 158(a)(4) (National Labor Relations Act); 45 U.S.C. § 441(a) (Federal Railroad Safety Authorization Act).

e. Whistleblower Protection Act

Similarly, the Whistleblower Protection Act ("WPA") prohibits retaliation against a public employee who reports what he or she reasonably believes to be "gross mismanagement, a gross waste of funds, an abuse of authority or a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A)(ii). When considering whether a WPA claimant possesses a "reasonable belief," courts examine whether a "disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the government evidence gross mismanagement." *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999). Under the WPA, an employee's purely subjective perspective is insufficient to establish a "reasonable belief," even if shared by other employees. *Id.* The *Lachance* court emphasized that the "WPA is not a weapon in arguments over policy or a shield for insubordinate conduct." *Id.* at 1381.

f. OSHA Safety or Health Complaints

The Federal Mine Safety Act and OSHA both require that employee whistleblowing claims be made in good faith and be objectively reasonable. *See, e.g., Consolidation Coal Co. v. Federal Mine Safety & Health Review Com.*, 795 F.2d 364 (4th Cir. 1986) (suspension violated antidiscrimination provision of Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1982), where work refusal was based on reasonable, good faith belief that another would be endangered by use of ten-ton trailing motor). The same reasonable and good-faith belief standard also is used for retaliation claims under OSHA. *See, e.g., Donovan v. Hahner, Foreman & Harness, Inc*., 736 F.2d 1421 (10th Cir. 1984).

2. Fraud

To constitute protected activity, the subject matter of a SOX complaint must involve a purported violation of "section 1341, 1343, 1344, or 1348, 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). SOX's legislative history reflects that fraud is an integral element of a cause of action under the whistleblower provision. *See, e.g.,* CONG. REC. S7418 (daily ed. July 26, 2002) (statement of Sen. Leahy) (whistleblower provision to protect "those who report fraudulent activity that can damage innocent investors in publicly traded companies"); S. Rep. No. 107-146, 2002 WL 863249 (May 6, 2002) (the relevant section "would provide whistleblower protection to employees of publicly traded companies who report acts of fraud to federal officials with the authority to remedy the wrongdoing or to supervisors or appropriate individuals within their company").

Consistent with this legislative history, an ALJ in *Hopkins v. ATK Tactical Systems*, 2004-SOX-19 (ALJ May 27, 2004), found that a complaint that did not address any kind of fraud and did not allege that the activities involved *intentional deceit* or resulted in a fraud against shareholders or investors did not fall within the purview of the SOX whistleblower provision. The employee's complaint questioned whether the employer's systems illegally resulted in the release of sludge water into the ground water system due to poor maintenance and

overdue inspections. The ALJ found that such an activity failed to state a cause of action because an "an element of intentional deceit that would impact shareholders or investors is implicit" under the SOX whistleblower provision.

In *Getman*, 2003-SOX-8, an ALJ addressed the scienter requirement under the "any rule or regulation of the Securities and Exchange Commission" provision, specifically Rule 10b-5. The court noted that scienter is defined as "'a mental state embracing intent to deceive, manipulate, or defraud,'" and is established by showing that the respondent acted intentionally or with severe recklessness. *Id.* at 14 (quoting *Aaron v. SEC*, 446 U.S. 680, 697, 701-02 (1980)). The ALJ found the scienter requirement was met where the complainant, a former securities analyst for an investment bank, provided evidence that the employer's act of pressuring her to change her rating of the stock of a company with whom her managers hoped to do future business was intentional.

In contrast, in *Morefield*, 2004-SOX-2, an ALJ broadly construed the catchall "any provision of Federal law relating to fraud against shareholders." The ALJ held that this provision "may provide ample latitude to include rules governing the application of accounting principles and the adequacy of internal accounting controls implemented by the publicly traded company in compliance with such rules and regulations." *Id.* at 5.

In *Reddy v. Medquist, Inc*., 2004-SOX-35 (ALJ June 10, 2004), an ALJ held that the complainant failed to show she engaged in protected activity where "the evidence demonstrate[d] the complaints concerned internal company policy as opposed to actual violations of federal law." *Id.* at 3 (complainant had expressed concerns to management regarding an internal company policy's impact on the rate of pay for medical transcriptionists). Furthermore, the ALJ noted that complainant did not raise violations of federal law until after her termination.

3. Materiality

Materiality is an element of the predicate fraud provisions. *See, e.g., Neder v. United States*, 527 U.S. 1, 4 (1999) ("materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes. . ."). In addition, ALJs have applied a materiality element under the "any rule or regulation of the Securities and Exchange Commission" and "any provision of Federal law relating to fraud against shareholders" provisions of the SOX whistleblower provision.

In *Getman*, 2003-SOX-8, an ALJ addressed the materiality requirement under the "any rule or regulation of the Securities and Exchange Commission" provision. The ALJ explained:

> Information is deemed material upon a showing that there is a substantial likelihood that the omitted facts would have assumed actual significance in the investment deliberations of a reasonable investor. A statement is misleading if the information disclosed does

> not accurately describe the facts, or if insufficient data is revealed.

Id. at 14 (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 240 (1988)). The ALJ found the materiality element was satisfied where complainant claimed she was pressured to change her rating because evidence showed that reasonable investors did rely on the respondent's rating in making investment decisions.

In *Harvey v. Home Depot, Inc*., 2004-SOX-20 (ALJ May 28, 2004), an ALJ discussed the materiality requirement under 18 U.S.C. § 1514A(a)(1)'s catchall, "any provision of Federal law relating to fraud against shareholders." The ALJ concluded that an employee complaint about alleged race discrimination that had "a very marginal connection with" (*e.g.*, did not materially affect) a corporation's accurate accounting and financial condition did not constitute activity protected under SOX. Initially, the ALJ found that the complaint plainly did not relate to mail fraud, wire fraud, bank fraud, securities fraud, or any violation of SEC rules. Therefore, the only conceivable relation to SOX was "an implicit argument . . . that a company which permits discriminatory practices despite its public policy of equal opportunity is acting contrary to the best interests of its shareholders," and therefore may implicate federal law relating to fraud against shareholders. *Id.* at 12. However, the ALJ found that the only federal law directly related to fraud against shareholders that could possibly be implicated was the SOX statute itself, which requires certification that a financial disclosure is accurate and does not contain any untrue statement of material fact. The ALJ concluded that, although a reported incident of discrimination within a publicly traded company that represents itself to be non-discriminatory may conceivably adversely affect the accuracy of corporate disclosures, "the connection becomes tenuous upon close examination of SOX." *Id.* For example, the ALJ found that individual discrimination does not reach the "materiality threshold in terms of a corporation's financial condition." *Id.* at 13 Additionally, the ALJ noted that the discrimination complaints at issue centered on the alleged *existence* of discrimination, not the company's *failure to report* such discrimination to the public. However, the ALJ suggested that "[p]erhaps, the failure to disclose a class action lawsuit based on systemic racial discrimination with the potential to sufficiently affect the financial condition of a corporation might become the subject of a SOX protected activity if an individual complained about the failure to disclose that situation." *Id.*

In contrast, in *Morefield*, 2004-SOX-2, the ALJ placed little emphasis on the materiality requirement under the catchall, "any provision of Federal law relating to fraud against shareholders." The ALJ denied respondent's motion to dismiss despite the fact that the amounts involved totaled less than .0001% of the annual revenues of the parent company. The ALJ reasoned that "[w]hether or not 'materiality' is a required element of a criminal fraud conviction as Respondents contend, we need be mindful that Sarbanes-Oxley is largely a prophylactic, not a punitive measure." *Id.* at 5. Therefore, "[t]he mere existence of alleged manipulation, if contrary to a regulatory standard, might not be criminal in nature, but it very well might reveal flaws in the internal controls that could implicate whistleblower coverage for seemingly paltry sums." *Id.*

4. Complaint to a Member of Congress

Senators Patrick Leahy and Charles E. Grassy, who co-authored the whistleblower provisions of the Act, have stated that the Act does not require there be an ongoing investigation of Congress or that the investigation be within the jurisdiction of any Congressional Committee. *See* Letter from Senators Leahy and Grassy to President George W. Bush (July 31, 2002). Likewise, in its interim regulations, the DOL has explained that the Act's protections extend to employees who complain to a Member of Congress "even if such member is not conducting an ongoing Committee investigation within the jurisdiction of a particular Congressional committee, provided that the complaint relates to conduct that the employee reasonably believes to be a violation of one of the enumerated laws or regulations." 68 Fed. Reg. 31861 (May 28, 2003) (explaining 29 C.F.R § 1980.102.).

Furthermore, in one recent decision, the DOL concluded that an employee's complaints to a Member of Congress constituted protected activity under the whistleblowing provisions of various environmental statutes, even though the Member was not conducting an official investigation. *See Sasse v. Office of the U.S. Attorney*, 1998-CAA-7 (ALJ May 8, 2002). The employee was an Assistant U.S. Attorney who alleged he was retaliated against by his Department of Justice supervisors because he investigated and prosecuted environmental crimes. In the course of his work, the Assistant U.S. Attorney complained to Congressman Dennis Kucinich about contaminated land by the Cleveland Hopkins International Airport. The ALJ concluded that the Assistant U.S. Attorney was engaging in protected activity despite the fact that Congressman Kucinich was not engaged in a duly authorized investigation. The ALJ found the Congressman was not in the employee's chain of command and that the employee's dealings with the Congressman were not a part of his normal work duties. Because he risked his "own personal job security for the advancement of the public good by disclosing abuses by government personnel," the employee demonstrated that he had engaged in protected activity.

5. "Information"

It is questionable whether employees who report already public information are engaging in protected activity under the Act. For instance, in applying the WPA, courts have determined that employees who report publicly known information are not engaging in protected activity. *Francisco v. Office of Pers. Mgmt.*, 295 F.3d 1310, 1314 (Fed. Cir. 2002); *Meuwissen v. Dep't of the Interior*, 234 F.3d 9, 12-14 (Fed. Cir. 2000). Likewise, a plaintiff bringing a *qui tam* suit under the FCA must be the "original source" of the information. 31 U.S.C. § 3730(e)(4)(A); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co*., 944 F.2d 1149, 1160 (3d Cir. 1991). Under the FCA, if a claim is based solely on information that has been publicly disclosed, the suit is barred. *Prudential Insurance Co*., 944 F.2d at 1160 (explaining the "public disclosure bar" in the FCA context). If these cases are any indication, it is unlikely that the Act's protections extend to the disclosure of public information.

6. "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).

There is little guidance to date on the parameters of this Section. However, in Gonzalez III, 2004-SOX-39, the complainant, former chairman of the local bank advisory board, allegedly informed two executive employees of the respondent bank (a regional CEO an regional president) that a lending company they had formed possibly violated banking laws, was a fraud against shareholders, and violated their employment contracts. The respondent moved for summary decision on the fact that the complainant testified that 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 the complainant's testimony, the ALJ found a genuine issue of material fact existed as to whether the CEO had authority over the complainant, or vice versa.

Moreover, the *Gonzalez* ALJ rejected respondent's argument that the complainant did not "provide information" to the executives because, even if he did inform the executives that the lending company was unlawful, they obviously already knew about it and therefore were not "person[s] working for the employer who has the authority to investigate, discover or terminate misconduct." The ALJ found that while the executives clearly knew about the lending company they had formed, the evidence showed the complainant had advised them to sell it or shut it down because of possible violations of banking and mail fraud laws, and that this type of communication was protected by the SOX whistleblower provision.

Notwithstanding *Gonzalez*, open issues for litigation include:

- How broadly will courts interpret who has "supervisory authority" over the employee? Just those in the chain-of-command or does the term include higher level supervisors even if located in a different department, division, state or country?
- If the complainant is a low level employee, could a broad interpretation of "supervisory-authority" include any first-line supervisor even if that supervisor has little knowledge of the employee's work environment necessary to assess the employee's claims?
- How will courts define who will be considered "such other person working for the employer who has authority to investigate, discover, or terminate misconduct?" It seems obvious this is intended to include human resources or certain risk management professionals, but will it also be deemed to include in-house counsel? External counsel, consultants or other agents of the company?

B. 18 U.S.C. § 1514A(a)(2)

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. There is not yet any case law under this provision of the Act defining the range of activities that are covered. Still, while this 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).

As the case law develops, there may be some surprises under this provision. For example, the "participation clause" protects against retaliation any employee who is involved in proceedings that implicate possible violations of any SEC rule or regulation – not merely rules or regulations relating to shareholder fraud, and not merely rules relating to publicly-traded corporations that are the prime target of SOX protections. Furthermore, employee involvement in a proceeding is protected if it involves violations of any federal law that touches on shareholder fraud, a provision that is not limited to laws enforced by the SEC. While it is likely that most complaints under the "participation clause" will originate with employees who are participating in familiar whistleblower-type proceedings, the broad language of the clause suggests that involvement in other types of proceedings may be protected as well.

V. VIOLATIVE CONDUCT - RETALIATION

A. Statutory Language

No 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 because of any lawful act done by the employee" to blow the whistle on a violation of the federal securities laws. 18 U.S.C. § 1514A(a).

B. Proof Issues

There is little case law under SOX as yet concerning the precise parameters of what constitutes unlawful retaliatory conduct. *See, however, Willis v. Vie Financial Group, Inc.*, 2004 WL 1774575 (E.D. Pa. Aug. 6, 2004) (loss of job responsibilities is a change in employment conditions sufficient to constitute an adverse action under the Act).

Case law under other whistleblower statutes and under various discrimination laws is well developed and should serve as a guide to the DOL and the courts.

1. Prior knowledge, particularly by the decisionmaker, of plaintiff's protected conduct.

    a. *See*, *e.g.*, *Mato v. Baldauf*, 267 F.3d 444, 450-52 (5th Cir. 2001) (retaliation not shown by plaintiff terminated allegedly for assisting co-workers in filing sexual harassment complaints, where no evidence of knowledge by decisionmaker); *Alexander v. Wisconsin Dept. of Health & Family Servs.*, 263 F.3d 673, 688 (7th Cir. 2001) (plaintiff's suspension just one day after his complaint

with personnel commission insufficient to establish retaliation, where no evidence decisionmakers had knowledge of his complaint); *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 831-32 (6th Cir. 1999) (plaintiff could not show individuals responsible for shift transfer on which she based her Title VII claim were aware of her earlier sexual harassment complaint at time of decision). *But see Gordon v. New York Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000) (district court erred in charging jury that agents had to know of protected activity; sufficient if agent found to be acting on orders of superior with knowledge); *Donlon v. Group Health Inc.*, No. 00 CIV 2190 MBM, 2001 WL 111220, at *3 (S.D.N.Y. Feb. 8, 2001) (general corporate knowledge established when supervisor who approved discharge decision knew employee had engaged in protected activity).

b. *See*, *e.g.*, *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1122 (5th Cir. 1998) (causal link between protected activity and allegedly retaliatory act "can be severed if there is evidence that the ultimate decisionmaker did not merely 'rubber stamp' the recommendation of the employee with knowledge of the protected activity, but conducted an independent investigation into the circumstances surrounding the employee's termination"); *Jackson v. Missouri Pac. R.R. Co.*, 803 F.2d 401, 407 (8th Cir. 1986) (no retaliation claim where, even though discharge occurred five months after filing of lawsuit, plaintiff was terminated after investigation by someone who did not know plaintiff had filed suit). *But see Bergene v. Salt River Project*, 272 F.3d 1136, 1141 (9th Cir. 2001) (evidence of retaliation where plaintiff's former supervisor, who threatened plaintiff with denial of foreman position if she held out for too much money in settlement negotiations for her pregnancy-discrimination claim, played influential role in selection process, even if he was not decisionmaker).

2. Causal nexus.

a. Knowledge alone not sufficient.

See, *e.g.*, *Gibson v. Old Town Trolley Tours, Inc.*, 160 F.3d 177, 182 (4th Cir. 1998) (decisionmaker's knowledge of plaintiff's race and age discrimination complaint did not establish retaliation absent evidence that plaintiff's "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 ("knowledge on an employer's part . . . cannot itself be sufficient to take a retaliation case to the jury").

b. Temporal proximity.

SOX Case: *Heaney v. GBS Properties LLC d/b/a Prudential Gardner Realtors*, 2004-SOX-00072 (December 2, 2004) (complaint dismissed because, *inter alia*, no temporal proximity between complainant's concerns and his termination).

SEE:

Raggs v. Mississippi Power & Light Co., No. 00-60874, 2002 WL 13632, at *7 (5th Cir. Jan. 3, 2002) (seven-year time lapse between plaintiff's EEOC claim and termination, given intervening positive evaluation, undermined any causal connection); *Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 443 (4th Cir. 1998) (14-year gap too long); *Chavez v. City of Arvada*, 88 F.3d 861, 866 (10th Cir. 1996) (absent strong evidence to contrary, a retaliatory inference cannot be drawn where more than a three-year gap between protected activity and adverse employment decision); *EEOC v. Cherry-Burrell Corp.*, 35 F.3d 356, 359 (8th Cir. 1994) ("passage of seven years blunts any inference" of retaliation).

AND:

Filipovic v. K&R Express Sys., Inc., 176 F.3d 390, 398-99 (7th Cir. 1999) (summary judgment for employer on Title VII retaliation claim where four-month gap between plaintiff's filing of EEOC charge and termination); *Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (13-month interval between charge and termination too long); *Parkins v. Civil Constr. of Ill., Inc.*, 163 F.3d 1027, 1039 (7th Cir. 1998) (no *prima facie* showing of causal connection between employee's complaint of sexual harassment in August and the subsequent layoff in November of same year).

BUT SEE:

Farrel v. Planters Lifesavers Co., 206 F.3d 271, 281 (3d Cir. 2000) (reversing summary judgment for employer; "'causation, not temporal proximity . . . is an element of plaintiff's *prima facie* case, and temporal proximity . . . merely provides an evidentiary basis for which an inference can be drawn'") (internal citations omitted); *Hunt-Golliday v. Metropolitan Water Reclamation Dist.*, 104 F.3d 1004, 1014 (7th Cir. 1997) (reversing summary judgment where "pattern of criticism and animosity" by plaintiff's supervisors began shortly after plaintiff's complaint of discrimination); EEOC Guidelines, Vol. 2, Sec. 8-II, E.2 (even where time lapse between protected activity and adverse action is

long, employee still may establish retaliation claim if there is other evidence that raises inference of retaliation, such as frequent comments about the protected activity during that period).

AND:

King v. Preferred Tech. Group, 166 F.3d 887, 893 (7th Cir. 1999) (plaintiff, discharged one day after returning from FMLA leave, established causal connection sufficient for *prima facie* showing): *Quinn v. Green Tree Credit Corp*, 159 F.3d 759, 769 (2d Cir. 1998) (*prima facie* case established where plaintiff discharged less than two months after filing internal complaint of sexual harassment and 10 days following her complaint to New York State Division of Human Rights); *Berman v. Orkin Exterminating Co.*, 160 F.3d 697, 702 (11th Cir. 1998) (several-month long time period between EEOC filing and two involuntary transfers sufficient to establish *prima facie* case of retaliation).

3. Performance problems.

See, *e.g.*, *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87, 95 (2d Cir. 2001) ("Where . . . gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise."), *cert. denied*, 534 U.S. 951 (2001); *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769-70 (2d Cir. 1998) (no retaliation where plaintiff had history of rudeness toward clients and co-workers resulting in negative performance evaluation); *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511-12 (7th Cir. 1998) (upholding summary judgment where employer had begun documenting plaintiff's performance problems long before she made complaint); *Jackson v. Delta Special Sch. Dist.*, 86 F.3d 1489, 1494 (8th Cir. 1996) (affirming JNOV notwithstanding close temporal proximity and damaging direct evidence because record of insubordinate activity long before plaintiff's EEOC complaint).

4. Previously planned decisions.

See, *e.g.*, *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (no causal connection where employer was contemplating transfer before learning of suit); *Pipkins v. City of Temple Terrace*, 267 F.3d 1197 (11th Cir. 2001) (holding that city employee whose job performance evaluations plummeted after she ended a consensual sexual relationship with a city official failed to make a *prima facie* case of retaliation because "[e]ven assuming . . . [she] suffered an adverse employment action, any protected expression on her part occurred only after the commencement of the adverse employment actions of which she complained."); *Workman v.*

Frito-Lay, Inc., 165 F.3d 460, 470 (6th Cir. 1999) (Guy, J., concurring) (employer's position concerning plaintiff's ability to return to work with or without reasonable accommodation remained essentially the same before and after she filed EEOC charge).

VI. PROCEDURES

A. Procedures and Burden of Proof

- **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.

- **Agency Interpretations**

On May 28, 2003, the Department of Labor issued interim final regulations and, on August 24, 2004, its Final Rule clarifying the procedures to be applied in SOX whistleblower retaliation actions. OSHA's Whistleblower Investigations Manual ("OSHA Manual"), issued August 22, 2004 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.

1. Filing of Complaint

a. 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. 29 CFR § 1980.103(c). However, OSHA suggests that complaints may be filed "with any official of the U.S. Department of Labor. . . ." OSHA Manual, at 1-2 (Aug. 22, 2003).

b. 90-Day Statute of Limitations

The complaint must be filed within 90 days of the alleged violation. 18 U.S.C. § 1514A(b)(2)(D). "Filed" has been interpreted as meaning when the complaint is received by the DOL. *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).

Complaints must be in writing and should include a full statement of the alleged violations. 29 CFR § 1980.103(b). In *Foss v. Celestica, Inc.*, 2004-SOX-4 (ALJ Jan. 8, 2004), an ALJ explained that unwritten complaints will not be considered and held that a telephone call to the DOL within the 90-day timeframe was not sufficient.

The 90-day limitation period commences on the date the alleged violation occurs. 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). *See also Lawrence v. AT&T Labs*, 2004-SOX-65 (ALJ Sept. 9, 2004) (statute of limitations begins to run "when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided") (citations omitted); *Flood v. Cedant Corp.,* 2004-SOX-16, at 2 (ALJ Feb. 23, 2004) (statute of limitations began to run on date complainant was notified of termination, not on date termination became effective); *Halpern v. XL Capital, Ltd.*, 2004-SOX-54, at 4 (ALJ June 7, 2004) ("[T]he statute of limitations begins to run once the employee is aware or reasonably should be aware of the employer's decision."); *Wintrich v. American Airlines, Inc*., 2004-AIR-1, at 2 (ALJ Dec. 30, 2003) ("it is when the employee is aware or reasonably should be aware of the employer's decision"); *Brune v. Horizon Air Industries, Inc*., 2002-AIR-8, at 9 (ALJ Dec. 16, 2003) ("[t]he period begins to run when the employer takes the adverse action, not when the employee engaged in the protected activity"); *Walker v. Aramark Corp*., 2003-SOX-22, at 3 (ALJ Aug. 26, 2003) ("[t]he act occurs on the day it happens and a charge must be filed within 90 days of that happening").

In *Murray*, the court expressed that a federal district court lacks jurisdiction over a SOX retaliation complaint if the plaintiff failed to file the original complaint with the DOL within 90 days of the alleged violation. 279 F. Supp. 2d at 802.

In *Mehen v. Delta Air Lines*, 2003-AIR-4 (ALJ Feb. 24, 2003), the adverse action allegedly occurred on March 6, 2002, when the employee's request for an extension of her COBRA benefits was denied. This decision was communicated to the employee by letter. The employee did not file her complaint until July 5, 2002, more than 90 days after the alleged denial. However, the ALJ held that the complaint was timely because the letter was incorrectly addressed, and therefore it was plausible that the complainant did not receive it until April 9, 2002, within the 90-day statute of limitations. *Id.* at 5.

In *Swenk v. Exelon Generation Co., LLC*, 2003-ERA-30 (ALJ Nov. 13, 2003), an employee's unescorted access to the employer's nuclear power plant was suspended on November 5, 2002, effectively terminating his employment. Until January 8, 2003, the employer

allowed him to seek employment opportunities that did not require unescorted access while also considering his internal appeal of the suspension. The ALJ held that the adverse action occurred on November 5; therefore, his June 4, 2003 complaint was untimely.

c. Equitable Tolling

OSHA opines that the 90-day filing period may be equitably tolled for "certain extenuating circumstances." OSHA Manual, at 2-4. 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 2-4, 5.

ALJs have addressed the issue of whether the 90-day filing period may be equitably tolled. In *Taylor v. Express One International, Inc*., 2001-AIR-2 (ALJ Feb. 15, 2002), an ALJ held that filing the complaint with the wrong agency, in that case the FAA, was sufficient basis for tolling the 90-day time limit for filing a complaint under AIR21. The ALJ noted that the improperly filed complaint raised the statutory claim in issue and the complainant had filed his complaint without the assistance of legal counsel. *Id.* at 30.

In *Trechak v. American Airlines, Inc*., 2003-AIR-5 (ALJ Aug. 8, 2003), an ALJ held that a complaint was not timely filed, and there was no basis for equitably tolling the 90-day filing time limit, where the complainant could not show that the defendant actively misled her respecting the cause of action or that she had in some extraordinary way been prevented from asserting her rights. The ALJ also noted that she had not raised "the precise statutory claim in issue" but had mistakenly done so in the wrong forum. *Id.* at 7-8.

In *Moldaver v. Canandaigua Wine Co.*, 2003-SOX-26 (ALJ Nov. 14, 2003), an ALJ accepted that the 90-day filing period may be equitably tolled, but held that the complainant's voluntary departure from the country and ignorance of law did not warrant equitable tolling. Moreover, although the complainant filed a complaint with another agency, the ALJ found that the complaint did not specifically allege facts that would support a SOX violation.

Finally, in *Wintrich v. American Airlines, Inc*., 2004-AIR-1 (ALJ Dec. 30, 2003), the ALJ held that the fact that the complainant was permitted to file an internal appeal of her termination pursuant to company policies did not delay the commencement of the running of the statute of limitations. *Id.* at 2. Therefore, the ALJ dismissed the complaint.

d. 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 90 days before the employee filed a complaint, even if they were related to acts that fall within the prescriptive period. The ALJ, citing *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), 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. *Id.* at 7. *See also Dolan v. EMC Corp.*, 2004-SOX-1, at 3 (ALJ Mar. 24, 2004) (applying *Morgan* to SOX claims and holding that retaliatory acts that took place outside the statute of limitation period are actionable only in hostile work environment claims).

In *Walker v. Aramark Corp*., 2003-SOX-22, at 3 (ALJ Aug. 26, 2003), the ALJ held that because the Complainant's first contact with OSHA was 105 days after his termination, OSHA properly dismissed his complaint because it was not timely filed. 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 his complaint regarding his termination timely because, under *Morgan*, these retaliatory actions constitute "discrete acts" and therefore the continuing violation doctrine would not apply. *See also Trechak v. American Airlines, Inc*., 2003-AIR-5, at 7 (ALJ Aug. 8, 2003) ("Discrete acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges").

In 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 90 days prior to the filing of a complaint may be timely where such conduct takes the form of an ongoing hostile work environment. *Id.* at 10. In *Brune*, the ALJ found that 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 as a pilot in command. Although some of the acts occurred outside the 90 days before the employee complained, the ALJ found that the actions collectively created a hostile work environment and "should be viewed as one unlawful employment practice." *Id.*

2. 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.[3] 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(b)(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.[4] 29 CFR § 1980.104(b)(2). Normally, this burden will be satisfied if the adverse action occurred "shortly after" the protected activity. *Id.* 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).

In *Taylor v. Express One Int'l, Inc.*, 2001-AIR-2 (ALJ Feb. 15, 2002), the ALJ stated that in order to establish a *prima facie* AIR21 case, the employee must demonstrate: (1) the employer is covered by the act; (2) the employee engaged in protected activity; (3) the employee suffered an adverse employment action; and (4) a nexus existed between the protected activity (as a contributing factor) and the adverse action, or circumstances are sufficient to raise an inference that the protected activity was likely a contributing factor in the adverse action.

In *Davis v. United Airlines, Inc.*, 2001-AIR-5 (ARB Apr. 25, 2002), the ARB, applying the same standard, expressed that the words "contributing factor" mean any factor, which alone or in connection with the other factors, tends to affect in any way the outcome of the decision. The ARB noted that this test is specifically intended to overrule the existing caselaw, which required a whistleblower to prove that his protected activity was a "significant," "motivating," "substantial," or "predominant" factor in an employment action.

The OSHA Manual provides that, although complaints which do not allege a *prima facie* allegation will not be docketed if the complainant indicates concurrence with the decision to close the case administratively, if the complainant refuses to accept this determination the case will be docketed and subsequently dismissed with appeal rights. OSHA Manual, at 2-2.

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[3] Once the claim proceeds to a hearing, the complainant must prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the adverse action alleged in the complaint. 29 CFR § 1980.109(a); *Harvey v. The Home Depot, Inc.,* 2004-SOX-77, n.4 (ALJ Nov. 24, 2004).

[4] The written complaint may be supplemented by OSHA's interviews of the complainant. 29 CFR § 1980.104(b)(1).

a. Particularity

In *Lerbs*, 2004-SOX-8, the ALJ granted the employer's motion for summary decision because the complainant, a "cash manager" for the restaurant, failed to show he engaged in protected activity, in part because one of his alleged complaints did not state a particular concern about the company's practices. Specifically, the employee allegedly asked the company's controller about certain entries in a general ledger that reclassified a negative cash account balance to accounts payable. On another occasion, he allegedly told the company's chief information officer that he thought the entry was misleading. The ALJ found that these remarks were more like general inquiries which were not protected under SOX.

In contrast, in *Collins*, 334 F. Supp. 2d 1365, a federal district court denied defendants' motion for summary judgment because it found a genuine issue of material fact existed as to whether the plaintiff had engaged in protected activity. The plaintiff made four disclosures which she alleged were protected by SOX: (1) that the company knowingly overpaid invoices to an advertising agency; (2) that the company used the ad agency because of a personal relationship between management and the agency; (3) that the Director of Sales violated the company's commissions scheme by overpaying sales agents who were her personal friends; and (4) that there were kickbacks involving the purchase of lumber. The plaintiff contended that these disclosures were protected because they alleged attempts to circumvent the company's system of internal accounting controls and therefore stated a violation of Section 13 of the Exchange Act, 15 U.S.C. § 78m(b) ("no person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls").

The *Collins* court rejected the company's assertion that the complaints were too vague to constitute protected activity, noting that the company had taken the allegations seriously and investigated the claims. Moreover, although the court agreed that "the connection of Plaintiff's complaints to the substantive law protected in Sarbanes-Oxley [wa]s less than direct," it found that "the mere fact that the severity or specificity of her complaints does not rise to the level of action that would spur Congress to draft legislation does not mean that the legislation it did draft was not meant to protect her." *Id.* at 1377.

3. 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).

According to the OSHA Manual, as part of the docketing procedures (after the 20-day preliminary determination period) 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 2-3. This suggests that the employer will not be notified until after the

investigator has already 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*, 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 ALJ, 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.

4. Notice to SEC

At the request of the SEC, copies of all pleadings must be sent to the SEC. 29 CFR § 1980.108(b). Moreover, a copy of OSHA's findings and determination must be transmitted to the SEC. OSHA Manual, at 14-5. Furthermore, the SEC may participate as *amicus curiae* at any time in the proceedings. 29 CFR § 1980.108(b).

5. 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(c). The respondent also must have the opportunity to meet with representatives of OSHA and present evidence in support of its position. *Id.*

If the respondent requests a meeting with OSHA, the respondent may be accompanied by counsel and "any persons with information about the complaint who may make statements." OSHA Manual, at 14-3.

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(c); OSHA Manual, at 14-2. 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)).

In *Cunningham v. Tampa Electric Co., Inc.,* 2002-ERA-24 (ALJ Dec. 18, 2002), an ALJ described this defense as a "statutory adoption of the dual or mixed motive analysis in *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 287 (1977)." However, the statute establishes a higher "clear and convincing evidence" standard. 49 U.S.C. § 42121(b)(2)(B)(ii).

In *Taylor v. Express One International, Inc.*, 2001-AIR-2 (ALJ Feb. 15, 2002), the ALJ observed that although there is no precise definition of "clear and convincing," "the Secretary and the courts recognize that this evidentiary standard is a higher burden than preponderance of the evidence but less than beyond a reasonable doubt." *Id*. at 28.

6. 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 if there is reasonable cause to believe that the respondent discriminated against the complainant in violation of the statute. 29 CFR § 1980.104(d); 1980.105(a). Although the statute mandates investigation within 60 days, OSHA recognizes that "there may be instances when it is not possible to meet [this mandate.]" OSHA Manual, at 14-4.

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 1-2.

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.*, 2004 WL 1900368 (D. Or. Aug. 25, 2004) (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").

- **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 § 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). This "preliminary order of reinstatement" mechanism is parallel to provisions found in AIR21, the ERA and the Surface Transportation Assistance Act ("STAA"), though most DOL-enforced whistleblower statutes do not provide for preliminary reinstatement.

If preliminary, immediate reinstatement is to be ordered, 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(e). The named party must be given an opportunity to provide a written response and to present rebuttal witness statements within 10 days. *Id*.; OSHA Manual, at 14-3.

In *Brock v. Roadway Express, Inc*., 481 U.S. 252 (1987), the Court interpreted a similar pre-hearing reinstatement provision in Section 405 of the Surface Transportation Assistance Act of 1982. The Court held that minimal due process is satisfied where a DOL reinstatement order provides the respondent with: (1) notice of the employee's allegations; (2) notice of the substance of the relevant supporting evidence; (3) an opportunity to submit a written response; and (4) an opportunity to meet with the investigator and present statements from rebuttal witnesses. The Court held that the employer's presentation need not be formal, and cross-examination of the employee's witnesses need not be afforded prior to temporary reinstatement. *Id.* at 264.

The summary of the interim regulations suggests that the "after-acquired evidence" defense is available to defeat reinstatement where evidence shows that the employer would have terminated the employee on lawful grounds, regardless of the protected activity, on the basis of subsequently obtained information. *See* 68 Fed. Reg. 31861 (citing *McKennon v. Nashville Banner Publishing, Co.*, 513 U.S. 352, 360-62 (1995)).

In the summary of its Final Rule, OSHA confirmed that "[w]here the named person establishes that the complainant would have been discharged even absent the protected activity, there would be no reasonable cause to believe that a violation has occurred. Therefore, a preliminary reinstatement order would not be issued." 69 Fed. Reg. 52108.

Another exception to reinstatement is where it can be established that the complainant is a "security risk (whether or not the information is obtained after the complainant's discharge)." 29 CFR § 1980.105(a)(1), 69 Fed. Reg. 52114. OSHA explained that this exception is to be narrowly construed. It is based on a similar provision added to the AIR21 regulations in response to the events of September 11, 2001. Accordingly, according to OSHA, it should only be applied where reinstatement might result in "physical violence" against persons or property. 69 Fed. Reg. 52109.

7. 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)(2).

Objections must be filed with the Chief ALJ of the DOL 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.

In *Bodine v. International Total Services*, 2001-AIR-4 (ALJ Nov. 20, 2001), the ALJ dismissed the respondent's objections because its filing was five (5) days beyond the deadline. However, in *Swint v. Net Jets Aviation, Inc*., 2003-AIR-26 (ALJ July 9, 2003), the ALJ decided that the 30-day objection period is subject to equitable tolling. Nonetheless, the ALJ

ultimately held that tolling was inappropriate because the complainant failed to demonstrate that his untimeliness fell within one of "the circumscribed equitable tolling 'exceptions.'" *Id.* at 8.

Likewise, 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 *Lerbs* ALJ 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 International, Inc.*, 2004-SOX-49, at 10-11 (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).

8. 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*, ARB No. 02-109, ALJ No. 2002-SWD-1 (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 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*. 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

Under SOX, 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. *See* 29 CFR § 1980.106(b)(1) (ALJ); 29 CFR § 1980.110(b) (ARB).

c. ALJ Can Limit 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 (ARB 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). Sanctions, including dismissal of the complaint, are available for failure to participate in discovery. *See Harnois v. American Eagle Airlines*, 2002-AIR-17, at 4 (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 as to 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).

Although SOX is silent as to 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) (following *Childers v. Carolina Power & Light Co*., ARB Case No. 98-77, ALJ Case No. 97-ERA-32 (ARB Dec. 29, 2000) (ruling that ALJs have inherent power to issue subpoenas when a statute requires a formal trial-like proceeding)); *Hill v. Tennessee Valley Authority*, 87-ERA-23 and 24 (ALJ Apr. 17, 1990). 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 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 International, 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); *see also United States v. Allis Chalmers Corp*., 498 F. Supp. at 1027, 1029 (E.D. Wis. 1964) (citing *United States v. Morton Salt Co*., 338 U.S. 632, 70 S. Ct. 357, 94 L.Ed. 401 (1950)).

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." 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.

In general, 29 CFR § 18.5(e) of the OALJ Rules of Practice governs amendment of "complaints, answers and other pleadings" before an ALJ. A "complaint," within the ambit of the Rules of Practice, is "any document initiating an adjudicatory proceeding." 29 CFR § 18.2(a). Because an initial OSHA complaint does not initiate an adjudicatory proceeding, it would appear that, under the plain language of the Rules, it is not subject to amendment under 29 CFR § 18.5(e). However, ALJs generally have not adhered to a strict interpretation of this text. Relation-back of amendments is governed by FED.R.CIV.P. 15(c), although ALJs have been inconsistent in its application.

- **Additional Claims**

It is fairly clear that a SOX complaint filed in federal court after the expiration of 180 days generally must be limited in scope to the claims identified in the initial OSHA complaint.

For example, in *Willis v. Vie Financial Group, Inc*., 2004 U.S. Dist. LEXIS 15753, 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. In *Willis*, the complainant was terminated after he filed his initial OSHA complaint, but never sought to amend his administrative complaint nor did he ever file a new complaint with OSHA. Only when complainant removed the action to federal court did he attempt to add his termination claim. The court dismissed, reasoning that the SOX administrative scheme, unlike the Title VII administrative scheme, "is judicial in nature and is designed to resolve the controversy on its merits. . . ." *Id* at *15. The court also noted that, if the plaintiff had chosen to pursue administrative, as opposed to federal district court, adjudication, he could not have added the subsequent claim during an appeal to the ARB if it had not been before the ALJ.

The question of whether a complainant may add claims in an *ALJ* proceeding after OSHA has issued its initial determination was answered in the negative in *Ford v. Northwest Airlines, Inc*., 2002-AIR-21 (ALJ Oct. 18, 2002). In *Ford*, an ALJ denied complainant's attempt to amend his complaint to include evidence of retaliatory adverse action that was not presented during the OSHA investigation. The ALJ reasoned that 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." *Id*. at 8 n.3. The ALJ concluded:

> I will not arbitrarily usurp the system established by Congress and determine the legitimacy of this allegation in the first instance. A better procedure is to make the initial complaint to OSHA and then move to consolidate the complaint with litigation pending before the OALJ.

Id.

Likewise, in *Kingoff v. Maxim Group LLC*, 2004-SOX-57 (ALJ July 21, 2004), the complainant, after OSHA issued its initial determination, attempted to add constructive discharge claims before the ALJ. The ALJ found that the constructive discharge claims were of a drastically different type from those contained in the initial complaint and were clearly untimely under the SOX whistleblower provision. The ALJ held that the belated claims could not, consistent with due process, be considered in the matter before the ALJ.

Similarly, in *Roulett v. American Capital Access*, 2004-SOX-00078 (ALJ Dec. 22, 2004), the ALJ refused to permit the complainant to amend his complaint after the expiration of the 90-day statute of limitations period to include an unfavorable compensation claim where the claim was not reasonably related to complainant's termination claim in his original complaint.

In contrast, in *Hooker v. Westinghouse Savannah River Co*., ARB No. 03-036, ALJ No. 2001-ERA-16 (ARB Aug. 26, 2004), a *pro se* complainant failed to allege his refusal-to-rehire claim in his initial ERA discrimination complaint, although he did testify to this in his deposition. The ALJ *sua sponte*, noting the complainant's *pro se* status and the fact that respondent did not contest the court's motion, amended the complaint to include the refusal-to-rehire allegation. On review, the ARB did not contest the *sua sponte* amendment, but explained that the proper procedure for amending complaints is found at 29 CFR § 18.5(e), which the ALJ ignored in the decision.

On a related issue, the ALJ in *Morefield v. Exelon Servs. Inc*., 2004-SOX-2 (ALJ Jan. 28, 2004), concluded that, although new *violations* generally may not be raised after 90 days, "the scope of an OSHA investigation does not establish boundaries of the factual inquiry permitted in the subsequent adjudication." Therefore, the ALJ found that there is no transgression of the "two tiered" administrative scheme for handling whistleblower claims where an ALJ considers *evidence* not raised at the OSHA investigation phase. The ALJ reasoned that the statute and regulations permit discovery and a *de novo* hearing of the facts relating to both the protected activities and the reasons for the adverse action regardless of OSHA's findings.

- **Additional Parties**

In *Hanna v. WCI Cmtys., Inc.*, 2004 U.S. Dist. LEXIS 25652 (S.D. Fla. Nov. 18, 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."

In contrast, complainants' attempts to add new respondents before the *ALJ* subsequent to an initial determination by OSHA have met with mixed results.

First, 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 that 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 more than 90 days after the alleged violation.

In contrast, in *Gonzalez v. Colonial Bank,* 2004-SOX-39 (ALJ Aug. 17, 2004), the ALJ, citing 29 CFR § 18.5(e) of the OALJ Rules of Practice, permitted complainant to amend his initial OSHA complaint to include as a respondent the publicly held parent company of his employer. Further, the ALJ, citing FED.R.CIV.P. 15(c), permitted the amendment to relate back to the date of the initial OSHA complaint, thereby rendering the claims against the parent corporation timely. The ALJ reasoned that, although the complainant was aware of the identity and role of the parent company from the outset, "amending the complaint filed before OSHA by adding . . . the parent company . . . as a respondent comports with the purpose of Rule 15(c) and the purpose of the Act."

Likewise, in *Gallagher v. Granada Entertainment USA and ITV plc*, 2004-SOX-74 (ALJ Oct. 19, 2004), the ALJ, citing no authority, stated that "[i]ndividuals and entities may be added as parties when they were not joined below through error." The ALJ permitted the complainant to add as respondents the individual executives of the named corporate respondent who were named as those who terminated the complainant's employment. Although the ALJ observed that the initial OSHA complaint is "not a pleading under Rule 8(a), Fed. R. Civ. P., but a complaint in the ordinary sense, . . ." the ALJ did not reconcile this observation with 29 CFR § 18.5(e), which only grants the ALJ discretion to permit amendments to "complaints, answers and other pleadings, as defined by the Rules." The ALJ denied the complainant's attempt to add as individual defendants other employees who were not the complainant's "superiors."

The *Gonzalez* and *Gallagher* decisions illustrate why a complainant might choose to pursue agency adjudication rather than removing to federal district court after 180 days. For example, if the complainant in *Gonzalez* had removed to federal court, the court, consistent with the reasoning in *Willis* and *Hanna*, likely would have held that the administrative exhaustion requirement of the SOX whistleblower provision precluded addition of the parent corporation as a defendant. Moreover, in federal court, the OSHA administrative complaint clearly would not have been subject to amendment under FED.R.CIV.P. 15(a). *See* FED.R.CIV.P. 3 ("complaint" is a document filed with the court that commences a "civil action"). Finally, the applicable federal district court would have been bound by Eleventh Circuit precedent. *See Powers v. Graff*, 148 F.3d 1223, 1226-27 (11th Cir. 1998) (Rule 15(c) does not permit relation back where the plaintiff

was "fully aware of the potential defendant's identity but not of its responsibility for the harm alleged. . . . '[E]ven the most liberal interpretation of "mistake" cannot include a deliberate decision not to sue a party whose identity plaintiff knew from the outset.'") (quoting *Wells v. HBO & Co*., 813 F. Supp. 1561, 1567 (N.D. Ga. 1992)).

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 No. 03-048, ALJ No. 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 which 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 act 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 No. 03-048, ALJ No. 2002-CAA-5 (ARB Aug. 31, 2004) (granting summary decision where complainant responded with "little more than conclusory statements").

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 4-3.

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."

- **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 a retaliatory act had occurred within the SOX limitations period. The letter was written in response to a letter from complainant's counsel arguing that the evaluation was false and defamatory and suggesting the employer should settle. The employer contended its counsel's letter was inadmissible as part of

settlement negotiations under FRE 408. The ALJ disagreed. The ALJ found that the policy favoring exclusion of settlement documents was to prevent chilling of nonlitigious solutions to disputes, and that exclusion is not required where the evidence is offered for a purpose other than to prove liability or damages. In the case at hand, 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 *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (ALJ Aug. 1, 2003), the ALJ granted the complainant's request that the employer produce, *in camera*, unredacted copies of the minutes of joint meetings of several Audit Committees. Nearly 50% of the text of the minutes produced by the employer during discovery had been redacted and the words "redacted – attorney client privilege" inserted in the blank portions of the documents. The ALJ, relying on Fourth Circuit precedent, ruled that the employer had not met its burden to demonstrate that the attorney-client privilege was applicable to the redacted portions of the minutes. Thereafter, in a decision reported at 2003-SOX-15 (ALJ Aug. 15, 2003), the ALJ determined, after inspection, that the privilege had not been properly invoked. Although two of the employer's attorneys had made statements before the Audit Committees, none of those statements contained confidential client communications made by the employer. Rather, their statements were, in large part, "descriptions of verbal and written communications *made by or to Complainant*, and actions *taken by him*, with respect to his concerns about alleged improprieties at the bank." Slip op. at 4 (emphasis in original).

- **Reconsideration**

The SOX regulations suggest that ALJs have the authority to reconsider within 10 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 and 10 (ALJ Aug. 21, 2001); *Macktal v. Brown & Root, Inc*., 86-ERA-23 (ARB Nov. 20, 1998). However, in *Negron v. Vieques Air Link, Inc*., ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Jan. 8, 2004), the ARB found that once a party filed 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 that she did not have jurisdiction to rule on a motion to reconsider when the complainant also filed on the same day an appeal to the ARB.

9. 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). Review is discretionary. 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 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 becomes effective while review is conducted. 29 CFR § 1980.110(b).

The ARB acts in an appellate capacity and its decision is based only on evidence considered by the ALJ in the initial hearing. No discovery is available. *See Reid v. Constellation Energy Group, Inc*., ARB No. 04-107, ALJ No. 2004-ERA-8 (ARB Oct. 13, 2004); *Halpern v. XL Capital, Ltd*., ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Oct. 13, 2004); *Cummings v. USA Truck, Inc*., ARB No. 04-043, ALJ No. 2003-STA-47 (ARB Sept. 15, 2004). The ARB holds its proceedings in Washington, DC, 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). There is no provision on oral argument before the ARB under the SOX regulations, and the absence of such a provision implies that granting oral argument is within the discretion of the ARB. *Varnadore v. Oak Ridge National Laboratory*, ARB No. 99-121, ALJ Nos. 1992-CAA-2 and 5, 1993-CAA-1, 1994-CAA-2 and 3, 1995-CAA-1 (ARB June 9, 2000). The ARB does not currently have its own procedural regulations.

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*. *Negron v. Vieques Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003-AIR-10 (ARB Jan. 8, 2004); *Hasan v. J.A. Jones, Inc.*, ARB No. 02-123, ALJ No. 2002-ERA-5 (ARB June 25, 2003). However, the ARB recently held that ALJ 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 Nos. 03-156 and 04-065, ALJ Nos. 2003-STA-6 and 2004-STA-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 expressed that this 120-day period is directory and not jurisdictional. *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, 2003-SOX-15 (ARB May 13, 2004).

- **Timeliness of Appeal**

In *Svendsen v. Air Methods, Inc*., ARB No. 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*, 2002-AIR-7, at 2 (ARB July 29, 2003); *Herchak v. America West Airlines, Inc*., 2002-AIR-12, at 5 (ARB May 14, 2003).

- **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., Welch v. Cardinal Bankshares Corp*., ARB No. 04-054, ALJ No. 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 No. 03 106, ALJ No. 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).

To obtain review of an ALJ's interlocutory order, a party seeking review is generally required to first obtain certification of the interlocutory questions from the ALJ. *Somerson v. Mail Contractors of America*, ARB No. 02-118, ALJ No. 02-STA-44 (ARB Feb. 13, 2003); *Puckett v. Tennessee Valley Auth*., 2002-ERA-15 (ARB Sept. 26, 2002). An ALJ's authority to certify questions of law for interlocutory review is analogous to a federal district court's authority to certify a question to a court of appeals under 28 U.S.C. § 1292(b). *See Plumley v. Federal Bureau of Prisons*, 86-CAA-6 (Sec'y April 29, 1987). 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 *Ford v. Northwest Airlines, Inc*., 2002-AIR-21, at 4 (ARB Jan. 24, 2003), the ARB held that it may also decide to review non-final orders that fall within the limited "collateral order" exception as applied by the courts, under which "the order appealed must 'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.'"

In *Hibler v. Exelon Generation Co., LLC*, ARB No. 03-106, ALJ No. 2003-ERA-9 (ARB Feb. 26, 2004), and *Welch v. Cardinal Bankshares Corp.*, ARB No. 04-054, 2003-SOX-15 (ARB May 13, 2004), the ARB expressed that even if the ALJ certifies an issue for appeal under 28 U.S.C. § 1292, the ARB will still evaluate whether interlocutory appeal is appropriate under the collateral order exception. In *Welch*, the ARB refused to decide the issue of whether a failure to obtain certification is fatal to a request to file an interlocutory appeal.

- **Sanctions**

Failure to adhere to ARB orders, such as briefing schedules, may be grounds for dismissal. *See Reid v. Niagara Mohawk Power Corp*., ARB No. 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 No. 04-107, ALJ No. 2004-ERA-8 (ARB Dec. 17, 2004) (dismissing appeal for failure to comply with briefing schedule); *Powers v. Pinnacle Airlines, Inc*., ARB No. 04-035, ALJ No. 2003-AIR-012 (ARB Sept. 28, 2004) (Board dismissed Powers's appeal for failure to file a conforming brief), *appeal pending*, *Powers v. Department of Labor*, No. 04-4441 (6th Cir.); *Melendez v.*

Exxon Chemical Americas, ARB No. 03-153, 1993-ERA-6 (ARB Mar. 30, 2004); *Gass v. Lockheed Martin Energy Systems, Inc.*, ARB No. 03-093, ALJ No. 2000-CAA-22 (ARB January 29, 2004); *Steffenhagen v. Securitas Sverige, AR*, ARB No. 03-139, ALJ No. 2003-SOX-24 (ARB January 13, 2004).

- **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).

10. 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 set forth 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*., 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 that 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."

11. 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). 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).

In *Hanna v. WCI Cmtys., Inc.*, 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 2004), a federal district court in Florida explained that OSHA's "preliminary findings" do not constitute a "final" order even if issued within 180 days, rather a "final" order is obtained only when the ARB issues a final decision or if the plaintiff fails to appeal the preliminary order.

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. September 2, 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 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).

Fifteen (15) days in advance of filing an action in district court, the complainant must file a notice with the ALJ or ARB of his or her intention to file such a complaint, and serve such notice upon all parties. 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 (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."

- **Issues Relating To Removal**

An issue that is just beginning to be addressed is whether a complainant may remove an action to district court after receiving an adverse decision from an ALJ, but before completing the appeals process to the ARB, if the ARB has not issued its ruling within 180 days after the filing of the complaint. The DOL suggests that if the administrative process has resulted in a decision by an ALJ or the ARB even if after the expiration of 180 days, courts should apply the principles of collateral estoppel or res judicata in order to prevent the waste of resources resulting from duplicative litigation. 69 Fed. Reg. 52111. Similarly, the DOL suggests that where an administrative hearing has been completed and a matter is pending before an ALJ or the ARB for a decision, a district court should treat a complaint as a petition for mandamus and order the DOL to issue a decision under appropriate time frames. Id.

In *Hanna v. WCI Cmtys., Inc.*, 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 2004), OSHA issued its preliminary order after the expiration of 180 days but prior to the filing of the plaintiff's district court lawsuit. While acknowledging the DOL's concerns regarding waste of resources resulting from duplicative litigation, the court held that the plaintiff was not required to exhaust his administrative appeals prior to filing a lawsuit in federal district court. The court reasoned that the plaintiff had not yet even reached the ALJ stage of the administrative process. The result may have been different had the complainant proceeded further through the administrative process.

In *Barron v. Duke Energy Corp.*, No. 3:03-CV-256 (W.D.N.C. June 10, 2003), a federal district court in North Carolina acknowledged the availability of a stay or writ of mandamus in such a case. *See also Corrada v. McDonald's Corp*., No. 04-1029 (D.C.P.R. Jan.

22, 2004) (granting plaintiff's motion to stay the administrative proceedings and ordering ALJ to demonstrate whether the failure of the DOL to issue a final decision within 180 days was due to the bad faith of the complainant).

A related issue arises when a complainant pursues claims in other fora based on the same facts and seeking similar relief as the SOX claim. This issue is particularly relevant in the SOX context because SOX retaliation claims potentially give rise to other securities-related or shareholder derivative litigation as well as related actions under state whistleblower protection statutes. The text of SOX suggests that its whistleblower provisions do not preempt such state laws. See 18 U.S.C. § 1514A(d).

In *Gonzalez v. Colonial Bank*, 2004-SOX-39 (ALJ Aug. 9, 2004) (*Gonzalez I*), complainant filed a SOX whistleblower complaint with OSHA and several days later a state whistleblower action seeking similar relief on the same facts, which the respondent removed to a federal district court in Florida. The ALJ rejected respondent's argument that complainant was precluded from pursuing his OSHA claim because allowing the SOX case to proceed would have constituted impermissible "claim-splitting." The ALJ held that complainant's case was not barred by *res judicata* or claim-splitting as there was no prior judgment, the SOX claim was filed first, and most significantly, because the SOX action differed materially from the Florida whistleblower action.

In *Hanna v. WCI Cmtys., Inc*., 2004 U.S. Dist. LEXIS 25651 (S.D. Fla. Nov. 18, 2004), the court held that OSHA's *preliminary* findings are not entitled to *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) treatment in federal district court.

- **Jury Trial**

SOX does not expressly provide for a jury trial. However, 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).

In *Hanna v. WCI Cmtys., Inc*., 2004 U.S. Dist. LEXIS 25650 (S.D. Fla. Dec. 2, 2004), a federal district court in Florida acknowledged that SOX is silent as to whether a plaintiff may demand a jury trial, *and* that the issue was one of first impression. The court, however, refused to address the issue until and unless the parties' dispositive motions were denied, so that "the court might have the benefit of guidance from other courts that have considered the availability of jury trials under the Sarbanes-Oxley Act."

12. 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). Some earlier ALJ decisions addressing similar whistleblower provisions suggested that the traditional *McDonnell Douglas* burden-shifting framework might apply in SOX whistleblower actions. *See, e.g., Taylor v. Express One International, Inc.*, 201-AIR-2 (ALJ Feb. 15, 2002). More recent decisions, however, have rejected this notion, instead consistently employing a "mixed motive" type analysis.

For example, in *Collins*, 334 F. Supp. 2d 1365, 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." *Id.* 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.

Likewise, this mixed-motive standard has been consistently applied by a number of ALJs during the past year. *See, e.g., Platone v. Atlantic Coast Airlines*, 2003-SOX-27 (ALJ Apr. 30, 2004); *Getman v. Southwest Securities, Inc.*, 2003-SOX-8 (ALJ Feb. 2, 2004); *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (ALJ Jan. 28, 2004).

In *Williams v. Administrative Rev. Bd.*, 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.

In *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 (ALJ Jan. 28, 2004), the employer contended that its Chief Financial Officer was terminated because he refused to meet with Audit Committee investigators (including the company's outside counsel) without his personal attorney present to discuss concerns he had raised about the company's accounting practices. The employer claimed it did not allow an outside attorney to be present because the attorney's presence would destroy the confidentiality of the meeting and prevent attorney-client privilege from attaching to communications made at the meeting. In addition, the company believed the presence of the attorney would have changed the meeting from a fact-finding investigation into an adversarial process oriented toward the complainant's desire for a severance package. The ALJ found the employer to be disingenuous. The ALJ opined that the purpose of the meeting was not to conduct a legitimate inquiry into concerns raised by the CFO, but to create a situation where the CFO would refuse to attend the meeting, thus justifying his discharge. Moreover, the ALJ found, the company under the circumstances had no reasonable expectation that the information to be discussed was confidential, making the attorney-client privilege inapplicable. In any event, the CFO, as an officer, could waive the privilege:

> Welch, as Cardinal's CFO, was a corporate officer of Respondent. As such, he had a fiduciary duty to Cardinal and its shareholders to ensure, *inter alia*, that Respondent complied with all applicable laws and regulations governing the administration of financial institutions such as Cardinal, and to disclose any failure of Cardinal to do so. In furtherance of those duties, he raised a number of issues regarding various events which occurred at Cardinal during the Summer and early Fall of 2002, which events he reasonably believed constituted violations of Federal law. Each of the issues raised by Welch concerned matters under the direct auspices of the CFO and involved a variety of documents and information to which he had legitimate access.
>
> Clearly, the disclosure of perceived financial improprieties is in the best interests of a corporation's shareholders so they may ensure that the corporation's officers and directors are complying with, *inter alia*, their duties of good care, good faith, and loyalty. Furthermore, Sarbanes-Oxley was expressly enacted by Congress to foster the disclosure of corporate wrongdoing and to protect from retaliation those employees, officers, and directors who make such disclosures. When ordered by Moore to meet with Densmore and Larrowe to discuss the issues he had raised, Welch was clearly acting in furtherance of his fiduciary duty to disclose possible wrongdoing. Allowing him to have his own counsel present during the meeting would not only promote Welch's fulfillment of that duty, it would further the purposes of Sarbanes-Oxley by protecting Welch from retaliation for disclosing improprieties governed by the Act. As an officer of Cardinal, it thus was within his power to waive the attorney-client privilege consistent with his fiduciary duty to act in the best interests of Respondent. [Citation Omitted.]

13. 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).

According to OSHA, "[t]he information and statements obtained from investigations are confidential except for those which may be released under [FOIA] and the Privacy Act. . . ." OSHA Manual, at 1-7 - 1-8; 14-5. Generally, this means that case file material will remain confidential during the pendency of the agency "enforcement proceedings."

See 5 U.S.C. § 522(b). *See also Pruitt Electric Co. v. U.S. Dep't of Labor*, 587 F. Supp. 893, 895 (N.D. Tex. 1984).

However, after the case is closed, much of the case file material will be available for disclosure upon receipt of a FOIA request, a request from another federal agency, a request from an ALJ or through discovery procedures. OSHA Manual, at 1-8; 29 CFR § 70.3. For purposes of FOIA, a case file is "closed" once OSHA has completed its investigation and issues its determination (unless OSHA is participating as a party before the ALJ). OSHA Manual, at 1-8.

According to the December 5, 2003 *DOL OALJ Notice Regarding Public Access to Court Records and Publication of Decisions* ("Notice"), in order 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.

Moreover, if during the course of an investigation the employer identifies any materials obtained as a trade secret or confidential commercial or financial information, such information may be protected from disclosure "except in accordance with the provisions of Section 15 of the Act or similar protections under the other statutes." OSHA Manual, at 1-8.

However, in *Wallace v.*CH2M *Hill Group, Inc*., 2004-SWD-3 (ALJ Dec. 6, 2004), the ALJ expressed that pleadings, motions and materials filed in the record as evidence probably cannot be shielded from public disclosure, but directed the parties to negotiate the issue and, if unsuccessful, file a motion to seal in the same manner as before a federal district court. The ALJ pointed out the distinction between confidentiality concerns and privileges, and directed that if a privilege is claimed, privilege logs should be prepared.

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).

In *Lerbs v. Buca Di Beppo, Inc.*, 2004-SOX-8 (ALJ June 15, 2004), the employer sought dismissal of the complaint on the ground, *inter alia*, that SOX was not in effect at the time the complainant blew the whistle. The ALJ ruled that the retroactivity inquiry looks to the date of the alleged retaliatory act, which occurred post-SOX effective date, rather than the date of the protected activity.

C. ADR

While still an open issue, where there is an arbitration agreement, the DOL 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

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 referring the case for litigation. *OSHA Whistleblower Investigations Manual* 6-1.

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-0037 (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, as did 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 of 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 No. 04-001, ALJ No. 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*, 2004-SOX-17, 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.

- **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 6-5.

In *Chao v. Alpine, Inc*., No. 04-102-P-H (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 No. 02-105, ALJ No. 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. Civil

1. Equitable Relief

Section 806 of the Act provides that a prevailing employee is "entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c). The available damages "include" reinstatement with the same seniority the employee would have had but for the discrimination and back pay plus interest. Also included are "special damages sustained as a result of the discrimination." There is no express authority for emotional distress damages, but the ARB consistently has viewed emotional distress damages as falling within the "make whole" relief authorized under the whistleblower statutes within its jurisdiction. *See*, *e.g.*, *Van der Meer v. Western Kentucky Univ.*, ARB No. 98-132, ALJ No. 1995-ERA-38 (April 20, 1998).

The statute also does not authorize punitive damages, and punitive damages would not be considered as "relief necessary to make the employee whole." *See Hanna v. WCI Communities, Inc.*, 2004 WL 2931132 (S.D. Fla. December 2, 2004) (punitive damages are unavailable under SOX). Furthermore, punitive damages could not be constitutionally awarded in an agency proceeding. It has been the ARB's view that the DOL cannot award exemplary or punitive damages absent express statutory authorization. *See*, *e.g.*, *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 97-CAA-2 (Feb. 9, 2000).

In *Halloum v. Intel Corp.*, 2003-SOX-7 (ALJ Mar. 4, 2004), the employer, while preparing for hearing, discovered that the complainant had made a misrepresentation regarding moving expenses. The ALJ found that the misrepresentation could not have been a reason for the adverse employment action, as it was discovered later. Thus, according to the ALJ, such after-acquired evidence does not bar an employee for prevailing on the issue of retaliation, but it would operate to limit the remedy in the event the complainant were to prevail.

2. Attorneys' Fees

To the prevailing employee, Section 806 authorizes "any special damages . . . including litigation costs, expert witness fees, and reasonable attorney fees."

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).

B. Criminal

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 definition of a whistleblower is narrower for criminal liability than for civil liability. *Compare* 18 U.S.C. § 1513(e) *with* 18 U.S.C. § 1514A(a). Under the criminal provisions, the whistleblower must have provided any truthful information to a "law enforcement officer" (rather than a federal regulatory or law enforcement agency, a member of Congress, or a person with supervisory authority over the employee). The information provided must be "truthful," as opposed to "reasonabl[y] believe[d]" for civil liability. Under the criminal provisions, the information provided must relate to the commission or possible commission of any federal offense (rather than an offense related to the enumerated types of fraud, a violation of an SEC rule or regulation, or any federal law relating to fraud against shareholders under the civil liability provisions). Persons who knowingly, with the intent to retaliate, take actions harmful to such whistleblowers, including interfering with the whistleblower's employment or livelihood, are subject to fines (up to $250,000 for individuals and $500,000 for organizations) and/or imprisonment for up to 10 years. The criminal provision provides for "extraterritorial Federal jurisdiction" (18 U.S.C. § 1513(d)), whereas the civil provisions are less clear. *See supra* Section III.A.

VIII. ATTORNEY OBLIGATIONS/ETHICAL ISSUES

A. SEC Rulemaking

Section 307 mandates that the SEC adopt new standards governing the conduct of attorneys who represent public companies before the Commission, including internal reporting requirements. The SEC promulgated interim final rules on January 23, 2003, 17 CFR Part 205. The rules establish minimum standards when an attorney (in-house or outside counsel) becomes aware of a material violation of federal securities laws, state securities laws or breaches of fiduciary duty. Generally, the rules:

- require an attorney to report evidence of a material violation, determined according to an objective standard, "up-the-ladder" within the issuer to the chief legal counsel or the chief executive officer of the company or the equivalent;

- require an attorney, if the chief legal counsel or the chief executive officer of the company does not respond appropriately to the evidence, to report the evidence to the audit committee, another committee of independent directors or the full board of directors;

- expressly cover attorneys providing legal services to an issuer who have an attorney-client relationship with the issuer, and who have notice that documents they are preparing or assisting in preparing will be filed with or submitted to the Commission;

- provide that foreign attorneys who are not admitted in the United States, and who do not advise clients regarding U.S. law, would not be covered by the rule, while foreign attorneys who provide legal advice regarding U.S. law would be covered to the extent they are appearing and practicing before the Commission, unless they provide such advice in consultation with U.S. counsel;

- allow an issuer to establish a "qualified legal compliance committee" (QLCC) as an alternative procedure for reporting evidence of a material violation. Such a QLCC would consist of at least one member of the issuer's audit committee, or an equivalent committee of independent directors, and two or more independent board members, and would have the responsibility, among other things, to recommend that an issuer implement an appropriate response to evidence of a material violation. One way in which an attorney could satisfy the rule's reporting obligation is by reporting evidence of a material violation to a QLCC;

- allow an attorney, without the consent of an issuer client, to reveal confidential information related to his or her representation to the extent the attorney reasonably believes necessary (1) to prevent the issuer from committing a material violation likely to cause substantial financial injury to the financial interests or property of the issuer or investors; (2) to prevent the issuer from committing an illegal act; or (3) to rectify the consequences of a material violation or illegal act in which the attorney's services have been used;

- state that the rules govern in the event they conflict with state law, but will not preempt the ability of a state to impose more rigorous obligations on attorneys that are not inconsistent with the rules; and

- state that the rules do not create a private cause of action and that authority to enforce compliance with the rules is vested exclusively with the SEC.

In addition, the rules define the term "evidence of a material violation," which triggers an attorney's obligation to report up-the-ladder within an issuer. The SEC adopted what it described as an objective, rather than a subjective, triggering standard, involving credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely a material violation has occurred, is ongoing or is about to occur.

The SEC also extended the comment period on the "noisy withdrawal" and related provisions originally included in proposed Part 205. The Noisy Withdrawal Proposal requires outside counsel to withdraw from representing the issuer, to provide written notice to the SEC within one business day indicating the withdrawal was based on "professional considerations," and to disaffirm certain documents filed with the SEC that the attorney believes to be false or misleading. The Proposal does not require in-house attorneys to resign, but they must notify the SEC of their intentions to disaffirm any documents that are believed to be false

or misleading. Under the Noisy Withdrawal Proposal, the attorney's notice to the SEC is deemed not to be a breach of the attorney-client privilege.

The Commission also proposed an alternative to Noisy Withdrawal that would require attorney withdrawal, but would require an issuer, rather than an attorney, to publicly disclose the attorney's withdrawal or written notice that the attorney did not receive an appropriate response to a report of a material violation. Under the proposed alternative, if an issuer has not complied with the disclosure requirement, the attorney could inform the SEC that the attorney has withdrawn from representing the issuer or provided the issuer with notice that the attorney has not received an appropriate response to a report of a material violation.

B. Ethical Obligations, Outside and In-House Counsel

The Act and the SEC's rules place new obligations on attorneys. These obligations raise ethical issues, particularly for in-house counsel acting as whistleblowers, concerning the attorney-client privilege, federal regulation of the various state bars and an attorney's ethical obligation to clients as defined by the Model Rules of Professional Conduct and the Model Code of Professional Responsibility. How such actions are presently treated varies under the Model Rules and the Model Code.

MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.6 Confidentiality of Information·

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

· The quoted Rule reflects the revisions made by the ABA in February 2002.

The ABA Model Rules of Professional Conduct permit in-house counsel to maintain actions against a former employer/client for wrongful discharge or for violation of whistleblower statutes, even if the attorney must disclose information relating to the representation of the client in the process. However, the disclosures must be limited "'to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client…'" ABA Formal Ethics Opinion 01-424 (2001) (quoting former ABA Model Rules of Professional Conduct Rule 1.6(b)(2) (2001), now Rule 1.6(b)(3)).

Recently, the Supreme Courts of Utah, Tennessee, and Montana have expressly allowed in-house attorneys to go forward with suits against their employers for wrongful discharge, even though some client confidences would necessarily be revealed in the process. *Spratley v. State Farm Mutual Automobile Insurance Co.*, 78 P.3d 603, 608-10 (Utah 2003) (relying on ABA Formal Ethics Opinion 01-424 and holding that the "claim or defense" provision of Rule 1.6 "plainly permits disclosure to establish a wrongful discharge claim") (internal citations omitted); *Crews v. Buckman Laboratories Int'l, Inc.*, 78 S.W.3d 852, 863-64 (Tenn. 2002) (adopting a new provision to TN Disciplinary Rule 4-101(C) that parallels the language of former Model Rule 1.6 (b)(2) and allowing the case to proceed); *Burkhart v. Semitool, Inc.*, 300 Mont. 480, 495-97 (2000) (concluding that in-house counsel may maintain an action for employment related claims against an employer-client, and that such claims are within the contemplation of former Rule 1.6 of the Model Rules, which Montana has adopted).

Utah and Montana had both adopted the Model Rules at the time of these opinions, and Tennessee adopted the Model Rule at issue during the decision; the ABA itself has declared that the Model Rules allow these claims to go forward. Moreover, the language of the revised Rule with regard to this issue remains identical to that of the former Rule. Therefore, wrongful discharge claims made by in-house counsel in Model Rules states should not be hampered by disclosure issues.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY

Canon 4

A lawyer should preserve the confidences and secrets of a client.

DR 4-101. PRESERVATION OF CONFIDENCES AND SECRETS OF A CLIENT.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
>
> (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
>
> (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

In Model Code states, there is a trend different from that in Model Rules states. In New York, a Model Code state, the Appellate Division of the New York State Supreme Court disallowed a suit brought by in-house counsel for wrongful termination because permitting it to go forward would entail counsel's improper disclosure of client confidences. *Wise v. Consolidated Edison Company of New York, Inc.*, 723 N.Y.S.2d 462 (2001). In reaching its decision the *Wise* court analyzed the relevant Disciplinary Rule, DR 4-101, and concluded that the exception allowing disclosure did not encompass a suit for wrongful discharge. *Id.* at 463. Therefore, the Model Code would not permit claims of wrongful termination to proceed if any client confidences could be revealed.

Moreover, in its Formal Ethics Opinion 01-424, the ABA compared the comparable provisions of the Model Code and the Model Rules and determined that the Model Code only allowed a lawyer to reveal confidences or secrets if such was necessary to establish or collect a fee or to defend him or herself against an accusation of wrongful conduct. The ABA further noted that the Model Rules expanded this exception to "'include disclosure of information relating to claims by the lawyer other than for the lawyer's fee—for example, recovery of property from the client.'" *Id.* (quoting the Annotated Model Rules of Professional Conduct 68 (4th ed. 1999); *see also Burkhart*, 300 Mont. at 496 (performing same comparison). The *Crews* court also acknowledged that the Model Code under which it was operating would

not permit wrongful discharge claims to go forward; thus, it adopted Model Rule 1.6 as a means to allow the Plaintiff's case to proceed. *Crews*, 78 S.W.3d at 863-64

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