NEW DEVELOPMENTS IN WHISTLEBLOWER CASES UNDER SARBANES-OXLEY AND DODD-FRANK

American Bar Association
Section of Labor and Employment Law
Annual Meeting
Boston
August, 2014

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I. Whistleblowing in 2014

Until recently, employees who brought to light financial improprieties or fraud had limited and ineffective whistleblower protections in many jurisdictions. The Sarbanes-Oxley Act had long been construed narrowly by the U.S. Department of Labor and the courts, leaving many employees uncovered or burdened with proof requirements that favored defendants. For employees in states without meaningful whistleblower laws, the federal remedies were weak.

The financial crisis and meltdown of 2008 convinced enough members of Congress that protecting whistleblowers -- and even encouraging them -- is important. In 2010, Congress created an entirely new and employee-friendly scheme of whistleblower protections, as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Dodd-Frank covers employees who make both internal and external complaints (depending on the context), and gives employees who disclose securities violations to the SEC a chance to receive substantial bounty awards. Congress also amended the Sarbanes-Oxley Act to make it easier for plaintiffs to bring and litigate their cases, and amended the False Claim (Qui Tam) Act in a plaintiff-friendly way as well.

The whistleblowing landscape has also been changed by the Department of Labor under the Obama administration. DOL’s Administrative Review Board,
which hears appeals from hearing decisions in SOX cases, is construing Sarbanes-Oxley more liberally, and permitting employees to proceed and recover in cases which the employees might have lost under the previous administration.

Congress also enacted broad whistleblower protections under the Affordable Care Act of 2010.

This paper analyzes:

1) Developments in the law under the Sarbanes-Oxley Act;

2) The whistleblower provisions of Dodd-Frank, including crucial changes to the Sarbanes-Oxley Act; protections for whistleblowers of entities which provide consumer financial services; the bounty incentive program for whistleblowers who provide information to the SEC; anti-retaliation protections for whistleblowers providing information to the SEC; whistleblower protections under the Commodity Exchange Act; new amendments to the False Claims Act; and

3.) The new whistleblower provisions of the Affordable Care Act of 2010.
II. The Sarbanes-Oxley Act, Sec. 806

In 2002, Congress reacted to the multiplying corporate accounting scandals by enacting protections for employees of publicly traded companies, who complain about or disclose certain frauds by their employers. Sec. 806 of the Sarbanes-Oxley Act gave employees who were retaliated against for making such complaints the ability to seek reinstatement and damages at the U.S. Department of Labor and, in many cases, in federal court.

However, the initial expectations that SOX cases would be a useful remedy for whistleblowers proved highly over optimistic. Decisions from the Department of Labor and the federal courts dramatically narrowed the classes of employees protected by SOX and the protections they could invoke. As a result, employees rarely prevailed in SOX cases.

In Dodd-Frank, Congress took steps to strengthen SOX Sec. 806. In addition, the new whistleblower protections created by Dodd-Frank are broader and stronger than those of SOX, and may in the end eclipse Sec. 806 as a remedy for employees. At the same time, under the Obama administration, decisions from the Department of Labor’s Administrative Review Board have been interpreting SOX more broadly, and liberalizing SOX’s pleading and proof requirements.
A. SOX protections

SOX’s whistleblower provision is in Section 806 of the Act, titled “Protection for Employees of Publicly Traded Companies who Provide Evidence of Fraud,” and codified in 18 U.S.C. Sec. 1514A, “Civil Action to protect against retaliation in fraud cases.” It prohibits a publicly traded company from engaging in a wide range of retaliatory actions: discharging, demoting, suspending, threatening, harassing or “in any other manner” discriminating against an employee in the terms and conditions of employment, because of the protected whistleblowing activities listed in the section. Whether an employer’s action is an adverse employment action is analyzed in accordance with the Supreme Court’s decision in Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006). Allen v. Administrative Review Board, 514 F.3d 468, 476 n. 2 (5th Cir. 2008).

The statute prohibits retaliation by a broad range of actors. These include not only the employer, but any officer, contractor, subcontractor, employee or agent. 18 U.S.C. Sec. 1514A(a).

B. Covered employers and employees

Sec. 806 covers the employees of all publicly traded companies. “Publicly traded companies” are defined as companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78l), or which are required
to file reports under section 15(d) of the Act (15 U.S.C. Sec. 78o(d)). 18 U.S.C. Sec. 1514A(a).

1. Subsidiaries of publicly traded companies

Sec. 806 as originally enacted did not specifically cover non-publicly traded subsidiaries of publicly traded companies. As a result, the courts and DOL issued conflicting decisions on whether those subsidiaries are governed by the statute. These decisions fell into three groups: Decisions holding that Congress intended to cover subsidiaries; that Congress intended to exclude them; and that subsidiaries are covered when the parent and subsidiary are sufficiently intertwined.

The conflicting decisions are no longer relevant, because with the passage of Dodd-Frank, subsidiaries are now considered covered employers if their financial information is included in the parent company’s consolidated financial statements. See Sec. III A, below.

2. Agents and contractors: Lawson v. FMR

In a decision with wide-ranging implications, in March the Supreme Court resolved the issue of whether contractors, subcontractors and agents of public companies can be held liable under Sec. 806, finding that employees of those entities can bring SOX claims against them. Lawson v. FMR, 134 S. Ct. 1158 (2014).
The plaintiffs were employees of a privately-held investment advisory company, FMR, which provided services to a mutual fund required to file reports under Sec. 15(d) of the Securities Exchange Act. The mutual fund did not employ the plaintiffs. After being terminated, the plaintiffs brought an action against the privately-held investment advisory firm. FMR moved to dismiss, arguing that Sec. 806 only provides a cause of action for the employees of public companies as defined in that provision. The district court denied the motion, 724 F. Supp. 2d 141 (D. Mass. 2010). On appeal, the First Circuit held that employees of the private entities could not bring claims against their employers under Sec. 806.

The Supreme Court reversed, in a 6 - 3 decision that defied traditional ideological alliances. The plurality opinion was delivered by Justice Ginsburg, and joined not only by Justices Breyer and Kagan, but also by Justice Roberts; Justices Scalia and Thomas also voted to reverse, joining a substantial part of Justice Ginsburg's opinion, and filing a concurring opinion. Justice Sotomayor wrote a blistering dissent, joined by Justices Alito and Kennedy.

Justice Ginsburg relied heavily on the legislative history of Sec. 806, particularly on what she described as Congress' awareness of the Enron scandal, that the Enron frauds were perpetrated by outside accounting, audit, and law firms, and that those entities had retaliated against their own employees for their complaints about fraud. She noted that the retaliatory acts prohibited by Sec. 806 (discharge, demotion, suspension, harassment, etc.) are actions an employer
can take against its employees -- not ones a contractor can take against the employees of a public company with which it contracts. Similarly, the remedy of reinstatement is one a contractor could not provide the employee of another entity. All in all, she wrote, Congress did not intend to leave the employees of these contractors without protections for whistleblowing.

Finally, the Court noted that the statute on which Sec. 806 was modeled (the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C.S. § 42121) had been interpreted for two decades as covering contractors.

In concurring, Justice Scalia wrote that the Court's interpretation of Sec. 806 "logically flows form…the text and broader context" of the provisions. He nonetheless dismissed the Court's reliance on legislative history. He wrote, "On most issues of detail that come before this Court, I am confident that the majority of Senators and Representatives had no views whatever on how the issues should be resolved — indeed, were unaware of the issues entirely."

Dissenting, Justice Sotomayor, joined by Justices Alito and Kennedy, wrote that the Court's decision gave Sec. 806 "a stunning reach," encompassing "any household employee of the millions of people who work for a publicly traded company and any employee of the hundreds of thousands of private business that contract or perform work for a public company." She raised the specter that a babysitter could bring a SOX claim against the babysitter's employer "if the parent stops employing the babysitter after he expresses concern that the parent's teenage son may have participating in an Internet
purchase fraud." The Court's interpretation, she wrote, "open the door to a cause of action against a small business that contracts to clean the local Starbucks (a public company) if an employee is demoted after reporting that another nonpublic company client has mailed the cleaning company a fraudulent invoice."

In Justice Ginsburg's plurality opinion, she dismissed these concerns as theoretical. She wrote that such employees are not in a position to discover and comprehend their employer's complicity in a fraud, and that there had been not a single instance of a SOX claim brought by the employee of a contractor that wasn't related to securities fraud by a public company. What is particularly striking, though, is that she did not say that the types of claims described by Justice Sotomayor were outside the scope of Sec. 806.

Prior to Lawson, the Department of Labor's ARB had ruled that Sec. 806 allowed claims by employees of contractors, subcontractors and agents. See, e.g., Spinner v. David Landau & Assoc., ARB Nos. 10-111 and 10-115, May 31, 2012 (employees of private accounting firm who provide SOX compliance services to publicly-traded corporation are covered); see also Kalkunte v. DVI Financial Services Inc., ARB Cases 5-139 and 5-140 (2/27/09) (Non-publicly traded company hired by bankrupt publicly traded employer to handle financial issues and provide CEO was contractor, subcontractor or agent of the parent, and so could be liable under Sec. 806).

What is not disputable is that the practical implications of Lawson could be tremendously
significant. Under the Court's decision, the accountants, auditors, and legal counsel -- as well as other contractors, subcontractors and agents -- of a public company can be sued for retaliation for any of the protected activities listed in Sec. 806. Does this mean that the protected activity can be about frauds by the contractors, subcontractors and agents? The plurality opinion seems to say yes.

3. **Foreign employers of foreign employees**

In *Carnero v. Boston Scientific Corporation*, 433 F.3d 1 (3d Cir. 2006), cert. denied, 548 U.S. 907 (2006), the Third Circuit ruled that a foreign employee of a foreign corporation is not covered by Sec. 806 concerning the foreign employer’s misconduct abroad.

The court relied on the general presumption against extra-territorial application of U.S. law; the existence of other provisions of SOX which explicitly provide for extra-territorial application; the absence of references in the legislative history to foreign application; what it characterized as Congress’ “focus on problems within the United States;” the dangers of granting authority to DOL and U.S. courts to “delve into the employment relationship between foreign employers and their foreign employees;” Congress’ failure to provide a means to enforce Sec. 806 against foreign employers; the absence of a venue provision governing foreign employers; prior ALJ decisions declining to enforce Sec. 806 extraterritorially; and the overall lack of Congressional intent to reach foreign employers.

A 2008 decision from the Southern District of New York took a far more liberal view of extraterritoriality. *O’Mahony v. Accenture Ltd*, 537 F. Supp. 2d 506 (S.D.N.Y. 2008). There, the plaintiff worked in France for a French subsidiary of a Bermuda company. She had previously worked in the U.S. for an American subsidiary. The court rejected defendants’ argument that dismissal was required under *Carnero*.

The *O’Mahony* court distinguished *Carnero*, focusing on several factors: 1. O’Mahony had previously worked in the U.S. for the American subsidiary before her expatriate assignment in France; 2. As a result, hearing the case would not interfere with the relationship between a foreign employer and its foreign employees; 3. O’Mahony had alleged that fraud was committed in the U.S. (Accenture’s decision not to withhold French Social Security taxes from her pay); and 4. O’Mahony was suing not just the foreign parent, but also the U.S. subsidiary, based on the American company’s actions in the U.S.
4. Claims by in-house counsel

What happens when the whistleblower is an employer’s in-house counsel? The Ninth Circuit has ruled that the possibility of disclosure of attorney-client privileged information does not bar in-house counsel from bringing a SOX charge. The court relied on the fact that the district court can supervise the proceedings to minimize the prejudice to the employer’s confidential information. *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009).

C. Protected whistleblowing activity

An employee is protected from retaliation for engaging in any lawful act taken to provide information, cause information to be provided, or otherwise assist in an investigation, regarding any conduct which the employee “reasonably believes” constitutes a violation of the criminal provisions noted in the statute, any SEC rule or regulation, or any provision of federal law relating to fraud against shareholders. 18 U.S.C. Sec. 1514A(a)(1). The criminal statutes noted are 18 U.S.C. Secs. 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud) and 1348 (securities fraud). One court has held that violation of an SEC guideline – as opposed to rule or regulation – cannot be the predicate of a protected complaint under Sec. 806. *Allen v. Stewart Enterprises*, 514 F.3d 468 (5th Cir. 2008).
Employees are protected when they provide information or assistance, either within the company or to an appropriate federal official. Within a company, employees can go to “a person with supervisory authority over the employee,” or someone who has authority to “investigate, discover, or terminate misconduct.” 18 U.S.C. Sec. 1514A(a)(1)(C).

Externally, they can provide information or help to a federal regulatory or law enforcement agency, or a congressperson or congressional committee. 18 U.S.C. Sec. 1514A(a)(1)(B) and (C). The Administrative Review Board has taken the position that reports to state law enforcement officials are also protected. Funke v. Federal Express, ARB 09-004 (July 8, 2011).

Disclosures to the news media are not protected. Tides v. Boeing Co., 644 F.3d 809 (9th Cir. 2011) (rejecting argument that a report to the media might eventually “cause information to be provided” to one of the recipients authorized in the statute.)

Employees are also protected from retaliation for filing, participating in, or assisting in a proceeding relating to the listed federal provisions, if the employer has “any knowledge” of the employee’s activity. The “proceeding” can be one which has been filed, or is “about to be filed.” 18 U.S.C. Sec. 1514A(a)(2). The “filed or about to be filed” language also appears in the anti-retaliation prohibition of the False Claims Act, and in that context protects employees who are collecting information about possible fraud “before they have put all the pieces of the puzzle together.” See, e.g., U.S. ex rel. Yesudian v. Howard University, 153 F.3d 731, 739-40 (D.C. Cir. 1998).
1. Fraud on shareholders vs. predicate frauds and securities violations in Sec. 806

A significant issue in SOX cases has been whether employees are protected only if they complain about perceived fraud on shareholders, or about any of the frauds or securities law violations listed in Sec. 806. Courts are divided on this issue; the Department of Labor’s Administrative Review Board (ARB) takes a liberal approach.

An example of the expansive view is O’Mahony v. Accenture Ltd, 537 F. Supp.2d 506 (E.D.N.Y. 2008). The court concluded that Sec. 806 “clearly protects an employee against retaliation based on the whistleblower’s reporting of fraud under any of the enumerated statutes regardless of whether the misconduct related to ‘shareholder’ fraud.” See also Reyna v. Con Agra Foods, Inc., 506 F. Supp.2d 1363 (M.D. Ga. 2007) (reporting of mail or wire fraud sufficient, even if unrelated to fraud on shareholders; employee had reported a supervisor’s scheme to have ineligible relatives covered as dependents on the employer’s health insurance); Smith v. Corning Inc., 496 F. Supp. 2d 244 (W.D.N.Y. 2007) (denying employer’s motion to dismiss employee’s claim based on allegation that company was implementing a financial reporting system that did not comply with GAAP, which would have resulted in incorrect reports to shareholders).
The most recent position of the Department of Labor’s Administrative Review Board (ARB) is that that a complaint about shareholder fraud is not required, and that complaints about any of the predicate frauds or SEC violations listed in Sec. 806 suffice. *Sylvester v. Parexel International LLC*, ARB No. 07-123 (May 25, 2011).

The ARB wrote,

“[I]t is clear that a complainant may be afforded protection for complaining about infractions that do not relate to shareholder fraud. On their face, mail fraud, fraud by wire, radio, or television, and bank fraud are not limited to frauds against shareholders…. Additionally, a reasonable belief about a violation of "any rule or regulation of the Securities and Exchange Commission" could encompass a situation in which the violation, if committed, is completely devoid of any type of fraud. In sum, we conclude that an allegation of shareholder fraud is not a necessary component of protected activity under SOX Section 806.”


The ARB in *Sylvester* also held that an employee does not have to have engaged in protected activity that has a “definitive and specific relationship” to one of the frauds listed in Sec. 806. Rather, the employee needs only to have a reasonable belief -- even if the employee
is mistaken -- that the employer engaged in conduct which violated one of the enumerated provisions. Courts have been following this interpretation. See also Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 432 (S.D.N.Y. 2013) ("ARB Opinions are entitled to some level of deference from federal courts, although the level of deference still remains in dispute….. In any event, this Court agrees with the ARB that the "definitive and specific" test is inapplicable to SOX violations, and it therefore is excluded from the determination of whether Plaintiff's activity is protected….")

To the contrary, see Livingston v. Wyeth, 520 F.3d 344 (4th Cir., 2008); Bishop v. PCS Administration, 2006 WL 1460032 (N.D. Ill. 2006), discussed below.

For an employee to show protected activity, whether by providing information or assisting in an investigation, the employee “must point to affirmative acts which advance the investigation.” Mahoney v. Keyspan Corp., 2007 U.S. Dist. LEXIS 41214 (E.D.N.Y. 2007). “Merely expressing concern or support for a whistleblower” is not protected activity. The court in Mahoney held that plaintiff’s conversations with Keyspan’s in-house and outside counsel in support of a whistleblower did not qualify.

However, the court ruled that plaintiff did engage in protected activity by successfully urging the CEO to meet with the whistleblower and the company’s lawyers to “‘hear directly… the details of accounting frauds at the company.’” The court relied on plaintiff’s assistance in “opening a channel of communication with the CEO,” and held that Sec. 806 applies not only to
“those who blow the whistle” but also those who “make the whistle audible.” A contrary interpretation, the court noted, would “lead to a point that isolates the whistleblower in a way that Congress could not have intended.”

While protected activity includes the “lawful acts” noted in Sec. 806, it may not include an employee’s refusal to engage in unlawful activity. In a Fifth Circuit case, the employee, an equity analyst at an investment advisory firm and broker-dealer, refused to change her rating of a stock, despite pressure from her superiors at a meeting, and said she would not sign a report that rated the stock more highly. The court upheld a decision of the Administrative Review Board finding that the employee had not engaged in protected activity, because the employer had not expressed its intent to make her change her rating, and the employee had never told a supervisor that the rating would violate securities laws. *Getman v. Administrative Review Board*, 2008 WL 400232 (5th Cir. 2008).

To encourage whistleblowing, employers are required to set up audit committees, which must have procedures for employees to confidentially and anonymously report concerns regarding questionable accounting or auditing matters. Public L. No. 107-204 at Sec. 301, amending 15 U.S.C. 78f. Outside of civil litigation, Sarbanes-Oxley criminalizes retaliation against whistleblowers. These penalties apply even if the object of retaliation is not an employee. 18 U.S.C. 1513(e).
2. Fraud by an employer’s clients and contractors

Several decisions hold that protected activity includes complaints about fraud by an employer’s clients or contractors. (This is a different issue than the question which the Supreme Court answered in Lawson, which was whether those contractors could be held liable for retaliating against their employees.)

In Sharkey v. J.P. Morgan Chase & Co., 2010 U.S. Dist. LEXIS 139761 (S.D.N.Y. 2010), the employee complained internally that a long term Private Wealth client of J.P. Morgan was engaged in mail fraud, bank fraud and money laundering. The court held that “[b]ecause SOX is a statute designed to promote corporate ethics by protecting whistleblowers from retaliation, it should not be read narrowly,” and that Sec. 806 “by its terms does not require that the fraudulent conduct or violation of federal securities law be committed directly by the employer that takes the retaliatory action.” 1

The Department of Labor’s Administrative Review Board has held similarly. Funke v. Federal Express Corp., ARB Case 09-004 (July 11, 2011). The ARB reversed an Administrative Law Judge’s ruling that the fraudulent activity has to be on the part of the employer. The employee had complained that a Federal

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1 Nonetheless, the court dismissed the complaint, finding that the plaintiff had not adequately alleged the specific illegal conduct which was the basis of her complaint. After Sharkey filed an amended complaint, the court denied defendants’ motion to dismiss. Sharkey v. J.P. Morgan Chase & Co., 805 F. Supp. 2d 45 (S.D.N.Y 2011).
Express customer was using Fed Ex to ship fraudulent money orders. The ARB pointedly held that “the plain language of the statute contains no express requirement that the reported misconduct be committed by a complainant’s employer.” Construing the language of Sec. 806, which protects “any conduct which the employee reasonably believes” is a violation of the enumerated provisions, the ARB noted that “the use of the term ‘any’…indicates that Congress intended ‘any conduct’ be interpreted broadly to extend the scope of coverage. The statute on its face does not limit its application to purported misconduct of the employer or any other particular perpetrator.”

See also Feldman v. Law Enforcement Associates Corp., 779 F. Supp. 2d 472 (E.D.N.C. 2011), 2013 U.S. Dist. LEXIS 91131 (E.D.N.C. June 28, 2013) (granting summary judgment on other grounds). There, the employee complained that the company with which the employer contracted to export the employer’s products was violating federal export controls; the court, citing Sharkey, held that the alleged fraudulent activity does not have to be directly committed by the employer.

D. What is a “reasonable belief” concerning unlawful conduct?

Sec. 1514(a)(1) protects employees who provide information, cause information to be provided, or otherwise assist in an investigation, regarding conduct which the employee “reasonably believes” constitutes a violation of the listed provisions. A major question in SOX cases is the level of knowledge a plaintiff must
have regarding an employer’s alleged illegal conduct for that belief to a reasonable.

1. Subjective and objective reasonable belief

The courts have required that the complainant have both a subjectively and objectively reasonable belief that conduct in question violated the listed provisions. *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013); *Fraser v. Fiduciary Trust Co. International*, 396 Fed. Appx. 734 (2d Cir. 2010); *Day v. Staples*, 555 F.3d 42 (1st Cir. 2009); *Van Asdale v. International Game Technologies*, 577 F.3d 989 (9th Cir. 2009); *Harp v. Charter Communications, Inc.*, 558 F. 3d 722 (7th Cir. 2009).

a. Subjectively reasonable:

The subjective requirement is one of good faith, *Day v. Staples*, 555 F.3d 42, 54, although it has also been described as requiring that the complainant actually believed that the conduct was illegal. *Gale v. U.S. Department of Labor*, 384 Fed. Appdx. 926 (11th Cir. 2010).

The legislative history indicates that Congress intended that the reasonable belief standard be liberally applied. Noting that retaliation cases should be subject to the “reasonable person” test, the Judiciary Committee cited to a whistleblower case under the Clean Water Act in which the Third Circuit spoke of protecting “good faith” and “non-frivolous” employee complaints. S.

Some courts in SOX cases have applied the *Passaic Valley* analysis to the subjective prong, noting that “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.” See, e.g., *Collins v. Beezer Homes USA Inc.*, 334 F. Supp. 2d 1365 (N.D. Ga. 2004); *Bishop v. PCS Administration (USA), Inc.*, 2006 WL 1460032 (N.D. Ill. 2006). As these cases noted, Sec. 806 does not require whistleblowers to identify the statutory provisions they believe are being violated. “If Congress had intended to limit the protection of Sarbanes Oxley…or to have required complainants to specifically identify the code section they believe was being violated, it would have done so.” *Id.* A plaintiff need not show an actual violation of the law, or cite a particular statute that he believed was being violated. *Sharkey v. J.P. Morgan Chase & Co.*, 805 F. Supp. 2d 45 (S.D.N.Y 2011); *Mahony v. Keyspan Corp.*, 2007 U.S. Dist. LEXIS 22042 (E.D.N.Y. 2007).

A good faith, non-frivolous standard is consistent with the Department of Labor’s regulations, under which a complainant may be sanctioned only for filing a “frivolous” or “bad faith” charge. 29 CFR 1979.105(b).
b. Objectively reasonable:

Objective reasonableness "is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee." *Harp v. Charter Communications, Inc.*, 558 F.3d 722 (7th Cir. 2009); *Allen v. Administrative Review Board*, 514 F.3d 468 (5th Cir. 2007). The reasonable belief standard protects employees who are completely mistaken in their evaluation of the employer’s alleged fraud. *Sylvester v. Parexel International LLC*, ARB No. 07-123 (May 25, 2011). “Congress chose statutory language which ensures that 'an employee's reasonable but mistaken belief that an employer engaged in conduct that constitutes a violation of one of the six enumerated categories [set forth in § 806] is protected.” *Wiest v Lynch*, 710 F.3d 121, 132 (3d Cir. 2013).

Many court decisions have construed objective reasonableness to require that the complainant communicate about conduct which “definitively and specifically” relates to one of the frauds or statues enumerated in Sec. 806, relying on older decisions of the DOL’s Administrative Review Board. *Vodopia v. Koninklijke Philips Electronics, N.V.*, 2010 U.S. App. LEXIS 22081 (2nd Cir. 2010); *Van Asdale v. International Game Tech.*, 577 F.3d 989, 996-7 (9th Cir. 2009); *Day v. Staples, Inc.*, 555 F.3d 42,55 (1st Cir. 2009); *Fraser v. Fiduciary Trust Company International*, 417 F. Supp. 2d 310 (S.D.N.Y. 2006).

However, in 2011, in a major reversal, the Administrative Review Board abandoned the
“definitively and specifically” standard. *Sylveste**r v. Parexel International*, ARB 7-123 (May 25, 2011). The Third Circuit has ruled that the ARB’s decision in *Parexel* is entitled to deference by the courts. *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013). Thus, “[a] belief is objectively reasonable when a reasonable person with the same training and experience as the employee would believe that the conduct implicated in the employee's communication could rise to the level of a violation of one of the enumerated provisions in Section 806.” *Wiest*, 710 F.3d 121, 132. For example, an employee without knowledge or training in securities law could reasonably "conclude that a press release that he found to be misleading could be securities fraud, or a violation of an SEC rule or regulation or a law relating to fraud against shareholders." *Perez v. Progenics Pharmaceuticals*, 965 F. Supp. 2d 353 (S.D.N.Y. 2013) (denying summary judgment).

2. **Plaintiffs with special expertise**

When a plaintiff has special expertise in the issues surrounding the fraud, he may be held to a higher standard. In *Allen v. Administrative Review Board*, 514 F.3d 468 (5th Cir. 2008), the Fifth Circuit held that the objective reasonableness of a complainant’s belief must be evaluated from the perspective of the complainant, and that the reasonableness of the belief of a licensed CPA must be evaluated from the perspective of an accounting expert. As a result, the court determined that the plaintiff should have understood that the records he cited as the basis for the alleged fraud did not have to
be submitted to the SEC, and that the company had not violated an SEC rule or regulation.

3. Future violations

An employee is protected for complaining about “a violation about to be committed,” as long as the employee “reasonably believes that the violation is likely to happen.” The employee’s belief “must be grounded in facts known to the employee.” Sylvester v. Parexel International LLC (ARB Case 07-123, May 25, 2011). See also Funke v. Federal Express Corp., ARB Case 09-004 (July 8, 2011) (“[D]isclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is likely to happen.”)

4. Speculation insufficient

Courts have rejected whistleblower claims based on a whistleblower’s speculation that an employer’s non-fraudulent activity might, in the end, lead to financial losses and ultimate fraud on shareholders. See, e.g.,

Safarian v. American DG Energy, Inc., 2014 U.S. Dist. LEXIS 59684 (D.N.J. April 30, 2014). The court dismissed the plaintiff’s claim (brought as a SOX claim via Dodd-Frank) that a utility company's overbilling, improper construction and failure to obtain proper permits would result in misstatement of accounting records and improper
tax filings. The court cited to the Supreme Court's statement in *Lawson* that Sec. 806 was "aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies;" since plaintiff was an engineer who had no involvement with the company's accounting or tax practices and the alleged improper activity "did not deal with corporate disclosures," his complaints were not protected by Sec. 806. ("Though overbilling might eventually lead to incorrect accounting records and tax submissions, these kinds of disclosures were not contemplated by the statute, have not been protected by other courts, and should fall outside the scope of the Sarbanes-Oxley Act.")

*Day v. Staples, Inc.* 555 F.3d 42 (1st Cir. 2009)
The court held that an employee’s complaint about shareholder fraud must allege basic elements of securities fraud (Misrepresentation / omission, scienter, loss, and a causal connection between the misrepresentation and the loss), and the loss to the company must be material. Thus, alleged data manipulation not related to a company’s financial condition and not reported to shareholders does not qualify as a predicate fraud for an action under Sec. 806. Also not qualifying are complaints about inefficiency, and even violations of GAAP.

*Platone v. U.S. Department of Labor,* 548 F.3d 322 (4th Cir. 2008) (Alerting superiors to billing discrepancy that affects short term profits does not constitute a claim of securities fraud.)
Livingston v. Wyeth Inc., 520 F.3d 344 (4th Cir. 2008) (Finding no reasonable belief for plaintiff’s complaints that pharmaceutical company would be unable to meet compliance and training deadlines of a consent decree regarding adulterated drugs and therefore would be fined $15,000 a day by the FDA; plaintiff’s belief was speculative, as he did not have a reasonable belief about an existing violation);

Bishop v. PCS Administration (USA), Inc., 2006 U.S. Dist. LEXIS 37230 (N.D. Ill. 2006) (“a reasonable belief that implementing certain procedures will be insufficient to prevent violations is not, by itself, a reasonable belief that a violation has occurred or been attempted.”)

DOL has also dismissed claims based on an employee’s speculation that an employer’s non-fraudulent conduct might create financial losses. See, e.g., Smith v. Hewlett Packard, 2005 SOX 00088 (January 19, 2006) (no protected activity where employee complained about “systematic race discrimination” caused by allegedly discriminatory evaluation processes, and noting that the result might be different if plaintiff had complained about the employer’s failure to disclose to shareholders the filing of a discrimination class action); Minkina v. Affiliated Physician’s Group, 2005 SOX 19 (February 22, 2005) (employee did not engage in protected activity by reporting to OSHA what she believed to be dangerous air quality in the workplace, since the possibility that those conditions would lead to financial losses was mere speculation).
A 2007 decision of the Administrative Review Board, affirmed by the Fourth Circuit, shows the difficulty employees have sometimes faced in meeting the reasonable belief standard. *Welch v. Cardinal Bankshares Corporation*, ARB Case 05-064 (ARB, May 31, 2007, aff’d *Welch v. Chao*, 536 F. 3d 269 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1985 (2009). After an extended hearing, the ALJ below had ruled that Cardinal Bankshares violated Sec. 806 by terminating its CFO in retaliation for various complaints he had made about financial improprieties. The CFO, Welch, had a) complained about insider trading by Bank officers; b) refused to sign off on a quarterly financial statement overstating the company’s income; c) refused to attest to the validity of financial statements because the company’s auditor did not provide him with necessary information; and d) complained that Cardinal’s internal controls improperly permitted employees outside the finance department to make journal entries without his knowledge.

The ALJ ordered that Welch be reinstated, and required further submissions on the calculation of an award of back pay, attorney’s fees and costs. The ALJ did not address the issue of emotional distress damages, which, as noted below, are arguably within the category of “special damages.”

On appeal, the ARB reversed the ALJ’s decision. It ruled that, as a matter of law, Welch could not have had a reasonable belief that Cardinal Bankshares was engaging in fraud. It held that Welch had to prove both that he actually believed there was fraud, and that a
person with his expertise and knowledge would also have had that belief. As the CFO, Welch should have known that no fraud occurred. The ARB also held that an employee’s belief that an employer is violating accounting standards, such as those in GAAP, is insufficient grounds for a SOX claim, because Congress sought to protect only employee complaints about violations of the statutory and regulatory provisions listed in Sec. 806. Finally, Welch’s complaints about Cardinal’s lack of internal controls were also not protected activity, since “[a]lthough having a deficient internal control may make an institution more vulnerable to fraud, in itself it is not fraudulent.”

The Fourth Circuit affirmed. *Welch v. Chao*, 536 F. 3d 269. The Court held that Sec. 806 contains an independent materiality requirement, apart from the materiality required by the predicate fraud statutes listed in Sec. 806. It further held that while a plaintiff does not have to be correct in his belief that the employer actually violated the law, he must still have made a complaint about conduct the he reasonably believed “definitely and specifically” related to a violation of one of the listed provisions. (The Court’s ruling on this point is now questionable, in light of the ARB’s decision in *Sylvester.* ) However, an employee does not have to identify specific statutory provisions in his complaint to the employer.

The Court did find that the ARB was wrong in holding that communications about misclassifications in a company’s financial statements can never be the basis of a SOX complaint. But it concluded that Welch had “utterly fail[ed] to explain how Cardinal’s conduct could
reasonably be regarded as violating” any of the provisions listed in Sec. 806, and that Welch had supported his argument before the ARB with only inapposite and irrelevant authority or conclusory, general statements.

The Ninth Circuit (but of course) takes a more liberal approach. *Van Asdale v. International Game Technology*, 577 F.3d 909 (9th Cir. 2009). While the court stated the law similarly as the First Circuit did in *Day v. Staples*, above, the court emphasized that the employee can be wrong in his belief that fraud took place, and need not have reached a conclusion that fraud actually occurred.

### E. Enforcement

Employees have a choice of remedies under SOX. While an employee has to first file a charge with the Department of Labor, if 180 days elapse before DOL has completed all the steps required by statute (investigation, hearing, and appeal), the employee can remove the charge to federal court in an action de novo.

Employees must file a charge with the Department of Labor within 180 days from when the violation occurred. 18 U.S.C. Sec. 1514A(b)(2)(D). (As discussed in Section IIIA below, the original statute of limitations under SOX was 90 days, but it was lengthened by the Dodd-Frank Act.) The 180 days runs from the date the employee receives “‘final, definitive, and unequivocal notice’ of an adverse employment

DOL is required to investigate the charge. If DOL does not issue a final decision (including a decision on an administrative appeal) within 180 days, the employee can bring an action “for de novo review” in federal court. An employee cannot sue in federal court if his own “bad faith” caused DOL’s delay. 18 U.S.C. Sec. 1514A(b)(1)(B).

1. **Administrative proceedings at the Department of Labor**

a. The employee’s prima facie case

At DOL, the complainant must make a prima facie showing that “protected activity” under Sec. 806 was a “contributing factor” to the unfavorable personnel action alleged in the complaint. 29 CFR 104(e)(1). DOL’s regulations require that the charge, as supplemented by DOL’s interviews with the charging party, allege “the existence of facts and evidence to make a prima facie showing” (i) that the employee engaged in protected activity or conduct, (ii) that the named person knew or suspected that the employee engaged in the protected activity, (iii) that the employee suffered an unfavorable personnel action, and (iv) that there are circumstances sufficient to raise an inference that protected activity was a contributing factor in the unfavorable action. 29 CFR Sec. 1980.104(e)(2). Bechtel v. Administrative Review Board, 710 F.3d 443, 447 (2d Cir. 2013); Harp v. Charter Communications Inc., 558 F. 3d 722, 723. (7th Cir. 2009). The regulations state that the employee can normally prove the employer’s knowledge and causation by showing, for example, that the adverse action took place shortly after the protected activity. 29 CFR 1980.104(e)(3).

Without this prima facie showing, the charge will be dismissed, without an investigation. 29 CFR 1980.104(e)(1). If the employee makes the prima facie showing, the charge will only be dismissed if the employer demonstrates by “clear and convincing evidence” that it would have taken the same unfavorable action absent the employee’s protected activity. 29 CFR 1980.104(e)(4). Bechtel, 710 F.3d 443, 447; Harp, 558 F.3d 722, 723.
The employer has ten days from receiving notice of the complaint to file a written statement, affidavits and documents in support of its position, and to request a meeting with DOL. 29 CFR 1980.104(f).

b. Department of Labor investigations

If the employee makes the required prima facie showing, and it is not rebutted by the employer, DOL must conduct an investigation, and complete it within 60 days after the complaint is filed. The investigation is to determine if there is “reasonable cause” to believe that a violation occurred. 29 CFR 1980.105(a).

DOL must also determine whether the information gathered initially warrants preliminary reinstatement while the charge is pending. If so, DOL gives the employer notice of the substance of the relevant evidence, including redacted or summarized witness statements, and the employer has ten business days to respond in writing and meet with investigators to oppose preliminary relief. 29 CFR 1980.104(f).

After conducting the investigation, DOL issues written findings as to whether there is reasonable cause to believe the employer discriminated against the employee in violation of the Act. The findings must be issued within sixty days after the complaint was filed. 29 CFR 1980.105(a). If DOL finds in the employee’s favor, it is supposed to order preliminary relief, which can include reinstatement, back pay with interest, compensation for “special damages,” (See Section 3
below) and costs and expenses, including attorney’s and expert witness fees. 29 CFR 1980.105(a)(1).

DOL’s findings and preliminary order are effective within thirty days unless either party files timely objections and requests a hearing. A party seeking review of the preliminary findings and order must file a request for a hearing within thirty days of receiving the findings. 29 CFR 1980.106(a). The filing of objections stays all aspects of the order, except for an order of reinstatement. If DOL has ordered reinstatement, it is effective immediately. 29 CFR 1980.105(c), 106(b).

However, an employee’s ability to obtain reinstatement is limited by the Second Circuit’s decision in Bechtel v. Competitive Technologies, Inc. 448 F.3d 469 (2d Cir. 2006). In Bechtel, the court reversed the district court’s preliminary injunction requiring the employer to reinstate the employee. The Court of Appeals held that a district court lacks jurisdiction to enforce a reinstatement order of the Department of Labor.

DOL’s regulations provide that there is no ALJ review of a decision by OSHA to conduct an investigation. If an ALJ determines that the complaint was erroneously dismissed, the ALJ will hear the case on the merits, rather than remanding to OSHA for the completion of an investigation. 29 CFR 1980.109(c).

c. Department of Labor hearings
DOL’s administrative hearings are conducted in accordance with the rules of practice and procedure of DOL’s Office of Administrative Law Judges. 29 CFR 1980.107(a). Hearings are de novo and on the record, and formal rules of evidence do not apply. 29 CFR 1980.107(b) and (d). The OALJ’s rules incorporate the provisions of the Administrative Procedure Act, which provide for, among other things, the issuance of subpoenas and taking of depositions, cross-examination, and other procedural protections. 5 U.S.C Sec. 554, 556(c) and (d).

The SEC may also participate in the hearing as an amicus, in the SEC’s discretion. Even if the SEC does not participate, the SEC may require that the parties provide it with copies of all pleadings. 29 CFR 1980.108(b).

DOL must issue a decision within 120 days after the hearing. DOL may only determine that a violation occurred if the complainant demonstrates, by a preponderance of the evidence, that the protected activity was a contributing factor in the adverse action alleged in the complaint. However, even if the employee meets that showing, the ALJ cannot order any relief if the employer demonstrates, by clear and convincing evidence, that it would have taken the same

adverse action in the absence of any protected activity. 29 CRR 1980.109(a) and (b).

If the ALJ concludes that the employer violated Sec. 806, the order will provide all relief necessary to make the employee whole, including reinstatement, back pay, “special damages,” litigation costs, attorney’s fees, and expert witness fees. If the employer shows that the complaint was frivolous or brought in bad faith, the ALJ may award a maximum of $1,000 in attorney’s fees to the employer. 29 CFR 1980.109(d)(1) and (2).

d. Appeals from DOL hearing decisions

Either side may seek review of the ALJ’s decision by filing a petition at DOL’s Administrative Review Board (ARB) within ten business days. If the ARB accepts the case for review, the ALJ’s decision becomes “inoperative,” although the ALJ’s reinstatement order will remain in effect. The ARB is to issue a final decision within 120 days after the hearing concludes. 29 CFR 1980.110.

Assuming DOL issues a final decision within 180 days after the charge was filed, the employee’s access to court is limited to appealing that decision to the Court of Appeals for the circuit in which the violation occurred. The employer has the same right. 49 USC Sec. 42121(b)(4).

Resources regarding DOL decisions and appeals:
The Department of Labor publishes decisions of both Administrative Law Judges and the Administrative Review Board at www.oalj.dol.gov. A link on that page to the OALJ Whistleblower Collection - http://www.oalj.dol.gov/LIBWHIST.HTM - has the complete text of Sec. 806, DOL’s implementing regulations, and the most recent decisions from DOL and the courts.

2. Federal court actions

If DOL does not issue a final decision within 180 days, the employee can bring an action “for de novo review” in federal court. Once the federal action is filed, DOL loses jurisdiction over the case. Stone v. Duke Energy Corp., 432 F.3d 320 (4th Cir. 2005).

3. Available relief

A prevailing plaintiff is entitled to “all relief necessary to make the employee whole,” which “shall include” reinstatement with seniority, back pay with interest, and compensation for any “special damages.

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3 18 U.S.C. Sec. 1514A(b)(1)(B). DOL’s regulations require that the federal court plaintiff give fifteen days notice to DOL and all other parties of the plaintiff’s intention to sue. 29 CFR 1980.114(b). This requirement does not appear in Sarbanes-Oxley or the Ford Aviation Investment Act, and should not be jurisdictional.

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sustained as a result of the discrimination,” including attorney’s fees and costs. 18 U.S.C. Sec. 1514A(c).

Sarbanes-Oxley does not state whether a plaintiff can recover damages for emotional distress as part of the “special damages” authorized by Sec. 1514(A)(c)(2)(C). The legislative history only speaks of employees recovering “compensatory damages to make a victim whole,” including attorney’s fees and costs.

However, a 2007 case from the Eastern District of New York held that “special damages” include damages for “reputational injury” which diminish a plaintiff’s future earning capacity. It is not clear from the opinion whether the court was referring to front pay, or damages to compensate plaintiff for the less tangible harm to his reputation and earning capacity. *Mahoney v. Keyspan Corp.*, 2007 WL 805813 (E.D.N.Y. March 12, 2007). The court in *Mahoney* relied on a similar decision from the Southern District of Florida, holding that “a successful Sarbanes-Oxley plaintiff cannot be made whole without being compensated for damages for reputational injury that diminished plaintiff’s future earning capacity.” *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fl. 2004). But see *Murray v. TXU Corp.*, 2005 WL 1356444 (N.D. Tex. 2005) (Special damages are limited to litigation costs, expert witness fees and reasonable attorney’s fees, based on text of Sec. 806, and analogizing to pre-1991 remedies of Title VII).

Some courts have construed the “special damages” permitted by the similarly-worded anti-retaliation provision of the False Claims Act to permit

III. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The Dodd-Frank Act, enacted in response to the financial crisis and the revelations of unchecked risk taking by American banks, contains the most significant changes to whistleblower protections since Sarbanes-Oxley. In many respects, those protections -- both substantive and procedural -- eclipse Sarbanes-Oxley, and in some cases they make SOX far less relevant to employers and employees. Dodd-Frank made crucial changes in six critical areas related to whistleblowing:

1. It amended SOX Sec. 806 to broaden the class of covered employers, guarantee the right to a jury trial, preclude mandatory pre-dispute arbitration agreements, and lengthen the statute of limitations.

2. It created whistleblower rights and remedies for employees of consumer financial services entities.

3. It established a new system of bounty incentive rewards for whistleblowers who disclose to the SEC violations of a broad range of securities laws, when the SEC recovers more than $1 million from the violator.
4. It established new anti-retaliation provisions for whistleblowers who disclose information to the SEC about securities law violations, with a private right of action in federal court and no administrative exhaustion requirement; in some cases, these provisions protect employees who complain internally.

5. It strengthened the substantive and procedural protections for whistleblowers under the False Claims (Qui Tam) Act.

6. It created new whistleblower protections under the Commodity Exchange Act.

The SEC has fleshed out the requirements of its whistleblowing program in its final regulations, which were issued in May, 2011. The regulations run to almost two hundred pages, are fairly whistleblower-friendly, and reflect the SEC’s rejection of significant comments by employers. For a full explanation, see accompanying Power Point (at the end of this volume), *The SEC’s Dodd-Frank Whistleblower Regulations*.

A. Dodd-Frank’s changes to SOX Sec. 806

1. Covered employers include certain subsidiaries and statistical rating agencies

Dodd-Frank finally settled the question of whether a publicly traded company’s wholly-owned subsidiaries are covered employers under SOX Sec. 806;
Dodd-Frank states that they are. Under Dodd-Frank Sec. 929A, “covered employers” now include “any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.’’

The change is extremely significant, because prior to the amendment, many employees had seen their SOX cases dismissed on the ground that their employer was a subsidiary of a publicly traded company, rather than the parent. To avoid dismissal, employees in many cases had argued that the parent company was sufficiently involved in the termination decision and in the subsidiary’s Human Resources functions, so as to require a finding of agency. These fact-intensive arguments are now unnecessary.

Dodd-Frank also expanded the class of covered employees to include employees of a “nationally recognized statistical rating organization,” as defined in section 3(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a). Moody’s and Standard & Poor’s are such agencies.

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4 15 U.S.C. 78c(a)(1)(62) defines a nationally recognized statistical rating organization as a credit rating agency that—

(A) has been in business as a credit rating agency for at least the 3 consecutive years immediately preceding the date of its application for registration under section 78o–7 of this title;

(B) issues credit ratings certified by qualified institutional buyers, in accordance with section 78o–7 (a)(1)(B)(ix) of this title, with respect to—

(i) financial institutions, brokers, or dealers;
2. Jury trial

Dodd-Frank amended SOX to provide that parties in SOX proceedings in federal court have the right to a jury trial. Dodd-Frank Sec. 922(c)(1)(B). Courts had issued conflicting decisions on this question.

3. No mandatory pre-dispute arbitration

Dodd-Frank prohibited employers from enforcing mandatory pre-dispute agreements which require arbitration of a claim under SOX Sec. 806. Dodd-Frank Sec. 922(c)(2). One case holds that this provision applies retroactively to conduct occurring before Dodd-Frank became effective. (In general, the statute is effective on July 22, 2010, the day after it was signed by President, although a good number of non-whistleblower provisions take effect over several years.) *Pezza v. Investors Capital Corp.*, 767 F. Supp. 2d 225 (D. Ma. 2011). But see *Henderson v. Masco Framing Corp.*, [ii] insurance companies; [iii] corporate issuers; [iv] issuers of asset-backed securities (as that term is defined in section 1101(c) of part 229 of title 17, Code of Federal Regulations, as in effect on September 29, 2006); [v] issuers of government securities, municipal securities, or securities issued by a foreign government; or [vi] a combination of one or more categories of obligors described in any of clauses (i) through (v); and

(C) is registered under section 78o–7 of this title.

4. **Lengthened statute of limitations for filing a charge at DOL**

SOX Sec. 806 originally contained an unusually short statute of limitations -- 90 days. The Department of Labor’s policy did not allow the parties to toll the limitations period. Dodd-Frank extended the limitations period to 180 days. Sec. 922(c)(1)(A).

B. **Whistleblower protections for employees of consumer financial services organizations - Dodd-Frank Title X - 12 USC Sec. 5567**

Dodd-Frank established a new set of whistleblower protections for employees of organizations that provide financial services to consumers. The protections cover both internal and external complaints.

The whistleblower protections are far broader than those of SOX 806, because they are not limited to employees of publicly-traded companies, but extend to all employees of entities involved in the provision of consumer financial services – which the statute defines expansively. Protected whistleblowing activity is defined more broadly than it is under SOX. The enforcement mechanism is somewhat similar to that under SOX: aggrieved employees must first file a
complaint with the Department of Labor, but can then remove the case to federal district court if DOL does not issue a final order within the statutory time limits.

1. What employees are covered

A “covered employee” is “any individual performing tasks related to the offering or provision of a consumer financial product or service.” Sec. 1057(b).

A consumer financial product or service has an expansive definition. It includes extending credit, brokering loans, providing certain real estate settlement services or property appraisals, taking deposits or acting as a custodian for a consumer, providing payments or financial data processing services to a consumer, providing consumers with financial advisory services, debt management services or credit counseling services, and collecting and distributing credit or other financial information concerning consumers which will be used in the decision to offer a consumer a financial product or service. The new Bureau of Consumer Financial Protection has the authority to include additional activities in the definition. Sec. 1002(5). See www.consumerfinance.gov.

2. What is protected activity: internal and external complaints - Sec. 1057(a)

A covered employer or service provider is prohibited from terminating or otherwise discriminating against a covered employee (or the employee’s
representative) because the employee or his representative:

(1) provided, caused to be provided, or is about to provide or cause to be provided, information to the employer, the Bureau of Consumer Financial Protection, or any other State, local, or Federal, government authority or law enforcement agency, relating to any act or omission that the employee reasonably believes is a violation of any provision Title X of Dodd-Frank (the Consumer Protection Act of 2010), or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(2) testified or will testify in any proceeding resulting from the administration or enforcement of any provision of Title X, or any other provision of law that is subject to the jurisdiction of the Bureau, or any rule, order, standard, or prohibition prescribed by the Bureau;

(3) filed, instituted, or caused to be filed or instituted any proceeding under any Federal consumer financial law; or

(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard, or prohibition, subject to the jurisdiction of, or enforceable by, the Bureau.

These listed protected activities go beyond those in SOX. Some cases under SOX Sec. 806 had ruled
that merely refusing to participate in unlawful activity
did constitute protected activity. Such an objection does
constitute whistleblowing under Dodd-Frank Title X.

3. Enforcement - Sec. 1057(c)

a. The charge and DOL investigation

The employee has to file a charge with the Department of Labor, within 180 days after the alleged violation. The Secretary of Labor notifies the alleged violator of the charge and the substance of the supporting evidence, and must give the employer the opportunity to file a written response. Within 60 days after the charge was filed, DOL must initiate an investigation and determine if there is “probable cause” to believe the employer committed a violation.

If DOL finds probable cause, it must order preliminary relief, which can include reinstatement and back pay.

b. Administrative hearing

Either party may object to DOL’s order within 30 days, and request a hearing. However, the request for a hearing does not stay an order of reinstatement.

DOL must issue a final order within 120 days after the hearing concludes.
c. **Available relief – 1057(c)(4)(B)**

DOL “shall” award a prevailing employee back pay, undefined “compensatory damages” and attorney’s fees and expert witness costs.

If DOL finds the employee brought a frivolous claim, it can award $1,000 to the employer.

The Secretary of Labor has authority to seek judicial enforcement of a DOL order, and the court can award injunctive relief and compensatory damages. The employee on whose behalf DOL issued a final order can also sue in district court to compel the employer to comply with the order. 1057(c)(5).

d. **Judicial actions - 1057(c)(4)(D)**

The employee can bring an action de novo in federal court, if DOL has not issued a final order within 210 days after the employee filed the complaint, or within 120 days after DOL’s preliminary determination. Either party has the right to have a jury trial. The court may award a prevailing employee back pay, compensatory damages, reasonable attorney’s fees and costs.

e. **Unless the employee has brought a judicial action, either party can seek review of the Secretary’s order by the Court of Appeals in the Circuit where the employee lived at the time of the alleged violation, within sixty days of the order. 1057(c)(4)(E).**

f. **Waiver and arbitration – 1057(d)**

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Employees cannot waive their rights under 1057, and any pre-dispute agreement to arbitrate such a claim is invalid. The bar on arbitration does not apply to an arbitration clause in a collective bargaining agreement, unless DOL determines by rule that the arbitration clause is “inconsistent with the purposes of this title.”

4. Burdens of proof – 1057(c)(3)

In its preliminary determination, DOL is required to dismiss a charge unless the employee proves, as its prima facie case, that the protected activity was a “contributing factor” in the adverse decision. The investigation is not to be conducted if the employer rebuts the prima facie case by demonstrating that it would have taken the same action in the absence of the protected activity. These same burdens of proof apply to DOL’s final determination.

C. Dodd-Frank’s whistleblower bounty incentive for disclosures to the SEC - Sec. 922; 15 USC Sec. 78u-6(a) - 6(g), 6(i).

Sec. 922 of Dodd-Frank establishes powerful financial incentives for whistleblowers to report fraud to the SEC, somewhat similar to those under the federal False Claims (qui tam) Act. It provides that whistleblowers who voluntarily provide original information to the SEC relating to the violation of securities laws, which lead to a recovery greater than $1
milllion in an administrative or judicial enforcement action, may receive ten to thirty percent of the recovery.


The SEC promulgated final regulations implementing Sec. 922. They can be found at http://www.sec.gov/about/offices/owb/reg-21f.pdf. The regulations, issued May 24, 2011, were effective August 12, 2011. 17 CFR 240.21F. A detailed explanation of the regulations can be found in the accompanying PowerPoint at the end of this volume, The SEC’s Dodd-Frank Whistleblower Regulations.

The SEC made its first award under the bounty program in August, 2012. The court awarded the SEC more than $1 million in sanctions; at the time of the award, the SEC had collected $150,000, and so awarded the whistleblower $50,000. See www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483972#.UgpU_JKtq_Y. In June, 2013, the SEC announced that it would award a whistleblower fifteen per cent of the more than $7 million the agency hopes to collect from a hedge fund, against which it had obtained a default judgment. See www.sec.gov/news/press/2013/2013-06-announcement.htm.

1. **Who is a whistleblower under Sec. 922**

Any individual who voluntarily provides information to the SEC about a violation of securities laws, in the manner provided by the SEC’s regulations.

Whistleblowers may submit anonymous claims if they are represented by counsel, but before payment of an award, the whistleblower must disclose his identity. Sec. 922(d)(2).

2. **What information must a whistleblower provide to be eligible for an award?**

a. The information must be “original information” concerning a violation of the securities laws. “Original information” is information which: i) is derived from the whistleblower’s independent knowledge or analysis; ii) is not known to the SEC from another source, and iii) is not exclusively derived from an allegation made in an administrative or judicial proceeding, a government report, hearing audit or investigation, or from the news media, unless the whistleblower was the source of that information.
b. The definition of “original” information as including information derived from the whistleblower’s independent analysis is significant, because it would permit awards to whistleblowers who provide an analysis of misconduct, rather than evidence of the misconduct itself.

3. Covered administrative or judicial actions on which a bounty award can be based

The whistleblower’s information must lead to the successful enforcement of an administrative or judicial action for violation of securities laws, with a sanction of more than $1 million. Sec. 922(a)(a)(1). The action can either be brought by the SEC, Sec. 922(a)(1)(1), or be a “related action,” which means an action by one of other domestic or foreign entities listed. Sec. 922(a)(a)(5); Sec. 922(h)(2)(D)(i)(I) - (IV). 5

4. Determination of the award

A whistleblower can receive between ten and thirty per cent of the amount over $1 million which is recovered in the action. Sec. 922(b)(1). The payment

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5 The agencies which can bring a “related action” are the “Attorney General, an appropriate regulatory authority; a self-regulatory organization; a State attorney general in connection with any criminal investigation; any appropriate State regulatory authority; the Public Company Accounting Oversight Board; a foreign securities authority; and a foreign law enforcement authority. Dodd-Frank 922(h)(2)(D)(i)(I) – (IV).
appears to be mandatory (“the Commission, under regulations prescribed by the Commissions and subject to subsection (c), shall pay an award….”) Sec. 922(b)(1). However the SEC has the discretion to determine the amount of the award. Sec. 922(c)(1). In determining the amount, the SEC is directed to take into consideration the significance of the information the whistleblower provided, the assistance the whistleblower provided, the SEC’s interest in deterrence, and other relevant factors that the SEC establishes by rule or regulation. Sec. 922(c)(1)(b).

5. Individuals not eligible to receive a bounty award are, under Sec. 922(c)(2):

   a. Whistleblowers convicted of a criminal violation related to the action.

   b. Whistleblowers who obtained the information through an audit of financial statements required under the securities laws, if the submission of the information would violate 15 USC 78j-1.

   c. Whistleblowers who do not submit their information in the form the Commission requires.

   d. Employees, officers or members of law enforcement, regulatory or self-regulatory organizations who obtained the information while associated with the organization.
e. Individuals who knowingly and willingly make any false representations, or use a false document knowing it contains any false information. Sec. 922(i).

D. Dodd-Frank’s anti-retaliation protections for whistleblowers who provide information about securities law violations – Sec. 922(h), 15 USC 78-u6(h)

Dodd-Frank established new anti-retaliation provisions for employees who provide information to the SEC about securities law violations. In contrast to SOX Sec. 806, the bar on retaliation applies to all employers, and employees who are retaliated against can sue directly in federal court. As discussed below, these provisions may also apply to employees who make certain internal complaints to a publicly-traded employer.

1. Expansion of covered employers beyond SOX 806

Dodd-Frank’s whistleblowing provisions cover all employers – not just the publicly traded companies covered by SOX Sec. 806. Dodd-Frank Sec. 922(h)(1).

2. Employees covered

A “whistleblower” is “any individual who provides… information relating to a violation of the
Securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” Sec. 922(a)(6). However, as discussed below, employees who make certain internal complaints are also protected.

3. Prohibited acts – Broad definition

An employer cannot “discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against” a whistleblower because of the whistleblower’s protected activity.


Whistleblowers are protected against retaliation for:

a. Providing information to the SEC in accordance with the whistleblower protection provision, 15 USC 78-u6. Note that the information does not have to be the “original information” required by the bounty recovery provision. *Ott v. Fred Alger Management, Inc.*, 2012 U.S. Dist. LEXIS 143339 (S.D.N.Y. 2012).

b. Initiating, testifying in, or assisting in any investigation or judicial or administrative action of the SEC which is based on that information; or

c. Making a disclosure required or protected by either:
i. The Sarbanes-Oxley Act,

ii. The Securities Exchange Act of 1934,

iii. 18 USC 1513(e) (which criminalizes harmful actions taken against individuals who provide truthful information to law enforcement authorities about any violation or possible violation of federal law), or

iv. Any law, rule or regulation subject to the SEC’s jurisdiction.

**Internal complaints may be protected:**

The SEC’s regulations protect *internal* corporate complaints, because they protect employees from retaliation for making disclosures required or protected by SOX. These employees can therefore bypass DOL’s SOX filing requirements, and file claims under Dodd-Frank Sec. 922, related to the SOX predicate frauds, directly in federal court. See the accompanying Power Point, *The SEC’s Dodd-Frank Whistleblower Regulations.*

Several court decisions have held that Sec. 922 protects employees who complain internally about the predicate frauds noted in Sarbanes-Oxley Sec. 806. The first of these was *Egan v. TradingScreen, Inc.*, 2011 WL 1672066 (S.D.N.Y. May 4, 2011). Egan had complained to TradingScreen’s President that the company’s CEO was diverting TradingScreen’s assets to a company the CEO owned. Egan was fired, and
brought an action under Dodd-Frank Sec. 922. Defendants moved to dismiss, arguing that Egan had no standing under Sec. 922 because he had not provided information to the SEC. The court held that Sec. 922 encompasses internal complaints by employees who make disclosures under the Sarbanes-Oxley Act.

The court acknowledged that the definition of “whistleblower” in Dodd-Frank Sec. 922 does not, on its face, apply to employees who make internal corporate complaints. 15 U.S.C. 78u-6(a)(6) defines “whistleblower” as “any individual who provides...information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” But the court ruled that if this definition were applied literally, it would effectively invalidate the provision of Dodd-Frank prohibiting retaliation against individuals who make “disclosures that are required or protected under the Sarbanes-Oxley Act...the Securities Exchange Act of 1934... section 1513(e) of title 18, United States Code, and any other law, rule or regulation subject to the jurisdiction of the Commission.” 15 U.S.C. 78u-6(h)(l)(A)(iii).

The court nonetheless found that Egan’s own complaint was not protected activity, because TradingScreen was not a publicly traded company as required by Sarbanes-Oxley Sec. 806). The court also rejected plaintiff’s argument that Sec. 922 applied to his disclosure of the defendant’s violations of rules promulgated by FINRA. The court said that Dodd-Frank does not protect whistleblowers who report violations of any rule or regulation subject to the SEC’s
jurisdiction, but rather “disclosures that are required or permitted under...any other law, rule or regulation subject to the jurisdiction of the Commission.” As the court reasoned, since the plaintiff in a Sec. 922 retaliation case “must alleged that a law or rule in the SEC’s jurisdiction explicitly requires or protects disclosure of [a] violation,” and since the FINRA rules did not impose on the plaintiff a duty to disclose, Egan could not base a whistleblower claim on his internal reporting of FINRA violations. 6


However, the one Court of Appeals to rule on the issue, the Fifth Circuit, recently came to the opposite

6 Egan also argued that he had provided information to the SEC because he had given information to TradingScreen’s counsel, Latham & Watkins. The court held that if Egan had done so, he would have been “acting jointly” with the law firm to provide information to the SEC, as permitted by Sec. 922. Since Egan had not pled sufficient facts to show that Latham & Watkins had disclosed information to the SEC, the court permitted Egan to amend his complaint. In a subsequent decision, the court dismissed the complaint, finding that Latham & Watkins had not, in fact, provided any information to the SEC. Egan v. TradingScreen, Inc., 2011 U.S. Dist. LEXIS 103416 (S.D.N.Y. September 12, 2011).
Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620 (5th Cir. 2013). The Court relied on the definition of “whistleblower” in 15 U.S.C. 78u-6 (“any individual who...provides information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission”). It then rejected the plaintiff’s claim that individuals who do not meet that definition of “whistleblower” -- because they make an internal disclosure under Sarbanes-Oxley, but not to the SEC -- can nonetheless bring retaliation claims under Dodd-Frank Sec. 922(h). The court wrote that if Dodd-Frank permitted claims based on SOX disclosures, SOX Sec. 806 would be “rendered moot,” because Dodd-Frank’s remedies are more generous than those of Sec. 806. A decision from the Northern District of California follows Asadi. Banko v. Apple Inc., 2013 U.S. Dist. LEXIS 149686, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013).

The SEC’s regulations and the court decisions permitting Dodd-Frank claims to be predicated on internal complaints are a significant expansion of the remedies for employees who make disclosures under Sarbanes-Oxley Sec. 806. Under this rationale, employees who engage in protected activity under Sec. 806 can avail themselves of the more liberal remedies provided by Dodd-Frank Sec. 922, as described below: a greatly lengthened statute of limitations, a plenary action in federal court without the necessity for filing a charge at the Department of Labor, and potential awards of double back pay.

“Reasonable belief” standard:
The whistleblower does not have to be correct about the unlawful activity in question. The SEC’s regulations make clear that the whistleblower need only “possess a reasonable belief that the information...relates to a possible securities law violation.” 17 CFR 240.21F-2(b)(i). *Murray v. UBS Securities, LLC*, 2013 U.S. Dist. LEXIS 71945 (S.D.N.Y. 2013); *Ott v. Fred Alger Management, Inc.*, 2012 U.S. Dist. LEXIS 143339 (S.D.N.Y. 2012); *Kramer v. Trans-Lux Corp.*, 2012 U.S. Dist. LEXIS 136939 (D. Ct. 2012).

5. Enforcement: Private right of action in federal court

In contrast to both SOX and Dodd-Frank’s enforcement scheme for employees of entities providing consumer financial services, whistleblowers under 922(h) can sue directly in federal court, without first initiating an administrative proceeding. Sec. 922(h)(1)(B).

a. Available relief

A prevailing plaintiff “shall” be awarded reinstatement with the same seniority the plaintiff would have had but for the discrimination, double back pay with interest, and reasonable attorney’s fees, litigation costs and expert witness fees. Sec. 922(h)(1)(C).

922(h) does not provide for damages for emotional distress or punitive damages. *Kramer v.*

b. Statute of limitations

The limitations period under 922(h) is far longer than that under SOX or under Dodd-Frank’s protections for whistleblowers working in consumer financial services. The employee must file and action within six years from the date of the violation, or three years from when the employee knew or reasonably should have known the facts material to the claim, but no later than ten years after the date of the violation. Sec. 922(h)(1)(B)(iii).

c. No pre-emption

Whistleblowers can bring an action under 922(h) without losing or impairing their rights and remedies under any other law, or a collective bargaining agreement. Sec. 922(h)(3).

d. Bad actors can’t recover: 922(i)

Whistleblowers may not recover damages for retaliation if they knowingly and willfully make a false or fraudulent representation, or use a document knowing it contains such information.

e. No extraterritorial application

As of this writing, one court has held that Sec. 922 does not apply to protect individuals who engage in protected activity abroad. Asadi v. G.E. Energy (USA),
LLC, 2012 U.S. Dist. LEXIS 89746 (S.D. Tex. 2012); aff’d on other grounds, 2013 U.S. App. LEXIS 14470 (5th Cir. July 17, 2013). The court reasoned that since Sec. 922 was silent on the issue, the presumption that a statute does not apply outside the United States would apply; in addition, since Dodd-Frank, in Sec. 929P(b), specifically gives district courts extraterritorial jurisdiction over enforcement actions brought by the SEC, the court ruled that Congress did not intend for Sec. 922, governing private retaliation actions, to apply abroad.

E. Dodd-Frank's anti-retaliation provisions and bounty incentives for Whistleblowers under the Commodity Exchange Act -- Sec. 748; 7 USC Sec. 26

Dodd-Frank establishes whistleblower protections and a bounty incentive program under the Commodity Exchange Act. These provisions track the protections, procedures, remedies and awards for individuals who provide information to the SEC about securities law violations. Sec. 748. The statute provides financial incentives for reports to the Commodity Futures Trading Commission (CFTC), and bars retaliation against individuals who provide that information or assist the CFTC in an investigation. Plaintiffs may sue directly in federal court, within two years of a retaliatory act. The CFTC has issued regulations implementing Sec. 748. 17 CFR 165.
F. Dodd-Frank’s expansion of protections under the False Claims (qui tam) Act: Associated persons protected; limitations period defined.

Dodd-Frank expands the class of individuals who are protected from retaliation under the False Claims (qui tam) Act. The False Claims Act prohibits fraud on the government (31 U.S.C. 3729) and retaliation against individuals who make internal and external complaints about false claims (31 U.S.C. 3730(h)). Under Dodd-Frank Sec. 1979A, employers are now prohibited from retaliating against individuals who are associated with a qui tam whistleblower because of the whistleblower’s protected activity.

Dodd-Frank also resolves the question of what statute of limitations governs retaliation claims under the False Claims Act. Courts had held that the limitations period was that of the most closely analogous state statute, with varying results. See, e.g., United States ex rel McKenna v. Senior Life Management, Inc. 429 F. Supp. 2d 695 (S.D.N.Y. 2006). Dodd-Frank sets a uniform limitations period of three years from the date of the retaliatory act. One case holds that the change in the limitations period is not retroactive. Riddle v. Dyncorp. International Inc., 733 F.Supp 743 (S.D. Tx 2010), mot. for reconsideration denied, 2011 U.S. Dist. LEXIS 3958 (January 14, 2011).
IV. Whistleblower Protections under the Patient Protection and Affordable Care Act of 2010

In enacting the Patient Protection and Affordable Care Act of 2010, Congress included significant whistleblower protections for employees. These provisions protect employees from retaliation for reporting violations of the ACA’s provisions relating to employee health plans, or for receiving tax credits or subsidies under the ACA. The whistleblower provisions, found in Sec. 1558 of the ACA, add a new Section 18C to the Fair Labor Standards Act, and are codified at 29 U.S.C. 218c.

OSHA issued proposed regulations to implement Section 18C on February 27, 2013, to be codified at 29 CFR 1984.100 et seq.

A. Covered employers and employees

Sec. 1558 covers employers and employees as they are broadly defined in the Fair Labor Standards Act, 29 U.S.C Sec. 203. See 29 CFR 1984.101 (proposed regulation).

B. Protected activity

Sec. 1558 prohibits employers from discharging or in any manner discriminating against any employee in the terms and conditions of employment, because the employee has
(1) received a credit under section 36B of the Internal Revenue Code (26 USCS § 36B) or a subsidy under section 1402 of the ACA;

(2) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or a State attorney general, information relating to any violation of, or any act or omission the employee reasonably believes to be a violation of, Title I of the ACA.

Note: Title I of the ACA includes a ban on lifetime coverage caps, unreasonable annual caps, and pre-existing condition limitations, and requires coverage for certain preventative services, dependent care coverage for children up to the age of 26, and uniform coverage documents.

The DOL’s regulations provide that for purposes of this section, “reasonable belief” is analyzed as under Sec. 806 of SOX; therefore, both a subjective and objective test must be met. 29 CFR 1984.102.

(3) testified or is about to testify in a proceeding concerning a violation of Title I of the ACA;

(4) assisted or participated, or is about to assist or participate, in such a proceeding; or

(5) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of Title I of the ACA, or any order, rule, regulation, standard, or ban under Title I.

29 U.S.C. 218c(a).
C. Enforcement


Under those procedures, a complainant must file a charge with OSHA within 180 days after the alleged violation. OSHA is to conduct an investigation, in which the parties may submit written statements and request an in-person meeting with the agency.

For the investigation to proceed, the complainant must make a prima facie showing that his protected activity was a contributing factor to the challenged adverse employment action. To rebut the prima facie case, and obtain dismissal of the charge, the employer must show, by clear and convincing evidence, that it would have taken the same action regardless of the employee’s protected activity.

Within sixty days after the complaint is filed, OSHA must issue findings, determining whether there is reasonable cause to believe the employer retaliated against the complainant. If OSHA does find reasonable cause, it can order reinstatement, back pay with interest, compensatory damages and attorney’s fees and costs.

Either party can then file objections, which stay the relief granted the employee, except for reinstatement, which remains effective. Either party can request a hearing within 30 days. The hearing is conducted before an Administrative Law Judge, whose decision can be appealed to DOL’s Administrative Review Board, and then to the Court of Appeals.
The employee can also seek de novo review in federal court, if the Secretary of Labor has not issued a final decision within 210 days after the complaint was filed, or within 90 days after receiving the Assistant Secretary’s written determination following the preliminary investigation. 29 CFR 1984.114.

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