WHISTLEBLOWER PROTECTIONS, RETALIATION ISSUES, AND INVESTIGATIVE ISSUES ARISING UNDER THE SARBANES-OXLEY ACT AND THE DODD-FRANK ACT

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Most attorneys representing employees in traditional EEO cases are intimately familiar with the retaliation laws under Title VII of the Civil Rights Act and similar statutes, which have anti-retaliation provisions prohibiting an employer from taking actions against an employees who report discrimination or harassment under those laws. Many of these attorneys are also familiar with state retaliatory discharge laws protecting employees who report criminal activity or other issues in the workplace affecting the health, welfare or safety of the state’s citizenry. However, there are dozens of additional protections for whistleblowers under federal law, protecting whistleblowers in many different industries, that often fly under the radar of the traditional plaintiff-side EEO attorney. And while many attorneys are generally familiar with the whistleblower incentive program available under the False Claims Act, many are not as familiar with, or even aware of, the whistleblower incentive program more recently put in place under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) or the additional whistleblower protections under the Sarbanes-Oxley Act (“SOX”) as well as Dodd-Frank.

Accordingly, this paper will focus on those whistleblower protections and anti-retaliation laws related to SOX and Dodd-Frank, which primarily relate to fraud and violations of securities laws by publicly traded companies, including violations affecting shareholders. The goal of the paper is to serve as a primer for traditional EEO attorneys to assist with spotting these claims, identifying legally protected whistleblowers, and to provide a general overview of the legal issues and claims procedures for bringing retaliation claims and obtaining any applicable bounty award. The paper will also discuss legal, strategic, and ethical issues pertinent to the investigations into, and litigation arising from, reported violations and will include practical suggestions for the plaintiff’s attorney in representing the whistleblower through those processes.

**Sarbanes-Oxley Act – 18 U.S.C. §1514A**

Sarbanes-Oxley was enacted after corporate scandals such as Enron shook investor confidence. The Act included significant changes to the regulation of financial practices and corporate governance and included anti-retaliation protections for employees who report violations. The following chart provides the basics of who is protected, the claims procedures, and the remedies allowed. The most significant difference for traditional EEO attorneys to be mindful of is that SOX claims must be brought before the Secretary of Labor, as there is no right to file the action in federal court. That said, SOX does allow a plaintiff to proceed to federal court if the Secretary of Labor does not issue a final determination within 180 days of the complaint being filed. However, unlike the EEOC process, if the Secretary does issue a final determination within 180 days, the plaintiff may not then elect to proceed in federal court. Rather, the plaintiff’s claims remain in the Department of Labor process set forth below.
| **SCOPE** | Sarbanes-Oxley protects those who report alleged violations relating to mail fraud, wire fraud, bank fraud, securities fraud, or 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). |
| **WHO IS ELIGIBLE** | Employees of 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)) including employees, any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. §78c). 18 U.S.C. §1514A(a).
Employees of privately held contractors and sub-contractors for publicly traded corporations are also protected by the anti-retaliation provisions. Lawson v. FMR LLC, 134 S. Ct. 1158, 1176 (2014). |
| **CLAIMS AVAILABLE** | Publicly traded companies (as defined above) and certain subsidiaries and affiliates (as defined above) or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, 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 lawful act done by the employee—
(1) 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 section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is 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); or  
(2) to 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 section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud), 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). |
| WHERE (to bring claims) | A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—  
(A) filing a complaint with the Secretary of Labor; or  
(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for *de novo* review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy. 18 U.S.C. §1514A(b)(1). If an action is brought in the district court, the plaintiff shall be entitled to a jury trial. 18 U.S.C. §1514A(b)(2)(E).  
Proceedings before the Secretary shall proceed in accordance with 49 U.S.C. §42121(b), which provides for the following general steps: the Secretary shall conduct an initial investigation and determine whether there is reasonable cause to conclude that the complaint has merit and, if so, order appropriate relief; within 30 days of the Secretary’s finding, either the complainant or the employer alleged to have committed the violation may file objections to the Secretary’s finding and request a hearing before an Administrative Law Judge who shall issue a decision on liability which can then be reviewed by the Administrative Review Board. The Board is authorized to render a final decision of the Secretary. The non-prevailing party may appeal to the United States Court of Appeals. See 29 C.F.R. 1980 *et seq.* |
| STATUTE OF LIMITATIONS | An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation. 18 U.S.C. §1514A(b)(2)(D). |
| PRIMA FACIE CASE/ELEMENTS | To state a claim for SOX retaliation, the employee must allege:  
1) he engaged in protected activity;  
2) the employer knew or suspected, either actually or constructively, that he engaged in protected activity;  
3) he suffered an unfavorable personnel action; and  
4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797 (6th Cir. 2015); see also 29 C.F.R. §1980.104(b)(1)(2007).  
An employee bears the initial burden of making a *prima facie* showing of retaliatory discrimination; the burden then shifts to the employer to rebut the employee’s *prima facie* case by demonstrating by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity. 29 C.F.R. §1980.104(b)(1). |
## Remedy

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<th>REMEDY</th>
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<tr>
<td>(1) In general. An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.</td>
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<td>(2) Compensatory damages. Relief for any action under paragraph (1) shall include—</td>
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<td>(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;</td>
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<td>(B) the amount of back pay, with interest; and</td>
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<tr>
<td>(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. 18 U.S.C. §1514A(c).</td>
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The make whole relief can include noneconomic compensatory damages, including emotional distress and reputational harm damages. *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254, 264 (5th Cir. 2014); *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1138 (10th Cir. 2013).

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### Dodd-Frank Wall Street Reform and Consumer Protection Act -

15 U.S.C. §78u-6

In 2010, Congress passed Dodd-Frank in response to the Great Recession. Like SOX, Dodd-Frank was designed to provide many new and stricter regulations of the financial industry, but it also included whistleblower protections in areas such as consumer protection and commodities. The focus of this paper, however, will be on Section 922, which provides whistleblower protections related to the Securities Exchange Act and SOX. Section 922 established a whistleblower incentive program whereby any individual (not limited to employees) who reports a securities violation to the SEC, resulting in an enforcement action with sanctions collected in an amount greater than $1 million, can be awarded between 10-30% of the sanction collected. Since the program’s inception, the SEC has paid more than $50 million to 18 whistleblowers. Section 922 of Dodd-Frank also established a new cause of action for covered employees who provide whistleblower information to the SEC, assist with an SEC action, or otherwise make disclosures required or protected under SOX, the Securities Exchange Act, or other laws, rules or regulations under SEC jurisdiction. While the anti-retaliation provisions of Dodd-Frank overlap in many respects with those under SOX, the two retaliation claims differ greatly with respect to procedure, in that Dodd-Frank has no exhaustion requirement and allows an immediate action in the United States District Court. The two claims also differ in important substantive respects, namely where Dodd-Frank allows for greater damages and a much more generous statute of limitations. Again, the following chart provides the basics of who is protected, the claims procedures, and the remedies allowed.
| SCOPE | Dodd-Frank’s whistleblower protections, under 15 U.S.C. §78u-6, protect those who report violations of federal securities laws or otherwise make disclosures required or protected under SOX.  
Common securities violations covered under Dodd-Frank’s whistleblower incentive program include: corporate disclosure and financial violations (*e.g.*, false/misleading financial statements, failure to file reports, executive compensation, etc.); offering fraud (*e.g.*, Ponzi schemes, misrepresentation in offering securities, etc.); market manipulation; insider trading; violations of the Foreign Corrupt Practices Act; unregistered offerings. See http://www.sec.gov/about/offices/owb/annual-report-2014.pdf; http://www.sec.gov/about/forms/formtcr.pdf  
Disclosures required or protected under SOX include: alleged violations of section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), or 1348 (securities fraud), any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders. 18 USC §1514A(a). |
| WHO IS ELIGIBLE | **Whistleblower Incentive Program** (Award program for successful tips to SEC)  
The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission. 15 U.S.C. §78u-6(a)(6).  
An “eligible whistleblower” is a person who voluntarily provides the SEC with original information about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. The information provided must lead to a successful SEC action resulting in an order of monetary sanctions exceeding $1 million. One or more people are allowed to act as a whistleblower, but companies or organizations cannot qualify as whistleblowers. You are not required to be an employee of the company to submit information about that company.  
*See* https://www.sec.gov/about/offices/owb/owb-faq.shtml#P5_1383; *See also* 17 C.F.R. §240.21F-2.  
**Whistleblower Protection Program** (Retaliation against employee whistleblowers)  
Employees of domestic, publically traded companies or their subsidiaries are covered under the retaliation provision in the whistleblower statute. The Act applies to publicly traded companies that have more than 500 shareholders and $10 million in assets.  
Note: An employee can maintain both a whistleblower incentive claim and a whistleblower protection (retaliation) claim. |
<table>
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<tr>
<th>CLAIMS AVAILABLE</th>
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<tr>
<td><strong>Whistleblower Incentive Program</strong></td>
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<td>In any covered judicial or administrative action, or related action, the Commission, under regulations prescribed by the Commission and subject to subsection (c), shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—</td>
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<td>(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and</td>
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<td>(B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions. 15 U.S.C. §78u-6(b)(1).</td>
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<tr>
<td>Original information. The term &quot;original information&quot; means information that—</td>
</tr>
<tr>
<td>(A) is derived from the independent knowledge or analysis of a whistleblower;</td>
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<tr>
<td>(B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and</td>
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<tr>
<td>(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information. 15 U.S.C. §78u-6(a)(3).</td>
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<tr>
<td><strong>Whistleblower Protection Program</strong></td>
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<tr>
<td>No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—</td>
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<td>(i) in providing information to the Commission in accordance with this section;</td>
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<td>(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or</td>
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| WHERE (to bring the claims) | **Whistleblower Incentive Program**  
To be considered a whistleblower under Section 21F of the Exchange Act (15 U.S.C. 78u-6(h)), you must submit your information about a possible securities law violation by either of these methods:  
(1) Online, through the Commission’s Web site located at http://www.sec.gov; or  
(2) By mailing or faxing a Form TCR (Tip, Complaint or Referral) (referenced in § 249.1800 of this chapter) to the SEC Office of the Whistleblower, 100 F Street NE., Washington, DC 20549-5631, Fax (703) 813-9322. 17 C.F.R. §240.21F-9.  
A whistleblower may be represented by counsel and must be represented by counsel if choosing to submit the complaint anonymously - which is permitted, provided the whistleblower is represented by counsel. However, the whistleblower’s identity must be disclosed prior to payment of an award. 15 U.S.C. §78u-6(d).  
Practice tip: Counsel can and should prepare the complaint and submit additional information with the complaint in the form of additional narrative and documents beyond what is called for on the SEC form.  
**Whistleblower Protection Program:**  
An individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C). 15 USC §78u-6(h)(1)(B)(i). |
| STATUTE OF LIMITATIONS | (I) In general. An action under this subsection may not be brought--  
(aa) more than 6 years after the date on which the violation of subparagraph (A) occurred; or  
(bb) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the employee alleging a violation of subparagraph (A).  
(II) Required action within 10 years. Notwithstanding subclause (I), an action under this subsection may not in any circumstance be brought more than 10 years after the date on which the violation occurs. 15 USC §78u-6(h)(1)(B)(iii). |
## PRIMA FACIE CASE/ELEMENTS

**Whistleblower Protection Program**

The elements of a retaliation claim under the Dodd-Frank Act are:

1. that the plaintiff engaged in a protected activity;
2. that the plaintiff suffered an adverse employment action; and
3. that the adverse action was causally connected to the protected activity.


## REMEDY

**Whistleblower Incentive Program**

### Determination of amount of award

(A) Discretion. The determination of the amount of an award made under subsection (b) shall be in the discretion of the Commission.

(B) Criteria. In determining the amount of an award made under subsection (b), the Commission--

(i) shall take into consideration--

(1) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;

(2) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;

(3) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and

(IV) such additional relevant factors as the Commission may establish by rule or regulation; and

(ii) shall not take into consideration the balance of the Fund. 15 USC §78u-6(c)(1).

See 15 USC §78u-6(c)(2) for bases for denying an award and 15 USC §78u-6(f) for appeal rights.
<table>
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<tr>
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<td>Relief for an individual prevailing in an action brought under subparagraph (B) shall include—</td>
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<td>(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;</td>
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<tr>
<td>(ii) 2 times the amount of back pay otherwise owed to the individual, with interest; and</td>
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<tr>
<td>(iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. 15 USC §78u-6(h)(1)(C).</td>
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I. LEGAL ISSUES ARISING UNDER ANTI-RETALIATION PROVISIONS OF SOX AND DODD-FRANK

Sarbanes-Oxley

A. Protected Activity

Whether an employee engaged in protected activity is an extensively litigated issue under SOX, as the parameters of what constitutes protected activity can be quite nuanced and fluid under jurisprudence from the Administrative Review Board (“ARB”) and the courts. Indeed, as discussed below, the ARB and the courts don’t always agree on the interpretation of what constitutes protected activity. Certain issues, however, such as internal reporting, are plainly addressed and afforded express protection under the Act.

- Internal Reporting Protected

The anti-retaliation provisions under SOX expressly protect employees who report violations internally to supervisors or other company representatives. 18 U.S.C. §1514A(a)(1)(C)(protecting those who report to “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)”).

- Reasonable Belief - no need to prove the underlying violation in fact occurred

A “reasonable belief” requires the plaintiff must have both a subjective, good faith belief and an objectively reasonable belief that the complained-of conduct violates one of the enumerated categories of law. See Lockheed Martin Corp., 717 F.3d at 1132; Wiest, 710 F.3d at 131-32. However, an employee need not prove that the corporate defendant actually committed the fraud or violation in order to prevail in the retaliation action. Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *45; Allen, 514 F.3d at 477.

- **Reasonable Belief - does not require identifying a violation “definitively and specifically”**

Prior to 2011, many courts required that an employee’s complaint under SOX must have “definitively and specifically” related to one of the six enumerated categories of violations set forth in the Act, as that phrase was used by the ARB in Platone v. FLYi, Inc., 2006 DOL Ad. Rev. Bd. LEXIS 89 (ARB Sept. 29, 2006). In 2011, the ARB abrogated its prior decision in Platone and clarified that in order to establish that the employee engaged in protected activity, he or she need not have complained of or reported a violation that “definitively and specifically” related to one of the identified violations under the Act. In so doing, the ARB reversed the opinion of the Administrative Law Judge (“ALJ”) below, finding that the ALJ had “failed to focus on the plain language of the SOX whistleblower provision, which protects ‘all good faith and reasonable reporting of fraud.’” Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *40 (ARB May 25, 2011). The ARB recognized that it had previously used “definitively and specifically” language in Platone and that many federal circuit courts had thereafter adopted a “definitively and specifically” standard. Accordingly, the ARB abrogated Platone and plainly stated that the employee need only “reasonably believe” that the reported conduct “constitutes a SOX violation.” Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *45.

Since then, most federal courts addressing the issue have followed the ARB’s ruling, finding that the ARB’s position is entitled to deference under Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), holding that deference to an agency interpretation is appropriate if Congress has not directly

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1 While some courts have declined to decide whether the ARB’s decision in Sylvester is entitled to deference, deciding the cases on other grounds, and other courts have continued to cite the “definitively and specifically” standard generally without discussion or application, no court since Sylvester has expressly examined the reasoning of Sylvester in rejecting the “definitively and specifically standard” and opted not to follow it. In Nazif v. Computer Scis. Corp., the Northern District of California noted that the plaintiff had not met the “definitively and specifically” standard and in the absence of Ninth Circuit authority, it assumed the standard still applied (Sylvester notwithstanding), but the court expressly decided the case on other grounds. Nazif v. Computer Scis. Corp., 2015 U.S. Dist. LEXIS 78673, *18, n.5 (N.D. Cal. June 17, 2015) citing Van Asdale v. Int’l Game Tech., 577 F.3d 989, 1001 (9th Cir. 2009).
addressed the precise question and the agency’s construction is based on a permissible construction of the statute. See Wiest v. Lynch, 710 F.3d 121, 123 (3d Cir. Pa. 2013)(ARB’s rejection of Platone’s “definitive and specific” standard is entitled to Chevron deference); Taylor, 2014 U.S. Dist. LEXIS 119042, at *7 (“[t]he ARB’s rejection of the “definitive and specific” requirement is entitled to deference under Chevron”); Stewart v. Doral Fin. Corp., 997 F. Supp. 2d 129, 136 (D.P.R. 2014)(affording Chevron deference and rejecting the “definitively and specifically” standard).

In Lawson v. FMR LLC, the Supreme Court declined to decide whether the ARB was entitled to deference under Chevron for interpreting SOX and Justice Sotomayor in her dissent expressly opined that it wasn’t, stating that the authority to interpret SOX was delegated to the SEC. Lawson, 134 S. Ct. 1158, 1186-1187 (2014)(Sotomayor, J. dissenting). However, even if not given deference under Chevron, the courts can still defer to the ARB’s decision in Sylvester under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), finding deference to the agency appropriate where rulings, interpretations and opinions are comprised of a body of experience and informed judgment, even if the agency is not expressly charged with interpreting an Act. See Nielsen v. AECOM, 762 F.3d 214, 219 (2nd Cir. 2014)(affording Skidmore deference and rejecting the “definitely and specifically” standard, abrogating its prior decision in Vodopia v. Koninklijke Philips Elec., N.V., 398 F. App’x. 659 (2nd Cir. 2010)); Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797 (6th Cir. May 28, 2015)(affording Skidmore deference and adopting “as persuasive the reasoning of the ARB in Sylvester reject[ing] the ‘definitively and specifically’ standard applied in this Court’s previous unpublished opinion of Riddle v. First Tenn. Bank, Nat’l Ass’n, 497 F. App’x 588, 595 (6th Cir. 2012)”).

- Subjectively Reasonable

To satisfy the subjective component of the “reasonable belief” test, the employee must actually have reasonably believed that the conduct complained of constituted a violation of relevant law. Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *32-33, citing Harp v. Charter Commc’ns, 558 F.3d 722, 723 (7th Cir. 2009). Subjective reasonableness requires that the employee ‘actually believed the conduct complained of constituted a violation of pertinent law.’” Sylvester, 2011 DOL Ad. Rev.

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2 The ARB acts on behalf of the Secretary of Labor when issuing final decisions.

3 An employee need not communicate to her employer the reasonableness of her belief; she merely has to have held a reasonable belief that what she reported is a violation of one of the enumerated laws. Sylvester at 34: see also Yang v. Navigators Group, Inc., 18 F. Supp. 3d 519, 529 (S.D.N.Y. 2014)(“the employee is not required to communicate to the employer which laws the conduct allegedly violated...the employee’s communication need only ‘identify the specific conduct that the employee believes to be illegal’“(emphasis in original).
Bd. LEXIS 47, at *32-33 quoting Day v. Staples, Inc., 555 F.3d 42, 54 n.10 (quoting Welch v. Chao, 536 F.3d 269, 277 n.4 (4th Cir. 2008)); see also Taylor, 2014 U.S.Dist. LEXIS 119042, at *7. In this regard, “the plaintiff’s particular educational background and sophistication [is] relevant.” Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47 at *32-33; Rhinehimer, 787 F.3d 797 (reasonable belief will be analyzed in light of the employee’s training and experience).

- Objectively Reasonable

The objective component of the “reasonable belief” test is evaluated “based on the knowledge available to a reasonable person in the same factual circumstance with the same level of training and experience as the aggrieved employee.” Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *33, quoting Harp, 558 F.3d at 723.

“Often the issue of ‘objective reasonableness’ involves factual issues and cannot be decided in the absence of an adjudicatory hearing.” Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *35; see also Allen, 514 F.3d at 477-478 (“the objective reasonableness of an employee’s belief cannot be decided as a matter of law if there is a genuine issue of material fact”). In Livingston v. Wyeth, the Fourth Circuit determined that it could decide, as a matter of law, whether an employee held an objectively reasonable belief that a violation occurred. Livingston v. Wyeth, 520 F.3d 344, 352, n.2 (4th Cir. 2008). However, the dissent in Livingston took exception to this as a blanket rule and clarified that:

The issue of objective reasonableness should be decided as a matter of law only when “[n]o reasonable person could have believed” that the facts amounted to a violation. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001)(per curiam). However, if reasonable minds could disagree about whether the employee’s belief was objectively reasonable, the issue cannot be decided as a matter of law. Allen, 514 F.3d 468, 2008 WL 171588, at *7 (citing Lipphardt v. Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1188 (11th Cir. 2001); Fine v. Ryan Int’l Airlines, 305 F.3d 746, 752-53 (7th Cir. 2002)).

Livingston, 520 F.3d at 361 (Michael, J., dissenting); see also, Rhinehimer, 787 F.3d 797 (quoting Livingston dissent); Welch v. Chao, 536 F.3d 269, 275 (4th Cir. 2008)(question whether a plaintiff’s belief was objectively reasonable is a “mixed question of law and fact,” meaning that it should be decided by the Court only if there is no genuine issue of material fact as to the belief’s reasonableness).4

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4 In Feldman v. Law Enforcement Assocs. Corp., the court dismissed plaintiffs’ complaint, reasoning that, inter alia, “plaintiffs did not have an objectively reasonable belief that a violation had occurred because they had very little information on which to make the insider trading allegation.” Feldman, 955 F. Supp. 2d 528, 551 (E.D.N.C. 2013).
- Fraud

SOX provides protection to employees who report or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 (mail fraud), 1343 (wire fraud), 1344 (bank fraud), 1348 (securities fraud), 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.

Prior to the ARB’s decision in Sylvester, the courts were split on whether a whistleblower must demonstrate that the fraud involved in the first four enumerated violations must be a fraud against shareholders and similarly split on whether the provision in reporting a violation of “any rule or regulation of the Securities and Exchange Commission” needed to involve fraud against shareholders or allege any fraud at all. Compare Livingston, 520 F.3d at 351, n.1 (concluding that each of the enumerated violations, including “any rule or regulation of the Securities and Exchange Commission” requires a showing of fraud, stating, “[t]o conclude otherwise would absurdly allow a retaliation suit for an employee’s complaints about administrative missteps or inadvertent omissions from filing statements”); Bishop v. PCS Admin. (USA), Inc., 2006 U.S. Dist. LEXIS 37230, *30-31 (N.D. Ill. May 23, 2006)(finding that the phrase "relating to fraud against shareholder" must be read as applying to all violations enumerated under section 806); and Reyna v. ConAgra Foods, Inc., 506 F.Supp.2d 1363, 1381-82 (M.D.Ga. 2007)(finding that §1514A “clearly protects an employee against retaliation based upon that employee’s reporting of mail fraud or wire fraud regardless of whether that fraud involves a shareholder of the company”); O’Mahony v. Accenture Ltd., 537 F. Supp. 2d 506, 517 (S.D.N.Y. 2008)(alleged fraud does not need to be directed at shareholders).

The ARB in Sylvester expressly stated that “shareholder or investor fraud is not required to establish SOX-protected activity,” reasoning that of the six enumerated violations that fall within the scope of protected reporting, only the last - “or any provision of Federal law relating to fraud against shareholders” - contains any requirement of fraud against shareholders. Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *46 (discussing the rule of last antecedent). Hence, the ARB determined that the first four enumerated violations can be reports of [mail, wire, bank, or securities] fraud generally and need not be directed at shareholders, and that the provision protecting reporting of a violation of “any rule or regulation of the Securities and Exchange Commission” need not involve fraud at all. Sylvester, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *50.5

5 In Lawson v. FMR LLC, the Supreme Court recognized, when rejecting an argument that statutory headings were controlling, that “activity protected under §1514A is not limited to “provid[ing] evidence of fraud; it also includes reporting violations of SEC rules or regulations.” Lawson, 134 S. Ct. at 1169. Justice Sotomayor, in her dissent, further noted that the District Court in Lawson required that the fraud reported be “against shareholders”
The Tenth Circuit deferred to the ARB in refusing to require an allegation of shareholder fraud in order to establish protected activity. *Lockheed Martin Corp. v. Admin. Review Bd.*, 717 F.3d 1121, 1131 (10th Cir. 2013)(affording *Chevron* deference and holding that there is no need to allege that the reported violations relate to fraud against shareholders to be protected from retaliation under the Act); see also *Yang v. Navigators Group, Inc.*, 18 F. Supp. 3d 519, 528 (S.D.N.Y. 2014)(noting that no Second Circuit case has so held and, “[a]s the statute plainly contemplates reporting of violations of ‘any rule or regulation,’ the Court declines to limit the scope of the statute to only SEC rules and regulations prohibiting fraud”); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 2d 432, 444, (S.D.N.Y. 2013)(“by listing certain specific fraud statutes to which §1514A applies, and then separately, as indicated by the disjunctive ‘or,’ extending the reach of the whistleblower protection to violations of any provision of federal law relating to fraud against securities shareholders,” the statute clearly protects employees who report any of the enumerated federal crimes, irrespective of whether the fraud affects shareholders”); *Gladitsch v. Neo@ogilvy, Ogilvy, Mather, WPP Group USA, Inc.*, 2012 U.S. Dist. LEXIS 41904, *20-22 (S.D.N.Y 2012)(“an allegation of shareholder fraud is not a necessary component of protected activity under Section 1514A”).

Notwithstanding *Sylvester* and the weight of authority following it, at least one court has continued to require not just an allegation of fraud, but fraud against shareholders, as essential to meeting the protected activity element of a SOX claim. See *Gauthier v. Shaw Group, Inc.*, 2012 U.S. Dist. LEXIS 172551, *12 (W.D.N.C. Dec. 3, 2012)(recognizing “there is a split of authority regarding the interpretation of this particular provision” but concluding “the conduct complained of will only be relevant under Section 1514A(a)(l) if it relates to fraud against shareholders”).

- **Materiality**

  The ARB, again in *Sylvester v. Parexel*, expressly rejected a materiality requirement, explaining that “a complainant can engage in protected activity under Section 806 even if he or she fails to allege or prove materiality, scienter, reliance, economic loss, or loss causation.” *Sylvester*, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *53. The Board expressly rejected any requirement that the plaintiff must allege the elements of a securities fraud claim to qualify for protection, explaining that any such requirement ran afoul of the statute’s requirement that the employee merely have a

  and that the majority in *Lawson* did not attempt to revive that limiting language. Id. at 1184. Given the Court’s *dicta* and Justice Sotomayor’s recognition that the language is (presumably unduly) limiting, it does not appear that the requirement to allege shareholder fraud would withstand a Supreme Court challenge.
reasonable belief of a violation and would thwart the purposes of the Act to encourage greater disclosure of violations and prevent potential fraud in its earliest stages. *Sylvester*, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *53-54.

Prior to *Sylvester*, the courts were split regarding the materiality requirement. *Compare Livingston v. Wyeth Inc.*, 520 F.3d 344, 354-355 (4th Cir. 2008)(requiring materiality); *Day v. Staples, Inc.*, 555 F.3d 42, 57 (1st Cir. Mass. 2009)(requiring materiality, explaining that materiality requires complainant must believe there is a “likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available”), and *Welch v. Chao*, 536 F.3d 269, 276 (4th Cir. 2008)(“nothing in §1514A (nor in *Livingston*) indicates that § 1514A contains an independent materiality requirement”)(emphasis in original); *Barker v. UBS AG*, 2011 U.S. Dist. LEXIS 7265, *11 (D. Conn. Jan. 26, 2011)(“the Sarbanes Oxley Act does not contain an independent materiality requirement”).

Several courts have followed *Sylvester* in rejecting a materiality requirement. In *Wiest v. Lynch*, the Third Circuit said of *Sylvester*’s rejection of a materiality requirement, “[w]e find this interpretation to be reasonable because there is nothing in the statutory text that suggests that a complainant’s communications must assert the elements of fraud in order to express a reasonable belief that his or her employer is violating a provision listed in Section 806.” *Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. Pa. 2013)(reversing dismissal of the complaint, finding that the district court “erred by requiring that an employee’s communication reveal the elements of securities fraud, including intentional misrepresentation and materiality”); see also *Perez v. Progenics Pharms., Inc.*, 46 F. Supp. 3d 310, 320, n. 3 (S.D.N.Y. 2014)(recognizing that other courts in the circuit had recognized that SOX did not have a materiality requirement).

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6 By way of example, the *Livingston* court found that the employee’s report of the company’s failure to comply with the implementation of a training program required by a consent decree was not material where the FDA had not issued a warning or made any observations about the failure; however, the dissent in *Livingston* felt that the employee’s report of the company’s failure to comply with the consent decree was material where the employee felt that the company had made material misrepresentations about its compliance, misrepresentations which could result in fines and settlement costs. *Livingston*, 520 F.3d at 365-366. See also *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 52-53 (2d Cir. 1995)(in a shareholder securities fraud action, the failure to disclose negative results of FDA inspections of two plants was not material where defendant operated over 30 plants, the FDA had taken no materially adverse action, and the defendant had committed to correct plant deficiencies).
Again on this point, however, not every court has agreed with, or given
decision in *Sylvester*. In *Nazif v. Computer Scis. Corp.*, decided very recently and long after *Sylvester*, the court held that there must be
evidence the plaintiff had an objectively reasonable belief that the employer's violations involved a “material misrepresentation or omission, scienter, a connection with the purchase or sale of a security, reliance, economic loss, and loss causation.” *Nazif*, 2015 U.S. Dist. LEXIS 78673, *17-20 (N.D. Cal. June 17, 2015) citing *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1001 (9th Cir. 2009), *quoting Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. Mass. 2009). The court relied on the First Circuit’s decision in *Day v. Staples, Inc.* to explain that the “materiality requirement means that the complainant must believe there is a ‘likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available’.” *Nazif*, 2015 U.S. Dist. LEXIS 78673, at *17-20.

- **Existing v. Prospective Violation**

Prior to the ARB’s decision in *Sylvester*, some courts held that an employee must have reported a violation that already occurred or is currently occurring. *See Livingston v. Wyeth Inc.*, 520 F.3d 344, 352 (4th Cir. 2008)(“[t]he statute requires [plaintiff] to have held a reasonable belief about an existing violation,” not one which has not yet happened or even “is about to happen”); *Sequeira v. KB Home*, 716 F. Supp. 2d 539, 553 (S.D. Tex. 2009)(“the whistleblower must allege that fraud is occurring, not simply voice a concern that a violation could occur upon some future contingency”); *Walton v. NOVA Info. Sys.*, 2008 U.S. Dist. LEXIS 29944, *22* (E.D. Tenn. Apr. 11, 2008).

Subsequently, the ARB in *Sylvester*, rejected the “existing violation” requirement, recognizing that a failure to protect whistleblowers who report violations that may be about to occur would frustrate the very purpose of SOX. *Sylvester*, 2011 DOL Ad. Rev. Bd. LEXIS 47, at *37 (“the employee need not wait until a law has actually been broken to safely register his or her concern”); *see also Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. Pa. 2013)(following *Sylvester*, holding that Section 806 protects an employee’s communication about a violation that has not yet occurred “as long as the employee reasonably believes that the violation is likely to happen,” reasoning that it “would frustrate that purpose to require an employee, who knows that a violation is imminent, to wait for the actual violation to occur when an earlier report possibly could have prevented it”); *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 136, n.5 (D.P.R. 2014)(“[t]he Court agrees with the ARB that only

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7 *Nazif* decided a matter brought under the Dodd-Frank whistleblower protections, but because the plaintiff had asserted his protected activity was “making disclosures that are required or protected under the Sarbanes-Oxley Act,” the court analyzed the protection afforded the reporting under SOX. *Nazif*, 2015 U.S. Dist. LEXIS 78673, *17-20.
providing whistleblower protection to individuals exposing existing fraud would be counterproductive…”)(emphasis in original): Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 446 (S.D.N.Y. 2013)(finding that reports of possible future violations are protected, explaining that “[i]t furthers the purpose of Section 806 to nip corporate wrongdoing in the bud, rather than permitting a scheme to blossom into a full-fledged crime before whistleblower protections take effect…[w]histleblowers should not be asked to wait until executives have dotted the i’s and crossed the t’s before sounding an alarm”).

Given the important purposes of the Act in preventing violations, and given the ARB’s position in Sylvester, it is unlikely that courts will give much, if any, weight to the pre-Sylvester decisions refusing to protect reports of potential future violations that are likely to arise from the complained of conduct.

• Reports protected even if within the scope of the employee’s job

In Robinson v. Morgan-Stanley, the ARB made clear that an employee may engage in protected activity even where the employee is discharging her job duties. Robinson, 2010 DOLSOX LEXIS 7, *24-25 (ARB January 10, 2010)(“an employee’s report or complaint about a potential violation does not need to involve actions outside the complainant’s assigned duties”); see also Barker v. UBS AG, 888 F. Supp. 2d 291, 297 (D. Conn. 2012)(the ARB “has made clear that an employee may engage in protected activity even where the employee is discharging her duties”); Yang v. Navigators Group, Inc., 18 F.Supp.3d 519, 530 (S.D.N.Y. 2014)(same).\(^8\)

B. Adverse Act

As traditional EEO lawyers know, in discrimination matters arising under the Civil Rights Act, employees must typically demonstrate that they have suffered a materially adverse employment action as one of the elements in bringing a claim. This traditionally has referred to a discrete personnel decision, such as a termination, demotion, failure to promote, etc., or has extended to a less material action but one that has led to material consequences, such as a negative performance review (which may not be actionable itself) that led to a denial of a bonus (rendering the negative performance review actionable due to the material damage suffered as a result). See e.g., Herrnreiter v. Chi. Hous. Auth., 315 F.3d 742, 743-47 (7th Cir. 2002).

In 2006, the Supreme Court, in *Burlington Northern & Santa Fe Railway Co. v. White*, held that the protection for employees alleging retaliation was broader than that of employees alleging discrimination. Specifically, the Supreme Court articulated that, in the context of retaliation, an adverse action is one that “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” *Burlington Northern* 548 U.S. 53, 67-68 (2006); *Lewis v. City of Chicago*, 496 F. 3d 645, 654-55 (7th Cir. 2007) (“the range of conduct prohibited under Title VII’s anti-retaliation provision is broader than Title VII’s anti-discrimination provision”) (quoting *Burlington Northern*). The Court explained: “The antiretaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms. It does so by prohibiting employer actions that are likely ‘to deter victims of discrimination from complaining to the EEOC, the courts, and their employers.’ *Burlington Northern*, 548 U.S. at 68, citing *Robinson v. Shell Oil*, 519 U.S. 337, 346 (1997).

Two years after *Burlington Northern* was decided, the Fifth Circuit adopted *Burlington’s* retaliation standard for SOX claims, yet decided that matter on other grounds and without any discussion of the application of *Burlington*. *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008) (“the *Burlington* definition of ‘unfavorable personnel action’ applies to SOX whistleblower claims”). Thereafter, in 2014, the Fifth Circuit was presented with an appeal regarding the parameters of “adverse action” under SOX and affirmed the adoption of *Burlington Northern’s* standard (“dissuade a reasonable worker”) to claims brought under SOX. *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254 (5th Cir. 2014). The plaintiff in the matter, Anthony Menendez, worked in Halliburton’s Finance and Accounting group monitoring and researching technical accounting issues. When Menendez raised concerns about particular accounting practices, he was told he was not a team player. Nevertheless, Menendez continued to raise his concerns internally and ultimately made a report to the SEC that he felt Halliburton was engaging in questionable accounting practices, in violation of Generally Accepted Accounting Principles, with respect to revenue recognition. The complaint to the SEC was made confidentially. However, in response to receiving the complaint from the SEC, Halliburton’s General Counsel sent a document preservation e-mail, later forwarded to the entire Finance and Accounting group, including Menendez, that identified Menendez as the individual who made the complaint (“the SEC has opened an investigation into the allegations of Mr. Menendez”). *Halliburton*, 771 F.3d at 256-57. Menendez claimed that Halliburton’s “outing” of him as the source of the complaint was retaliatory and he brought a SOX claim against the company. The ALJ ruled against him, finding that the disclosure of his identity did not amount to an “adverse act” as required to prove his claim. The ARB then reversed, finding that the disclosure did amount to an adverse act, particularly where it resulted in ensuing isolation from his co-workers and exclusion from decision-making. *Menendez v. Halliburton, Inc.*, 2011 DOL Ad. Rev. Bd. LEXIS 83, *60-64* (September 13, 2011).
In making its finding, the ARB disavowed using the Burlington Northern standard, purporting to use the standard set forth in Williams v. American Airlines, Inc. ARB No. 09-018, ALJ No. 2007-AIR-004, slip op. at 12-15 (ARB Dec. 29, 2010) (“the term ‘adverse actions’ refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged”). However, in rendering its conclusion, the Board stated, “[c]learly, a reasonable employee in Menendez’s position would be deterred from filing a confidential disclosure regarding misconduct if there existed the prospect that his identity would be revealed to the very people implicated in the alleged misconduct.” When the matter was appealed further, the Fifth Circuit which had already adopted the Burlington Northern standard, affirmed the ultimate finding but disregarded the ARB’s disavowal of the Burlington Northern standard as “unfortunate dicta” and pointed out that the ARB, notwithstanding its dicta, used the Burlington Northern standard in fact. Halliburton, 771 F.3d at 260, n. 5. The Fifth Circuit agreed that Menendez had suffered an adverse act under Burlington Northern’s standard, concluding:

The undesirable consequences, from a whistleblower’s perspective, of the whistleblower’s supervisor telling the whistleblower’s colleagues that he reported them to authorities... are obvious. It is inevitable that such a disclosure would result in ostracism... when it is the boss that identifies one of his employees as the whistleblower who has brought an official investigation upon the department, as happened here, the boss could be read as sending a warning, granting his implied imprimatur on differential treatment of the employee, or otherwise expressing a sort of discontent from on high. Moreover, in Menendez's workplace, collaboration with colleagues was valued. Menendez's supervisor scolded him for not collaborating with his colleagues enough and told him to be more of a “team player.” In an environment where insufficient collaboration constitutes deficient performance, the employer's disclosure of the whistleblower's identity and thus targeted creation of an environment in which the whistleblower is ostracized is not merely a matter of social concern, but is, in effect, a potential deprivation of opportunities for future advancement. Halliburton, 771 F.3d at 262.

The Fifth Circuit noted that other courts have come to the same conclusion regarding how the outing of a whistleblower might well dissuade a reasonable employee from blowing the whistle: Mogenhan v. Napolitano, 613 F.3d 1162, 1166 (D.C. Cir. 2010) (supervisor’s posting of employee’s equal employment opportunity

9 In reliance on Menendez, the N.D. of California adopted the broader Williams standard and expressly rejected the Burlington Northern standard as applying to SOX, though also noting that Burlington Northern was a “helpful guide” as Menendez first noted. Guitron v. Wells Fargo Bank, N.A., 2012 U.S.Dist. LEXIS 93883, *49-53 (N.D. Cal. July 6, 2012). Guitron was decided before the Fifth Circuit affirmed Menendez, but expressly under Burlington Northern’s standard. It remains to be seen whether courts will defer to the ARB’s use of Williams or the Fifth Circuit’s use of Burlington Northern.
complaint to the office intranet, which the employee’s colleagues could and did access, could “chill a reasonable employee from further protected activity”): Franklin v. Local 2 of the Sheet Metal Workers Int’l Ass’n, 565 F.3d 508, 520 (8th Cir. 2009)(union’s public posting of legal bills associated with employees’ lawsuit could dissuade a reasonable employee from making a charge of discrimination); Booth v. Pasco Cnty., 829 F. Supp. 2d 1180, 1201-02 (M.D. Fla. 2011)(union’s public posting of announcement that named employees had sued it could dissuade a reasonable worker from making a charge of discrimination because “no one volunteers for the role of social pariah”).

For the traditional EEO plaintiff’s lawyer, the adverse act element of a SOX claim is most familiar and the ARB and court opinions will often parallel, and sometimes rely on, Title VII analysis in discussing the parameters of what constitutes an adverse or unfavorable personnel action under SOX. The Halliburton example is offered here as instructive for how expansive the standard can be in protecting employees from retaliation for reporting potential violations. It is important to note, however, that when it comes to the determination of whether an action would “dissuade a reasonable worker,” context matters - the same action that might dissuade a worker in one workplace under a particular set of circumstances may not rise to that level in another workplace under different circumstances. Accordingly, practitioners should evaluate the adverse action element of the employee’s claim on a case by case basis.

C. Causation – Contributing Factor

Any similarities in the standard used for the adverse act element of the claim under Title VII and SOX do not extend to causation. Here, SOX diverges sharply from Title VII jurisprudence, as the plain language of the statute allows for liability where the protected activity is merely a “contributing factor” in the decision to take adverse action, which means “any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.” Halliburton, 771 F.3d at 263; Lockheed Martin Corp. v. Admin. Review Bd., 717 F.3d 1121, 1136 (10th Cir. 2013)(describing the “contributing factor” test as “broad and forgiving”). “[T]he contributing factor standard was intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.” Klopfenstein, 2006 DOLSOX LEXIS 59, *38-39 (quoting Marano v. Dep’t of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993)).

- Contributing Factor Need Not be Wrongfully Motivated

In Halliburton, the defense suggested that the employee must prove a “wrongfully-motivated causal connection.” The Fifth Circuit rejected this suggestion, stating, “The Federal Circuit has explained that “a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected conduct] was a contributing factor to the
personnel action.” Halliburton, 771 F.3d at 263 (emphasis in original) citing Marano v. Dep’t of Justice, 2 F.3d 1137, 1141 (Fed. Cir. 1993). Thus, an employee need not establish evidence of retaliatory animus, or that the protected activity was considered with intent to retaliate, in order to establish causation. It is enough that the protected activity was simply a “contributing factor” in the employment decision, without regard to the motive behind the consideration.

- Temporal Proximity

“Temporal proximity between the protected activity and the adverse action is a significant factor in considering a circumstantial showing of causation.” Fraser v. Fiduciary Trust Co. Int’l., 2009 U.S. Dist. LEXIS 75565, *18 (S.D.N.Y. Aug. 25, 2009)(citation and internal quotation marks omitted), aff’d 396 F. App’x. 734 (2d Cir. 2010)(unpublished); see also Van Asdale v. Int’l Game Tech., 577 F.3d 989, 1003 (9th Cir. 2009)(“causation can be inferred from timing alone where an adverse employment action follows on the heels of protected activity”)(citation and internal quotation marks omitted)).

However, be wary of relying on temporal proximity alone, unless the timing is “on the heels” of the protected activity. See Feldman v. Law Enforcement Assocs. Corp., 955 F. Supp. 2d 528, 553 (E.D.N.C. 2013)(recognizing that temporal proximity is evidence of causation, but concluding “here, the gap of approximately sixteen to seventeen months between the protected activity and the unfavorable employment actions is simply too attenuated to establish the causation necessary to sustain their SOX claims”) citing Miller v. Stifel, Nicolaus & Co., 812 F. Supp. 2d 975, 988 (D.Minn.)(eight-month gap between plaintiff’s last complaint and her discharge was not sufficiently proximate to demonstrate that the protected activity was a contributing factor to her termination); Fraser, 2009 U.S. Dist. LEXIS 75565, at *18 (ten-month gap in time defeated SOX claim); Pardy v. Gray, No. 07 Civ. 6324(LAP), 2008 U.S. Dist. LEXIS 53997, *17 (S.D.N.Y. July 15, 2008) (six-month gap in time defeated SOX claim); see also Riddle v. First Tennessee Bank, 497 Fed. Appx. 588, 596 (6th Cir. Tenn. 2012)(four month gap insufficient).

D. Affirmative Defense

Under SOX, where the employee proves that the protected activity was a contributing factor in the adverse employment action, the employer can still avoid liability if it proves “by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity.” *Rhinehimer v. U.S. Bancorp Invs., Inc.*, 787 F.3d 797 (6th Cir. 2015). This is a marked difference from traditional EEO law where the burden on the employer is merely to articulate a legitimate, non-discriminatory reason for the action, and the employee then must prove, by a preponderance of the evidence, that the employer’s reason is pretextual or false. Under SOX, the employee is more easily able to meet the causation standard to begin with, given that causation requires only that the protected activity be a “contributing factor” in the employment decision, without regard to retaliatory animus.

In October 2014, the ARB in *Fordham v. Fannie Mae* clarified the standards for determining whether the parties had met their respective burdens of proof, including what evidence could be considered at each stage. *Fordham*, 2014 DOL Ad. Rev. Bd. LEXIS 69 (ARB October 9, 2014). Prior to *Fordham*, many ALJs simultaneously considered evidence offered by each side, supporting their respective positions, when making the initial determination of whether the complainant had met her *prima facie* case that her protected activity was a contributing factor in the employer’s decision to take action against her. The Board in *Fordham* held that the Administrative Law Judge erred when considering the evidence offered by the complainant regarding causation simultaneously with the evidence offered by the employer supporting its defense that it would have taken the same action. The Board found that by considering the evidence together, the ALJ improperly weighed the employer’s evidence (which, under its burden, was to be evaluated under a “clear and convincing standard”) against the employee’s evidence (which was only to be evaluated under a “preponderance of the evidence” standard), effectively then reducing the employer’s “clear and convincing” burden to a “preponderance of the evidence.”

The Board remanded the matter for reconsideration with the mandate that the ALJ should consider the claim using a two-step process, each under their respective burdens of proof. Specifically, the ALJ should first determine, under a preponderance standard and only considering evidence presented by the complainant, whether the protected activity was a “contributing factor” in the adverse action. Only then, and provided the employee had satisfied the contributing factor criterion, should the ALJ consider the evidence offered by the employer that it would have taken the same action absent the protected activity, which evidence it must consider under the more stringent “clear and convincing” standard. *Fordham*, 2014 DOL Ad. Rev. Bd. LEXIS 69, at *4 (“whether a complainant has met his or her initial burden of proving that the protected activity was a contributing factor in the adverse personnel action at issue is required to be made based on evidence submitted by the complainant, in
disregard of any evidence submitted by the respondent in support of its affirmative defense...should the complainant meet his or her evidentiary burden of proving “contributing factor” causation, the respondent’s affirmative defense evidence is then to be taken into consideration, subject to the higher “clear and convincing” evidence burden of proof standard”.

There was a vigorous dissent in *Fordham* and the ARB revisited the issue *en banc* in *Powers v. Union Pacific RR Co.*, a case arising under the Federal Rail Safety Act, but with the same evidentiary framework as SOX. *Powers*, 2015 DOL Ad. Rev. Bd. LEXIS 20 (ARB March 20, 2015). The ARB in *Powers* affirmed *Fordham* and “fully adopted” its holding that, “legitimate, non-retaliatory reasons for employer action (which must be proven by clear and convincing evidence) may not be weighed against a complainant’s showing of contribution (which must be proven by a preponderance of the evidence).” *Powers*, 2015 DOL Ad. Rev. Bd. LEXIS 20, at *29-30. The Board, however, clarified that the trier of fact could consider any evidence in the record (regardless of which party offered the evidence), provided the evidence was relevant to the particular element being considered. *Powers*, 2015 DOL Ad. Rev. Bd. LEXIS 20, at *46. As such, the ALJ can hear evidence offered by the employer to rebut the employee’s evidence on the elements needed to establish the claim, provided that the evidence is both relevant to that element and is only considered under a preponderance of the evidence standard. *Powers*, 2015 DOL Ad. Rev. Bd. LEXIS 20, at *46-50.

**E. Arbitration**

SOX’s rights and remedies cannot be waived in any employment contract or other agreement. 18 U.S.C. §1514A(e)(1). The plain language of the Act further states: “No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.” 18 U.S.C. §1514A(e)(2). Whether employees may be excused from arbitrating other claims, including Dodd-Frank claims, brought along with SOX claims remains an open question. See *Laubenstein v. Conair Corp.*, 2014 U.S. Dist. LEXIS 163410, *8 (W.D. Ark. Nov. 19, 2014)(finding plaintiff’s wrongful termination claim entangled with, and arising from the same nucleus of operative facts as her SOX claim, thus precluding arbitration of the wrongful termination claim); *Stewart v. Doral Fin. Corp.*, 997 F. Supp. 2d 129, 139-140 (D.P.R. 2014)(same for breach of contract claim).
Dodd-Frank

While Dodd-Frank is very similar to SOX in the whistleblower claims it covers (Dodd-Frank, in fact, protects any reporting required by or protected by SOX) and protections it provides, there are a number of qualitative differences for whistleblower practitioners to be mindful of when bringing these claims: Dodd-Frank’s more expansive statute of limitations and remedies available and the right to proceed directly to federal court. 15 U.S.C. §78u-6(h)(1)(B); 15 U.S.C. §78u-6(h)(1)(C)(ii). Because Dodd-Frank is a newer cause of action, there is not nearly the extensive body of law under Dodd-Frank as there is under SOX. And while the elements of each claim are similar, and the law will likely develop along similar lines with respect to the protected activity and adverse action elements,10 the jurisprudence will diverge with regard to causation where SOX only requires a “contributing factor” while Dodd-Frank requires a “causal connection.” Compare Rhinehimer v. U.S. Bancorp Invs., Inc., 787 F.3d 797 (6th Cir. 2015); and Ott v. Fred Alger Mgmt., Inc., 2012 U.S. Dist. LEXIS 143339, *9-10 (S.D.N.Y. Sept. 27, 2012). Also, Dodd-Frank does not require the employer to prove by clear and convincing evidence that it would have taken the same action; hence, the more traditional burden shifting paradigms familiar to EEO lawyers will likely be employed. See Securities and Exchange Commission, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545 (May 25, 2011), at 18 n.41.

Currently, the most hotly litigated issues under the anti-retaliation provision of Dodd-Frank relate to whether internal reporting is protected and whether a pre-dispute arbitration agreement between the parties is enforceable.

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10 This is particularly so where one of the protected activities under Dodd-Frank is to have made a disclosure required or protected by SOX. Nazif v. Computer Scis. Corp., 2015 U.S. Dist. LEXIS 78673, *14-15, Fed. Sec. L. Rep. (CCH) P98,546 (N.D. Cal. June 17, 2015)(noting that, “[t]he parties agree that in order to prevail on his DFA claim, [plaintiff] must prove that he could win a SOX anti-retaliation action brought directly under section 1514A...[s]tated differently, to show that his disclosure was ‘protected’ under SOX, [plaintiff] must show that he is entitled to the anti-retaliation protections of Sarbanes-Oxley”).
A. Protected activity

- Internal Reporting Protection – split in courts

Dodd-Frank prohibits employers from discharging or discriminating against a whistleblower who:

(i) provides information to the Securities Exchange Commission in accordance with this section;

(ii) initiates, testifies in, or assists in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

(iii) makes disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), 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)(1)(A). SOX expressly protects employees who report misconduct internally. 18 U.S.C. § 1514A(a)(1)(c)(protecting whistleblowers who report conduct that the employee reasonable believes constitutes a violation to “a person with supervisory authority over the employee”). However, Dodd-Frank defines “whistleblower” as an individual who provides information relating to a violation of the securities laws to the Commission. Thus, there is a conflict in the statutory language between the definition of prohibited retaliation and the definition of whistleblower. Employers have argued that the definition of whistleblower limited Dodd-Frank’s protection to only those who report the misconduct to the Commission. Conversely, employees have argued that because Dodd-Frank prohibits retaliation for having made disclosures required or protected under SOX (as internal reporting is), that internal reporting is protected.

Because of the friction between the statutory language of Dodd-Frank protecting conduct covered by SOX and the definition of whistleblower, the SEC promulgated Rule 21F-2(b)(1) which states that an employee is a whistleblower if the employee provides information in a manner described in SOX, thereby interpreting the term whistleblower, for the purposes of the anti-retaliation provision, to include employees who make reports internally to their supervisors. 17 C.F.R. §240.21F-2(b)(1). In the comments to that rule, the SEC stated: “This change to the rule reflects the fact that the statutory anti-retaliation protections apply to

11 Dodd-Frank provides that “[t]he Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section [i.e., the whistleblower program] consistent with the purposes of this section.” 15 U.S.C. § 78u-6(j).
three different categories of whistleblowers, and the third category includes individuals who report to persons or governmental authorities other than the Commission.” Securities Whistleblower Protections & Incentives, 76 Fed. Reg. 34300-01, at *34304 (June 13, 2011)(“Comments to Final Rule”)(emphasis in original).

Several courts thereafter have agreed that Dodd-Frank protects internal reporting. Murray v. UBS Secs., LLC, 2013 U.S. Dist. LEXIS 71945, *12 (S.D.N.Y. May 21, 2013)(finding internal reporting to be protected under Dodd-Frank because the SEC’s rule is entitled to deference); Kramer v. Trans-Lux Corp., 2012 U.S. Dist. LEXIS 136939, *10 (D. Conn. Sept. 25, 2012)(internal reporting protected because it is consistent with the goal of Dodd-Frank which includes “creat[ing] new incentives and protections for whistleblowers” and finding Rule 21F-2(b)(1) to be a permissible construction of the statute); Egan v. Tradingscreen, Inc., 2011 U.S. Dist. LEXIS 47713, *14 (S.D.N.Y. May 4, 2011)(finding internal reporting protected if the disclosures fall into one of the categories of disclosure under SOX that does not require external reporting because that is the most “harmonized” reading of the statute); see also Nollner v. Southern Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012).


12 The Second Circuit, in a case regarding whether Dodd-Frank’s anti-retaliation provisions had extra-territorial reach, agreed with Asadi’s conclusion that it did not, but the court expressly declined to address whether internal reporting was protected under Dodd-Frank, stating that on the issue, “we express no view.” Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 181 (2d Cir. N.Y. 2014).

- **Interaction With the Bounty Provisions**

  Dodd-Frank protects whistleblowers who provide information to the SEC in connection with the whistleblower incentive (i.e., bounty) program. However, the whistleblower need not satisfy all of the prerequisites to receive an award under that program in order to receive the protections of the anti-retaliation provision. For example, the anti-retaliation provision does not require an individual to provide “original information” in order to be protected. Ott v. Fred Alger Mgmt., Inc., 2012 U.S. Dist. LEXIS 143339, *12-13 (S.D.N.Y. Sept. 27, 2012)(the “anti-retaliation protections apply whether or not [the employee] satisfy[ies] the requirements, procedures and conditions to qualify for an award”) quoting 17 C.F.R. § 240.21F-2(b)(1)(iii). Similarly, the individual does not need to have been successful in obtaining an award under the incentive program in order to enjoy the protections of the anti-retaliation provisions. 17 C.F.R. § 240.21F-2(b)(1)(iii).
B. Arbitration

Employees bringing Dodd-Frank claims have argued that the anti-arbitration provision amending SOX also applies to the Dodd-Frank retaliation claims and that arbitration agreements are unenforceable as to Dodd-Frank claims. In Wiggins v. ING U.S., Inc., the court agreed that the anti-arbitration provision applied to both SOX and Dodd-Frank claims and denied defendant’s motion to compel arbitration of plaintiff’s Dodd-Frank claim as well as his SOX claim. Wiggins, 2015 U.S. Dist. LEXIS 78129, *21 (D. Conn. June 17, 2015)(but declining to follow Laubenstein and Stewart and compelling arbitration of other related claims). However, the Third Circuit, in Khazin v. TD Ameritrade Holding Corp., rejected plaintiff’s argument that it would be counterintuitive for Congress to treat Sarbanes-Oxley claims differently than Dodd-Frank claims and held that the pre-dispute arbitration agreement would be enforced for plaintiff’s Dodd-Frank claim. Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 493 (3d Cir. N.J. 2014) citing Murray v. UBS Sec., LLC, 2014 U.S. Dist. LEXIS 9696, *26-28 (S.D.N.Y. Jan. 27, 2014)(Dodd-Frank retaliation claims can be arbitrated, as the prohibition on arbitration of SOX claims does not reach Dodd-Frank retaliation claims; Ruhe v. Masimo Corp., 2011 U.S. Dist. LEXIS 104811, *13-14 (C.D. Cal. Sept. 16, 2011)(same).

C. Open Communication With SEC – Rule 21F-17

In connection with Dodd-Frank’s amendments to the Security Exchange Act, which purpose was to, inter alia, encourage whistleblowers to come forward and report possible violations, the Commission adopted Rule 21F-17, providing, in pertinent part:

(a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement...with respect to such communication.

On April 1, 2015, the Commission entered into a settlement with KBR, Inc. arising from a confidentiality agreement KBR required its employees to sign, in connection with its internal compliance and investigations program, which stated:

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.
The Commission took the position that this agreement undermined the purpose of Section 21F of the Exchange Act and Rule 21F-17(a), which is to “encourage individuals to report to the Commission.”

As part of the settlement reached, KBR agreed to:

1) amend its confidentiality statement to expressly advise employees that nothing in the statement would prohibit them from reporting possible violations of federal law or regulation to any government agency or entity, and expressly noting that prior approval from the company is not required nor is any notification or disclosure to the company required;

2) make reasonable efforts to notify all employees who had signed the agreement that it did not require them to seek permission before communicating with a government agency and to provide them with a copy of the SEC order setting forth the settlement terms, and to certify compliance with this provision; and

3) to comply with the Commission’s order to cease and desist from committing future violations of Rule 21F-17 and pay the Commission a sanction of $130,000.

The agreement with KBR was particularly significant given that the Commission was admittedly unaware of a single instance in which a KBR employee was prevented from communicating with the SEC about a potential violation and was unaware of a single instance where KBR took any action to enforce the confidentiality agreement or otherwise prevent a communication with the SEC. [See Security Exchange Commission order dated April 1, 2015] The form’s chilling effect and potential for obstruction was enough for the Commission to take action to make clear to KBR and others that this type of private agreement with its employees would not be permitted.

Attorneys representing corporations need to be mindful of the KBR settlement and order when advising their clients on any agreements with employees that may implicate Section 21F and Rule 21F-17. This could include confidentiality statements made as part of an investigation, as with KBR, and could also include employment contracts, global confidentiality and proprietary information agreements, and settlement agreements. Attorneys representing employees should be on the lookout for any offending language and insist that it be stricken or modified.
II. **KEY CONSIDERATIONS FOR PLAINTIFFS’ LAWYERS WHEN REPRESENTING WHISTLEBLOWERS - LEGAL, ETHICAL, AND STRATEGIC**

Traditional plaintiff-side employment attorneys are rarely involved in internal investigations into corporate wrongdoing. Quite obviously, most corporations aren’t eager to invite another attorney, let alone one representing a whistleblower (who may even have ongoing retaliation claims) into the company’s investigation regarding the validity and/or scope of alleged violations of law. When they are, the role is fairly limited. The following are practical tips and best practices for attorneys when retained by the target of an investigation (which is rare, as the company will typically retain its own counsel to represent the target) and when retained by a whistleblower.

**Best practices when retained by the target of an investigation:**

- Know your limits and gather additional protections. Attorneys who practice EEO and whistleblower law are not typically well versed in securities laws or white collar criminal defense. Consult with someone who is. It may well be in your client’s best interest to have both an employment attorney to protect his or her career interests and also have a securities or white collar criminal defense attorney in order to avoid being implicated in criminal wrongdoing.

- Be mindful of ethical implications arising from joint representation issues if you happen to also be retained by the corporation. See Model Rules of Professional Conduct 1.7: Conflict of Interest – Current Clients; and 1.8: Conflict of Interest – Current Clients, Specific Rules.

- Similarly, be mindful of privilege issues when sharing information and collaborating with the attorney representing the corporation and/or with the securities or white collar criminal defense attorney you are working with.

**Best practices when retained by the whistleblower:**

- If your client has not yet made a report of a violation, carefully consider whether your client should make his or her report anonymously. If your client remains an employee of the company, he or she may wish to make the report anonymously, as he or she will almost inevitably experience retaliation. Many corporations have an anonymous hotline, or a “confidential” department, where employees can report corporate wrongdoing. Just keep in mind that “confidential” departments can sometimes be as leaky as politicians in Washington. On the other hand, if your client makes the report anonymously and the employer makes an
educated guess of his or her identity and retaliates, he or she could potentially lose additional whistleblower protections and legal claims if the company can plausibly deny awareness.

- Be mindful of the timing of making a report. Having your client make a report on the heels of a negative performance evaluation may not be the best idea. On the other hand, having your client make a report as soon as possible after learning that the employer already suspects it is your client who is feeding information to the SEC is a very good idea. Never make a report, or threaten to make a report, while discussing settlement of the client’s legal claims. This can be interpreted as leveraging the report to gain an advantage in litigation and obtain a favorable settlement, which is not ethical. See Model Rules of Professional Conduct Rule 8.4(e): Maintaining the Integrity of the Profession; 4.4(a): Respect for Rights of Third Persons; See also, e.g., Illinois Rules of Professional Conduct 8.4(g): Misconduct.

- Ask to be present during any interview of your client, whether internally by the company, or by any agency or law enforcement official. The company may not permit you to be present if the interview is strictly internal, in which case you should carefully consider whether you will cooperate with the request for an interview. Many factors will go into this consideration, including whether your client is a current (v. former) employee, whether your client is at all implicated in the possible violations, whether your client has potential or already filed legal claims, and whether your client has any legal or contractual obligations of cooperation. If the employer doesn’t permit your attendance, and you decide with your client that he or she should still attend, then insist that no attorneys for the company be present either, as this would constitute an ex parte communication with your client on a matter that may already be in litigation, or where litigation is a distinct possibility on the horizon. See Model Rule of Professional Conduct 4.2: Communication With Person Represented By Counsel.

- Prepare your client well for any investigative interview and be mindful of the issues that will come up later in the litigation as you prepare for the interview. Research the elements of your client’s claims and the parameters of the employer’s defense(s) as part of your preparation with your client.

- If you are able (ethically), interview witnesses and gather witness statements to bolster your client’s credibility before the agency, law enforcement officials, and ultimately the court and trier of fact. Be mindful that the ethics rules prohibit communications with certain employees of a
company and research the prevailing authority in your jurisdiction before contacting current or former employees of the company.

- Again, if your client is at all at risk for implicating himself or herself in any violation or criminal conduct, consult or co-counsel with an attorney who can assist you with best protecting your client’s overall interests.

- Be mindful of purloined documents and any obligations your client may have under an employment contract or confidentiality agreement. At the same time, research the law in your jurisdiction regarding the right of the employee to gather and retain certain evidence in support of his or her claims.

- If assisting your client with an outside interview (by government or law enforcement officials), be careful to advise your client not to waive privilege – the attorney-client or work product privilege – as relating to your representation of him/her or any possible litigation, and as relating to any privilege he or she may share with the company’s lawyers.

- With respect to documents and privilege, be aware that merely copying an attorney on an email is not enough to bestow attorney-client privilege on the contents of that email. See e.g., Ziemack v. Centel Corp., 1995 U.S. Dist. Lexis 6942, *16-17 (N.D.Ill. May 18, 1995)(“The mere fact that an attorney was present, or even participated in the meeting, does not make the meeting’s minutes privileged.”). Also, where business advice predominates a communication, there may be no privilege at all. Neuder v. Battelle Pacific Northwest National Laboratory, 194 F.R.D. 289, 292 (D.C. 2000)(“Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.”); Ziemack, 1995 U.S. Dist. Lexis 6942, *21 (N.D. Ill. 1985)(a document will only be deemed work product if it is primarily concerned with legal assistance). Be mindful of this principle both with regard to your client’s communications with yourself and with third parties and be mindful of this when seeking discovery documents in litigation. Insist that you get a privilege log so that you can determine whether documents withheld pursuant to privilege are truly entitled to that protection.

- When cooperating with any investigation (whether an internal corporate investigation or an agency/law enforcement investigation), be careful not to make unnecessary out of court statements that could adversely affect any whistleblower or other claims your client may have. Attorneys should always try to direct communications through themselves and speak on behalf of their clients any time they can, as an employee is unlikely to later be impeached through the words of his attorney. Also, the attorney can
anticipate legal issues that may arise later in a whistleblower claim and be more strategic, with these in mind, when making a report. For example, to ensure that the employer cannot later argue a lack of awareness, the attorney can ensure communications are shared with all likely decisionmakers to avoid a “Who me?” defense later.

- Be careful when responding to any inquiries from the news media. In addition to avoiding a client’s unnecessary out of court statements, you will want to avoid any ethical implications relating to trial publicity. See Model Rule of Professional Conduct 3.6: Trial Publicity.

- Remember that there are many reasons to advise your client to report wrongdoing. In addition to the financial incentives under various federal bounty programs, there are other legal considerations, such as having your client mitigate his or her own responsibility for any violations as well mandatory reporting issues where your client may be legally obligated to report misconduct in order to retain his or her professional licenses or privileges. See, e.g., Lawson v. FMR LLC, 134 S. Ct. 1158, 1171 (2014) (“SOX requires accountants and lawyers for public companies to investigate and report misconduct, or risk being banned from further practice before the SEC”) citing 15 U.S.C. §§7215(c)(4), 7245; See also Somers v. Digital Realty Trust, Inc., 2015 U.S. Dist. LEXIS 64178, *37 (N.D. Cal. May 15, 2015). Finally, there is always the best (in this author’s opinion) reason to be on the front end of reporting wrongdoing: it’s simply the right thing to do ethically and it will likely protect and prevent innocent potential victims.