THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
New York, Connecticut and Northern New Jersey

May 22, 2014
5.30 – 8.30 pm

Jones Day * 222 E. 41st St. * New York, NY

PROGRAM AGENDA

Regional Chair and Welcome Remarks
Evan Spelfogel, Member of the Firm, Epstein Becker & Green, P.C.

Panel I. Whistle Blowing/Sarbanes Oxley (5.30 – 6.55 pm)

Jonathan Ben-Asher – Ritz Clark & Ben-Asher LLP

Frances H. Nicastro – Barclays

Jill L. Rosenberg – Orrick Herrington & Sutcliffe LLP

Terri Wigger – U.S. Dept. of Labor, Assistant Regional Administrator for Region 2 OSHA Programs

Panel II. New York City Sick Leave Law – Update (6.55 - 7.10 pm)

Gerald T. Hathaway – Mitchell Silberberg & Knupp LLP

Panel III. Labor, Employment and Collective Bargaining Implications of Obama Care – The Affordable Care Act (ACA) (7.10 – 8.30 pm)

Bruce S. Levine – Cohen Weiss & Simon LLP

Catherine E. Livingston – Jones Day

TABLE OF CONTENTS

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TABLE OF CONTENTS

THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS, INC.

PRINCIPLES OF CIVILITY AND PROFESSIONALISM FOR ADVOCATES

Preamble

As a Fellow of The College of Labor and Employment Lawyers, I recognize that I have a special obligation to ensure that our system of justice works fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all practitioners, but I will also conduct myself in accordance with the following Principles of Civility and Professionalism as guidance for Fellows when dealing with clients, opposing parties, their counsel, the courts, other adjudicators, arbitrators, mediators and neutrals, and the general public.

A. With respect to client(s):

1. Fellows should be loyal and committed to their client's cause. Fellows should not permit that loyalty and commitment to interfere with their ability to provide clients wixth objective and independent advice.
2. Fellows should endeavor to accomplish their client's objectives in all matters as expeditiously and economically as possible.
3. Fellows should counsel their clients with respect to mediation, arbitration and other forms of alternative dispute resolution in appropriate cases.
4. Fellows should advise their clients against pursuing litigation (or any other course of action) that is without merit, and against insisting on tactics which are intended to unduly delay resolution of a matter or to harass or drain the financial resources of the opposing party.
5. Fellows should advise their clients, colleagues and co-workers, and demonstrate by example, that civility and courtesy are not to be equated with weakness.
6. Fellows should counsel their clients that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation, and should abide by the client's decisions concerning the objectives and strategies of the representation.

B. With respect to opposing parties and their counsel:

1. Fellows should be zealous advocates, but should treat opposing counsel, opposing parties, tribunals and tribunal staff with courtesy, civility, respect and dignity, conducting business in a professional manner at all times.
2. In litigation and other proceedings, Fellows should zealously advocate for their clients, consistent with their duties to the proper functioning of our judicial system.
3. Fellows should consult with opposing counsel before scheduling depositions, meetings and hearings, and be cooperative with opposing counsel when scheduling changes are requested.
4. Fellows should refrain from utilizing litigation or any other course of conduct to harass the opposing party.
5. Fellows should refrain from engaging in excessive or abusive discovery tactics.
6. Although delay may be necessary or appropriate in certain circumstances, Fellows should refrain from utilizing improper delaying tactics.
7. In depositions, proceedings and negotiations, Fellows should act with dignity, avoiding groundless objections and maintaining a courteous and respectful demeanor towards all other persons present.
8. Fellows should be guided by the clients' goals in completing a transaction. Pride of authorship, when matters of substance are not involved, only contributes to delay and cost in a transaction.
9. Fellows should clearly identify for other counsel or parties all changes that they have made in documents submitted to them for review.

C. With respect to the courts and other tribunals:

1. Fellows should recognize that the proper functioning of our system of justice is enhanced by both vigorous and zealous advocacy and civility and courtesy.
2. Where consistent with the clients' interests and instructions, Fellows should communicate with opposing counsel or parties in an effort to minimize or resolve litigation.
3. Fellows should voluntarily withdraw claims or defenses when it becomes apparent that they do not have merit.
4. Fellows should refrain from filing frivolous claims, motions or responses thereto.
5. Fellows should make reasonable efforts to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery.
6. Fellows should attempt to resolve by agreement objections to matters contained in the opponents' pleadings and discovery requests or responses.
7. Fellows should notify opposing counsel and, if appropriate, the court or other tribunal, as early as possible when scheduled hearings, meetings or depositions must be cancelled, postponed or rescheduled.
8. Fellows should verify the availability of known key participants and witnesses before dates for hearings or trials are set — or, if that is not feasible, immediately after such dates have been set — so that the court (or other tribunal) and opposing counsel or party can be promptly notified of any scheduling conflicts.
9. Fellows should be punctual in court proceedings, hearings, arbitrations, conferences, depositions and other meetings.
10. Fellows should approach all tribunals with candor, honesty, diligence and utmost respect.

D. With respect to the public and our system of justice:

1. Fellows should remember that, in addition to a commitment to their clients' causes, their responsibilities as lawyers and Fellows of the College include a devotion to the public good.
2. Fellows should endeavor to keep current in the areas of law in which they practice and, when necessary, to associate with, or refer clients to, others knowledgeable in a field of practice in which they do not have the requisite experience.
3. Fellows should conduct themselves in a manner that reflects acceptance of their obligations as Fellows of the College and as members of a self-regulating profession. Fellows should also encourage fellow lawyers to conduct themselves in accordance with the standards set forth in these Principles and other standards of civility and professionalism.
4. Fellows should be mindful of the need to conduct themselves in a way that will enhance the image of the legal profession in the eyes of the public, and should be so guided when considering methods and contents of advertising.
5. Fellows should conduct themselves in a manner that reflects acceptance of their obligation as attorneys to contribute to public service, to the improvement of the administration of justice and to the provision of uncompensated time and civic influence on behalf of those persons who do not have access to adequate legal assistance.

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

College of Labor and Employment Lawyers
New York, Connecticut and Northern New Jersey
May 22, 2014

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Table of Contents

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. 78*l*), 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 Third 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 perpetuated 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.

See also *Villanueva v. Core Laboratories NV*, ARB 9-108 (December 22, 2011) (SOX does not protect a non-citizen working abroad who complains about violation of foreign tax laws.); *Meng-Lin Liu v. Siemens A.G.*, 2013 U.S. Dist. LEXIS 151005 (S.D.N.Y. 2013) (dismissing SOX claim by foreign employee working abroad for foreign employer).

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."

See also *Vannoy v. Celanese Corp.*, ARB 09-118 (September 28, 2011); *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121 (10th Cir. 2013); *Leshinsky v. Telvent GIT, S.A.*, 942 F. Supp. 432 (S.D.N.Y. 2013).

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

[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.

Rep. No. 107-146, 107th Cong., 2d Sess. 19 (2002). *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474, 478-79 (3rd Cir. 1993).

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. *Sylvester 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

decision," and the time limit will be "equitably tolled" only in extraordinary circumstances. *Halpern v. XL Capital, Ltd.,* ARB Case No. 04-120 (August 31, 2005). Each discriminatory act starts a new clock for the filing of a charge (or at least the amendment of a prior charge.) *McClendon v. Hewlett-Packard Company*, 2005 WL 2847224 (D. Idaho 2005); *Willis v. Vie Financial Group,* 2004 WL 1774575 (E.D. Pa. 2004)

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

DOL's proceedings are governed by the procedures set out in the federal law, enacted in 2000, covering whistleblowing in the airline industry – Sec. 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. Sec. 42121(b). 18 U.S.C. Sec. 1514A(b)(2)(A). The Department of Labor's regulations on SOX enforcement are at 29 CFR Part 1980. These regulations were amended in November, 2011, in accordance with changes made by the Dodd-Frank Act. 76 FR 68092 (11/3/11).

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. [2] 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

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[2] 49 U.S.C. Sec. 42121(b)(3). This requirement is in the Ford Aviation Investment and Reform Act, which governs proof and proceedings cases under Sec. 806. See 18 U.S.C. Sec. 1514(b)(2)(A). *Bechtel v. Administrative Review Board*, 710 F.3d 443, 447 (2d Cir. 2013).

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. [3] 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.

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

awards for emotional pain and suffering. *Brandon v. Anesthesia & Pain Mngmt. Assoc., Ltd.*, 277 F.3d 936 (7th Cir. 2002) (*in dicta*); *Hammond v. Northland Counseling Center, Inc.*, 218 F.3d 886 (8th Cir. 2000); *Neal v. Honeywell, Inc.*, 191 F.3d 827 (7th Cir. 1999).

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). [4] 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.

2011 U.S. Dist. LEXIS 80494 (D. Nevada 2011) (no retroactivity).

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)

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

million in an administrative or judicial enforcement action, may receive ten to thirty percent of the recovery.

The new provisions are amendments to the Securities Exchange Act of 1934, 15 U.S.C. 78a et seq, and create a new section of the Act, Sec. 21E. The bounty provisions are enforced by the SEC's Office of the Whistleblower, headed by Sean McKessy. See www.sec.gov/whistleblower.

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_JKTg_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.

The SEC's Inspector General evaluated the whistleblower program in January, 2013, and made minor recommendations for improvements. See http://www.sec-oig.gov/Reports/AuditsInspections/2013/511.pdf.

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.

4. Protected activity - 15 USC 78-u6(h)(1)(A):

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]

Since *Egan*, five other decisions have found that Sec. 922(h) protects employees who make an internal disclosure required by or protected by Sarbanes-Oxley. *Murray v. UBS Securities*, 2013 U.S. Dist. LEXIS 71945 (S.D.N.Y. 2013); *Genberg v. Porter*, 2013 U.S. Dist. LEXIS 41302 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, 2012 U.S. Dist. LEXIS 136939 (D. Ct. 2012); *Nollner v. Southern Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M. D. Tenn. 2012). *Khazin v. TD Ameritrade Holding Corp.*, 2014 U.S. Dist. LEXIS 31142, 2014 WL 940703 (D.N.J. Mar. 11, 2014).

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

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[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).

conclusion. *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.*

Trans-Lux Corp., 2012 U.S. Dist. LEXIS 136939 (D. Ct. 2012).

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

The ACA's whistleblower provisions are enforced through the procedures governing whistleblower complaints under the Consumer Product Safety Improvement Act, 15 U.S.C. Sec. 2087(b). See proposed regulations at 29 CFR 1984.103 - 1984.114.

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.

The SEC's Dodd-Frank Whistleblower Regulations

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Where to find them

http://www.sec.gov/about/offices/owb/reg-21f.pdf

17 CFR Part 240.21F

Crucial areas

1. Scope of anti-retaliation protections:
   - What's a "reasonable belief"
   - Incorporation and expansion of SOX protections
2. Scope of "original information" required for bounty awards:
   - What is "Independent knowledge or analysis" – many exceptions
   - What is "voluntary"

Crucial areas

3. Criteria for increasing and decreasing bounty awards

What these regulations don't address

1. Dodd-Frank Title X enforcement: whistleblowing concerning entities that provide consumer financial services

   (protects internal and external complaints; enforced through DOL and federal courts)

2. Whistleblower and bounty provisions under the Commodity Exchange Act (Dodd-Frank Sec. 748)

What else the regulations don't cover

Interpretation of Dodd-Frank's changes to Sarbanes-Oxley Sec. 806:

- No mandatory pre-dispute arbitration
- Right to a jury trial
- Lengthened limitations period: 180 days
- Coverage of subsidiaries
- Coverage of statistical ratings agencies (e.g. Moody's, S&P)

Anti-retaliation provisions

- Apply whether or not whistleblower qualifies for a bounty award
- The whistleblower does not have to be right: reasonable belief is enough.

What's a reasonable belief?

- SEC declined to require that a whistleblower must a "probable," "likely" or "potential" violation
- Standard is "possible" securities law violation that has occurred, is ongoing, or about to occur
- SEC's commentary: A "facially plausible" relation to some securities violation is enough

Reasonable belief, continued

Subjective and objective standards:

Subjective: Whistleblower has subjectively genuine belief

Objective: This is a belief a similarly situated person might reasonably possess

No materiality requirement

Incorporation of SOX anti-retaliation remedies

- The whistleblower's "reasonable belief" can also relate to a possible violation of the Sarbanes-Oxley Act (that has occurred, is ongoing, or is about to occur).
- This means that a whistleblower can complain about the predicate frauds described in Sarbanes-Oxley Sec. 806 - 18 USC 1514(a) - as long as the whistleblower is the employee of a publicly traded company.

SOX incorporation

- For employees of publicly traded companies who complain about SOX violations, the regulations protect both internal and external complaints – because SOX Sec. 806 does.
- These SOX complainants then have a direct action in federal court, although an action under SOX requires an initial complaint to the US Department of Labor

SOX violations

- The SOX violations which can be the predicate of a whistleblower's complaint are:
  - Mail fraud
  - Wire fraud
  - Bank fraud
  - Securities fraud
  - Violation of any SEC rule or regulation
  - Violation of any provision of federal law relating to fraud on shareholders

Bounty award requires provision of "original information"

- Is derived from whistleblower's independent knowledge or independent analysis – doesn't have to be first hand, but can be from observations.
- Isn't already known to the SEC
- Isn't exclusively derived from a judicial or administrative hearing, government report, hearing, audit or investigation, or from the media (unless the whistleblower is the source)
- Must be provided after July 21, 2010

Original information

- Also includes information the whistleblower reports internally (through legal or compliance procedures) if the company then provides that information to the SEC
- Independent analysis: can be of public information, if the whistleblower provides additional assessment or insight

Exceptions from "independent knowledge or analysis"

Cannot use attorney-client privileged information (includes outside counsel, in-house attorneys, and non-attorneys),

BUT

Attorney can use attorney-client privileged information if:

Permitted by state ethical rules, or

Allowed by SOX's up-the-ladder reporting rules - 17 CFR 205.3(d)

SOX regulations permitting attorneys to disclose confidences

- Attorney representing an issuer before the SEC ***can*** disclose otherwise privileged information to the SEC:
  - to prevent a material violation which is likely to cause substantial injury to the financial interest or property of the issuer or investors, or
  - to rectify such a material violation, or
  - to prevent perjury or a fraud on the SEC.

Exceptions from independent knowledge or analysis, continued

No whistleblowing status for attorney who obtains information by representing a client, and seeks to use it for attorney's own benefit.

BUT –

OK if allowed by 17 CFR 205.3(d)(2) or state ethics rules

Exceptions from independent knowledge or analysis, continued

Officers, directors, trustees, partners if:

Were informed of misconduct or

Learned of it through entity's procedures for identifying and investigating violations

Compliance or internal auditors (in-house or external)

Individuals associated with a firm retained to investigate

Public accounting firms, on engagement required by securities laws (subject to exceptions)

Exceptions from independent knowledge or analysis, continued

- If a court determines the would-be whistleblower obtained the information in a way that violates federal or state criminal law

Exceptions to the exceptions....

An individual ***won't*** be barred from qualifying for an award by these provisions IF:

1. The whistleblower has a reasonable belief that disclosure is necessary to prevent conduct likely to cause substantial injury to the entity's financial interest or property, or
2. The whistleblower has a reasonable belief the entity is impeding an investigation, or

Exceptions to the exceptions, continued

3. The whistleblower makes an internal complaint (to audit, CLO or chief compliance officer), and 120 days pass; or

4. The whistleblower receives information, and circumstances indicate audit, CLO or chief compliance officer were already aware of it, and 120 days pass.

Original information: voluntariness

Must be provided "voluntarily"
So, doesn't qualify if provided:

After a request from SEC, any federal, state or local authority, SRO, Public Company Accounting Oversight Board, or

In an investigation by Congress, any other federal authority, a state AG or state securities regulatory authority.

Internal investigations:

- SEC rejected proposal to disqualify whistleblower's submissions if made after the whistleblower was contacted as part of an internal investigation

Original information

Information is not "original" if complainant has:

- A "pre-existing legal duty" to report it to the SEC, Public Company Accounting Oversight Board, any SRO, other federal authority, state AG, or self-regulatory organization
- A contractual duty to report to the Commission or certain other authorities (eg, US DOJ)
- A duty arising out of a court or administrative order (e.g., monitors or consultants)

Bounty awards: Factors to increase include

The SEC will consider as a factor that may increase an award the whistleblower's participation in internal compliance systems (the extent to which the whistleblower reported the possible violations, and assisted any internal inquiry).

Bounty awards: Factors to decrease include

The SEC will consider as a factor which may decrease a bounty award:

- The whistleblower's culpability
- Whether the whistleblower unreasonably delayed reporting
- Whether the whistleblower interfered with internal compliance and reporting systems or made any misrepresentations to hinder them

Practical tips

Employee counsel:

- Read the regulations
- Pick cases wisely
- Work with a securities lawyer
- Choose the right remedy

Practical tips

Employer counsel:

- **Read the regulations**
- **Educate and train**
- **Cooperate with SEC**
- **Pick your battles wisely**

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THE COLLEGE OF LABOR AND EMPLOYMENT LAWYERS
New York, Connecticut, Northern New Jersey - May 22, 2014

Recent Developments in Whistleblower Claims under Sarbanes-Oxley and Dodd-Frank

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Whistleblower claims against employers have seen a dramatic increase in recent years. The Sarbanes-Oxley Act of 2002 has been reinvigorated as a result of statutory amendments in 2010, a spate of decisions from the Department of Labor's Administrative Review Board ("ARB") that has significantly expanded the rights and remedies of individuals claiming retaliation for "blowing the whistle," and a 2014 U.S. Supreme Court decision broadly interpreting the scope of Sarbanes-Oxley's protections. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 creates new protections for employees who disclose securities law violations, including the opportunity to receive bounty awards and enhanced remedies for victims of retaliation. Courts are just beginning to interpret the scope of the Dodd-Frank retaliation provisions with somewhat inconsistent results.

Section I of this paper provides an overview of the Sarbanes-Oxley Act's whistleblower provisions and highlights several recent court and ARB decisions that have significantly altered the SOX landscape. Section II summarizes the new whistleblower protections in Dodd-Frank and analyzes the first wave of decisions by the federal courts.

I. SARBANES-OXLEY AND WHISTLEBLOWER LAW

On July 30, 2002, President Bush signed the the Sarbanes–Oxley Act of 2002 ("SOX") into law.[1] Seeking to restore investor confidence in ailing financial markets reeling from a spate of highly publicized alleged corporate financial wrongdoings, the Act reforms the oversight of corporate accounting practices and addresses a range of corporate accountability issues. The legislative history of Sarbanes-Oxley also makes it clear that Congress was intent upon closing loopholes in existing state and federal laws that provide protection for whistleblowers. *See* 148 Cong. Rec. S6439-40, 107th Cong., 2d Session (2002). Congress clearly reacted strongly to Enron's attempted retaliation against Sherron Watkins, the now-famous whistleblower, and sought to deter similar conduct in the future by making employers who perpetrate such acts subject to stiff civil liability and criminal penalties. *Id.*

Section 806 of Sarbanes-Oxley protects from retaliation employees of covered employers who report any conduct that the employee reasonably believes constitutes a violation of: (1) federal criminal law provisions prohibiting mail, wire, bank or securities fraud; (2) any rule or regulation of the Securities and Exchange Commission ("SEC"); or (3) any provision of federal law relating to fraud against shareholders. 18 U.S.C. § 1514A(a)(1). The Act covers reports made to the employee's supervisor or other persons with investigative or disciplinary authority, as well as information or assistance provided to a federal regulatory or law enforcement agency. *Id.* Covered whistleblowers also include those persons who file, testify, participate in or otherwise assist in a proceeding relating to alleged corporate or shareholder fraud. *Id.*

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[1] See *Pub.*L. 107-204, 116 Stat. 745 (2002). Section 806 of SOX provides protections for whistleblowers. This section of SOX has since been amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (discussed *infra*).

To establish a claim for a violation of Section 806, a covered employee must prove by a preponderance of the evidence (1) that the employee engaged in protected activity; (2) that the employer was aware of the protected activity; (3) that the claimant suffered an adverse employment action; and (4) that the protected activity was a contributing factor in the adverse employment action.[2] If the employee establishes this prima facie case, the employer may avoid liability "if it can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of that protected behavior."[3]

A successful complaining party under Sarbanes-Oxley is entitled to a broad array of remedies to make that individual "whole." Damages may include reinstatement (in a termination case), backpay with interest, special damages, attorneys' fees, litigation costs and expert witness fees. 18 U.S.C. § 1514A(c). The Act, however, does not provide for the recovery of punitive or liquidated damages, and the caselaw is split as to whether emotional distress and other non-pecuniary compensatory damages are recoverable. *See Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1332 (S.D. Fla. 2004). Under limited circumstances, criminal liability can attach to certain retaliatory acts under section 1107 of the Act. *See In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 456 F. Supp. 2d 131 (D. Me. 2006).

A. Recent Amendments to the Sarbanes-Oxley Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act, discussed further in Section II, *infra*, expanded the scope of SOX's whistleblower protections in several key ways.

The statute of limitations was broadened from 90 to 180 days to file a complaint with the U.S. Department of Labor - OSHA.[4]

SOX plaintiffs are now entitled to a jury trial, which was an unsettled question under SOX caselaw.[5]

Non-publicly traded subsidiaries of publicly traded companies are now covered by SOX, by amendment to the definition of "publicly traded company" to include any "subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company."[6]

"Nationally recognized statistical ratings organizations" are now covered by SOX, so employees of these organizations will now have the benefit of SOX whistleblower protection.[7]

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[2] *See Bechtel v. Administrative Review Bd.*, 710 F.3d 443, 447 (2d Cir. 2013).
[3] *Id.* (quotation marks omitted).
[4] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(c)(1), 124 Stat. 1376, 1848 (2010); 18 U.S.C. § 1514A(b)(2)(D).
[5] 18 U.S.C. § 1514A(b)(2)(E).
[6] 18 U.S.C. § 1514A(a).
[7] 18 U.S.C. § 1514A(a).

Pre-dispute arbitration agreements will no longer be enforceable under SOX (except perhaps in the collective bargaining agreement context), nor will the rights and remedies under SOX be capable of waiver by agreement. This means that employers will no longer be able to compel arbitration under SOX.[8]

B. Recent Case Law Developments

For many years, individuals claiming retaliation under SOX had limited success, whether claims were brought in federal court or proceeded through the Department of Labor ("DOL") administrative process up through the Administrative Review Board ("ARB"). Recent developments have created a more whistleblower-friendly litigation environment. In 2014, the U.S. Supreme Court issued its first SOX decision, in which it broadly interpreted the Act's scope in favor of employee coverage. In addition, in 2010 and 2011, President Obama appointed a new five-member ARB, which has been issuing favorable decisions to whistleblowers and taken a more expansive view of SOX than in the past. The new ARB has been overturning prior precedents that more narrowly construed SOX, making it more difficult for employers to get cases dismissed at the early stages and otherwise defend SOX claims. Federal district courts and courts of appeals have generally continued this trend with several significant whistleblower-friendly decisions. Some of the more noteworthy court and ARB decisions are discussed below.

- *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014)

SOX provides that "[n]o [public] company . . . , or any officer, employee, contractor, subcontractor, or agent of such company, may [retaliate] . . . against an employee in the terms and conditions of employment . . . ." In *Lawson*, the Supreme Court addressed the question of whether these protections extend only to employees of public companies, or whether they also reach the employees of contractors and subcontractors of public companies.

The plaintiffs in *Lawson* brought retaliation claims against their former employers, private companies that provided investment and management services for Fidelity mutual funds (collectively, the "Fidelity Management companies"), alleging that they were discharged for raising questions about accounting methodologies and concerns about inaccuracies in statements for certain Fidelity funds. Plaintiffs' employers were subsidiaries of FMR LLC, a publicly traded company. The Fidelity Management companies moved to dismiss, arguing that SOX's whistleblower protections do not encompass employees of private companies that are contractors or subcontractors of publically-traded companies. The district court denied the motion, and the First Circuit reversed.

[8] 18 U.S.C. § 1514A(e).

With an unusual alignment resulting in three separate opinions, a majority of the Supreme Court found that SOX's protections extend not only to the employees of public companies, but also to the employees of their contractors and subcontractors, and, at least theoretically, to employees of all officers, employees, and agents of public companies. For example, Justice Ginsburg, writing for the plurality, reasoned that, once you conclude (as she did) that the statute covers employees of any "contractor" of "subcontractor," there's no reasoned basis to exclude personal employees of an "officer" or "employee" of a public company: housekeepers, gardeners, and babysitters. Justices Scalia and Thomas concurred in this expansive construction of the statute. This construction is even more expansive than the one pressed by the petitioners, the Solicitor General, and the Department of Labor. No one before the Court was arguing for such a radically expansive construction.

So today, the law of land is that SOX's whistleblower protections extend not just to employees of public companies, but also to the employees of officers, employees, contractors, subcontractors, and agents of public companies, including the "[l]egions of [outside] accountants and lawyers" performing services for public companies.[9]

- *Sylvester v. Parexel International, LLC*, 2007-SOX-39, 2007-SOX-42 (ARB May 25, 2011)

The ARB in *Sylvester* reversed an ALJ's decision granting the company's motion to dismiss on several grounds. First, the ARB held that the heightened pleading standards applicable to federal court complaints as established in *Bell Atlantic Corp. v. Twombly*[10] and *Ashcroft v. Iqbal*[11] are inappropriate for SOX whistleblower claims before the Department of Labor and that SOX claims to the DOL require "no particular form of complaint," except that they must be in writing and "should contain a full statement of the facts and omissions with pertinent dates, which are believed to constitute the violations."

The ARB also concluded that the "definitive and specific" evidentiary standard for SOX complaints previously applied in ARB decisions was not an appropriate test and that complainants do not need to demonstrate that their complaints "definitively and specifically" related to a SOX enumerated violation. Rather, according to the ARB in *Sylvester*, "the critical focus is on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law." Further, the ARB disagreed with the ALJ's conclusion that complainants must expressly allege shareholder fraud as SOX was intended to address corporate fraud generally not just securities fraud. Finally, the ARB held that complainants need not plead, prove or approximate the elements of a fraud claim to sufficiently allege that they were engaged in protected activity under SOX.

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[9] *See also Spinner v. Landau*, 2010-SOX-29 (ARB May 31, 2012) (pre-*Lawson*, holding accountant who worked for private firm covered by SOX).
[10] 550 U.S. 544 (2007).
[11] 129 S. Ct. 1937 (2009).

- *Wiest v. Lynch*, 710 F.3d 121 (3d Cir. 2013)

In *Wiest*, the Third Circuit applied *Chevron* deference to the ARB's rejection of the "definitive and specific" standard, relying on *Sylvester* in holding that a reporting employee's communication is protected under SOX if it reflects a subjective and objectively reasonable belief that the employer's conduct relates to an existing or prospective violation of one of the provisions enumerated in Section 806.

Wiest was a former accountant for Tyco Electronics Corporation who questioned expense requests for various company events. After Tyco began investigating Wiest for alleged misconduct, he went on medical leave and was later terminated. Wiest sued under SOX and state law, alleging that he had been discharged for reporting improper expenditures. The district court dismissed the complaint, concluding that Wiest had failed to allege that his complaints to Tyco definitively and specifically related to a violation of a law or rule enumerated in Section 806. The Third Circuit reversed, holding that the ARB's "reasonable belief" standard was entitled to *Chevron* deference. Thus, an employee must establish both a subjective, good faith belief that the employer violated a provision listed in SOX, and that this belief was objectively reasonable—*i.e.*, that "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."

The Third Circuit also disagreed with the district court's holding that an employee's communication must allege the elements of a securities fraud violation. The Third Circuit found *Sylvester's* rejection of such a requirement to be reasonable, concluding that a "whistleblower's communication need not ring the bell on each element of one of the stated provisions of federal law to support an inference that the employer knew or suspected that the plaintiff was blowing the whistle on conduct that may fall within the ample reach of the anti-fraud laws listed in § 806." To hold otherwise, the court said, "would eviscerate § 806," noting that an employee might not have sufficient information to form a judgment on each element of a fraud claim yet still have "knowledge of facts sufficient to alert the employer to fraudulent conduct." The Third Circuit also rejected the district court's holding that an employee's communication must reflect a reasonable belief in an existing violation, endorsing *Sylvester*'s contrary conclusion that Section 806 also protects communications about prospective violations that the reporting employee believes are likely to occur. Applying the *Sylvester* standard, the Third Circuit found that Wiest had pleaded sufficient facts to show that some of the communications at issue were protected under Section 806, and reversed the district court's dismissal as to these communications.

- *Lockheed Martin Corp. v. Administrative Review Bd.*, 717 F.3d 1121 (10th Cir. 2013)

In *Lockheed Martin*, the Tenth Circuit rejected a narrow interpretation of SOX that would have limited the protections of Section 806 to reports of conduct relating to fraud against shareholders.

Complainant Andrea Brown worked as a communications director for Lockheed from 2000 to 2008. In May 2006, Brown filed an anonymous ethics complaint against her supervisor, Vice President of Communications Wendy Owen, alleging that Owen had engaged in misconduct in connection with a pen pal program between Lockheed employees and U.S. soldiers deployed in Iraq. Brown alleged that Owen had engaged in sexual relationships with soldiers, sent pornography to soldiers, and used company funds to buy a laptop and other gifts for soldiers and to take soldiers to expensive hotels in limousines for sexual encounters. Brown believed that these costs were being passed on to the government as Lockheed's customer, and "became concerned Owen's actions were fraudulent and illegal and that there could be media exposure which could lead to government audits and affect the company's future contracts and stock price." In December 2006, Owen became aware that Brown had been behind the complaint. Subsequently, Brown received a lower performance evaluation. In March 2007, Brown began reporting to Judy Gan, the Senior Vice President of Communications, who had a negative attitude towards Brown and told her that she was not the right person for her position and that there would be a reduction in staff. In June 2007, Owen called Brown and told her that her job had been posted on the Internet and that she should get her resume together. Brown applied for the position but withdrew her application after Gan called her, told her she was not qualified for the position, and criticized her for applying. Lockheed hired David Jewell for the position. Jewell solicited Owen's advice about the position and employees and was told that Brown had received imperfect evaluations in the past. Subsequently, Brown was asked to vacate her office and work from home or use a visitor office that doubled as a storage room. Brown was also denied permission to attend a conference she had previously attended at which she was to receive an award, told she or another employee would be laid off, and demoted. Brown then suffered an emotional breakdown and took medical leave.

Brown brought a complaint with OSHA alleging violations of SOX. An administrative law judge held that she had engaged in protected activity, that she had suffered adverse employment actions including constructive discharge, and that her protected activity was a contributing factor in the constructive discharge. The ALJ awarded Brown reinstatement, back pay, medical expenses, and $75,000 in non-economic compensatory damages. The ARB affirmed.

On appeal to the Tenth Circuit, Lockheed argued that despite the ALJ's finding that Brown reasonably believed Owen had committed mail or wire fraud, Brown's report was not protected under Section 806 because Owen's conduct did not relate to fraud against shareholders. The Tenth Circuit rejected this argument, finding it inconsistent with the plain language of the statute: "The plain, unambiguous text of § 1514A(a)(1) establishes six categories of employer conduct against which an employee is protected from retaliation for reporting: violations of 18 U.S.C. § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (bank fraud), § 1348 (securities fraud), any rule or regulation of the SEC, or any provision of Federal law relating to fraud against shareholders. Because 18 U.S.C. §§ 1341, 1343, 1344, and 1348 are all clearly provisions of federal law, Lockheed's reading of the statute would render their enumeration in § 1514A(a)(1) wholly superfluous" in violation of basic principles of statutory construction. The Tenth Circuit also concluded that even if the statute were ambiguous, the ARB's interpretation was permissible and thus entitled to *Chevron* deference.

The Tenth Circuit also noted that the ARB in *Sylvester* had repudiated the "definitive and specific" evidentiary standard for SOX complaints, but did not reach this issue because it found there was substantial evidence to support the ARB's conclusion that Brown's report was definitively and specifically related to the federal mail and wire fraud statutes. The court also held that the ARB's finding that Brown's complaint was a contributing factor in her constructive discharge was supported by the administrative record. The court cited the temporal proximity between Brown's report and the adverse employment action, rejecting Lockheed's argument that too much time had elapsed between Brown's May 2006 complaint and January 2008 termination, noting that "the relevant time frame is not when the constructive discharge occurred, but when the conduct leading up to the discharge began. The Tenth Circuit also upheld the ARB's application of the "cat's paw" theory of liability, finding that the evidence supported the finding that Owen "poisoned" Gan and Jewell's opinion of Brown.

- *Sharkey v. J.P. Morgan & Co.*, No. 10 Civ. 3824, 2010 U.S. Dist. LEXIS 139761 (S.D.N.Y. Jan. 14, 2011)

The plaintiff in *Sharkey* allegedly brought to the bank's attention her belief that a J.P. Morgan client was engaging in criminal activity and recommended based on an investigation that the bank severs its relationship with the client. The bank allegedly rejected Sharkey's recommendation and terminated her employment. Sharkey then filed a SOX complaint with the DOL, which found in the bank's favor and she subsequently filed an action in federal court. J.P. Morgan argued that Sharkey's actions did not constitute protected activity because she reported illegal activities by a third party (client), not by the bank itself. The court observed, in denying J.P. Morgan's 12(b)(6) motion, that while there are no prior decisions on whether reporting fraud by a third party is protected activity, the broad purposes of SOX and the Dodd-Frank Act support a finding that reports of third-party fraud are protected under SOX.[12]

A few months after *Sharkey*, the ARB reached a similar conclusion in *Funke v. Federal Express Corp.*, 2007-SOX-43 (ARB July 8, 2011), holding that an employee of Federal Express who reported suspected fraud by a Federal Express customer engaged in protected activity under SOX. The ARB also took an expansive view of its jurisdiction, holding that even though the complainant had abandoned her third-party fraud claim on appeal, the claim was not waived before the ARB, as the ARB "is not necessarily bound by the legal theory of any party in determining whether a violation has occurred."

[12] The court subsequently dismissed Sharkey's claims on other grounds on summary judgment. 2013 U.S. Dist. LEXIS 183168 (S.D.N.Y. Dec. 12, 2013).

- *Menendez v. Halliburton, Inc.*, 2007-SOX-005, ARB Case No. 12-026 (ARB Mar. 15, 2013)

The ARB in *Menendez* established a new and broader standard for what constitutes an adverse employment action under SOX. The ARB held that an employer's action may rise to the level of adverse if it is "more than trivial," even if the employee suffers no tangible employment harm.

Anthony Menendez worked for Halliburton as Director of Technical Accounting Research & Training. Menendez raised concerns about Halliburton's accounting practices with the SEC and made a complaint to his company's Audit Committee via email. The email contained Menendez's name and contact information. Upon receiving the email complaint to the Audit Committee, Halliburton's general counsel sent a litigation hold notice via email to members of company management and co-workers of Menendez. The email identified Menendez as having filed a complaint with the SEC. Menendez alleged that after co-workers became aware of his complaint, he was ignored and ostracized. He also claimed that he had an expectation that his identity would be kept confidential, even though he did not file his complaint anonymously and never specifically requested anonymity.

After leaving Halliburton several months later, Menendez filed a SOX complaint alleging retaliation, specifically that Halliburton had breached his confidentiality in disclosing his identity to other employees. An ALJ dismissed Menendez's complaint on, among other grounds that Halliburton's breach of confidentiality did not qualify as an adverse employment action.

On appeal, the ARB disagreed, concluding that the ALJ had applied too strict a standard in requiring Menendez to show that he suffered "tangible job consequences" as a result of the breach of confidentiality. The ARB adopted the standard set in a 2010 decision applying a statute with similar wording to SOX (AIR 21) in which the ARB held that the term adverse action "refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." *See Williams v. American Airlines*, 2007-AIR-004 (ARB Dec. 29, 2010).

The ARB also distinguished the standard applied in Title VII cases as established by *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). According to the ARB, the Title VII standard, in which a plaintiff must show conduct that would dissuade a reasonable worker from making or supporting a charge of discrimination, is derived from different and narrower statutory language than the retaliation provisions of SOX. Thus, Menendez establishes a new standard for adverse actions under SOX and suggests that breach of an employee's right to confidentiality can constitute an adverse employment action under SOX.

The ARB remanded for a determination of whether Menendez's protected activity was a contributing factor in the adverse action, and if so, whether Halliburton could establish by clear and convincing evidence that it would have taken the same action absent Menendez's whistleblowing. On remand, the ALJ determined that Halliburton had proved by clear and convincing evidence that it disclosed Menendez's identity for legitimate business reasons and dismissed the complaint. Anticipating possible reversal, the ALJ also entered an alternate finding that Halliburton had failed to prove its affirmative defense and awarding Menendez damages.

Upon review, the ARB reversed the ALJ's main holding. The ARB acknowledged that "in a strictly literal sense, the exposure of a whistleblower's identity is always 'caused' by his whistleblowing," but emphasized that "this seemingly circular logic is supported by sound policy reasons," namely, protecting anonymity to promote reporting violations of law. As to Halliburton's affirmative defense, the ARB held that the ALJ had applied the wrong standard by holding Halliburton to the lesser burden of showing that it acted for a "legitimate business reason," as opposed to requiring a showing that it would have taken the adverse action even absent the protected activity. The ARB held that the evidence was insufficient as a matter of law to support a finding that Halliburton had proven its affirmative defense. The ARB affirmed the ALJ's alternate award of $30,000 in damages for emotional distress and reputational harm and also awarded Menendez costs and attorney's fees as the prevailing party.

- *Vannoy v. Celanese Corp.*, 2008-SOX-00064, ARB Case No. 09-118 (ALJ July 24, 2013)

The ARB in Vannoy held that an employee's admitted theft of confidential business documents from his company's computer system may, depending on the circumstances, be protected activity under SOX.

Matthew Vannoy worked for Celanese in reconciling problems with the company's corporate employee expense reimbursement system. He complained to management and to the IRS as part of its bounty program about expense reimbursement issues with respect to employee charges on company credit cards. During an investigation of a separate employee complaint regarding Vannoy, Celanese discovered that he had sent a document to his domestic partner's personal email account containing the social security numbers of 1,600 current and former employees. Vannoy later claimed that while he was aware of the employer's confidentiality policy, he took the data to support his IRS report.

Vannoy was terminated after twice refusing to participate in the investigation of his concerns regarding expense reimbursements. Thereafter, he brought a SOX retaliation claim. The ALJ dismissed the case on Celanese's motion for summary judgment, holding that Vannoy did not engage in protected activity and that he was terminated for violating the company's confidentiality policies.

The ARB reversed and remanded. The ARB held that Vannoy's complaints to management and the IRS could constitute protected activity. To the extent Vannoy took employee data as part of his efforts to facilitate his complaint to the IRS, SOX is intended to protect all "lawful" conduct to disclose misconduct. The ARB went on to state that since no criminal charges were brought against Vannoy for misappropriating the social security numbers, his conduct must have been lawful.

The ARB recognized that there is "a clear tension between a company's legitimate business policies protecting confidential information and the whistleblower bounty programs created by Congress to encourage whistleblowers to disclose confidential company information in furtherance of enforcement of tax and securities laws." In light of this tension, the ARB remanded the case to the ALJ for hearing on whether the information produced by Vannoy was the type of "original information" that Congress intended to protect and whether the manner of transmission was protected under SOX. Notably, the ARB did not instruct the ALJ to engage in any type of balancing of the employer's need to protect its confidential information against the whistleblower's right to gather evidence to support a SOX claim, as is typically done in Title VII and other discrimination cases involving this issue.

On remand, the ALJ determined that Vannoy's conduct was protected activity. The ALJ found no support for Celanese's argument that Vannoy had acted unlawfully, noting that he had not been charged or convicted of any crimes. The ALJ also found that Vannoy's sole purpose in removing the confidential data was to support his whistleblower complaints, and thus his actions constituted protected activity under SOX. The ALJ also held that Vannoy's protected activity was a contributing factor in his termination and that Celanese had failed to establish by clear and convincing evidence that it would have terminated Vannoy even absent the protected activity. The ALJ awarded Vannoy approximately $355,000 in back pay and front pay, $25,000 in emotional distress damages, and costs and attorney's fees.

II. DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT OF 2010

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act").[13] The legislation covers a wide range of topics in an effort to address the causes of the financial crisis of 2008 and 2009 that created vast turmoil and dislocations in the financial markets.

[13] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

With respect to whistleblowing, the legislative history of the Dodd-Frank Act explains that "whistleblowers often face the difficult choice between telling the truth and the risk of committing 'career suicide.'"[14] It cites Madoff whistleblower Henry Markopolos' congressional testimony that "[w]histleblower tips were 13 times more effective than external audits" at uncovering "fraud schemes in public companies."[15]

Thus, the Dodd-Frank Act includes significant new whistleblower incentives and protections, including the creation of SEC and Commodity Futures Trading Commission (CFTC) whistleblower programs, expansion of current whistleblower protections under the Sarbanes-Oxley Act of 2002, and a new whistleblower cause of action for employees performing tasks related to consumer financial products or services. The legislation "aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud."[16]

Significantly, the Dodd-Frank Act creates alternative paths for whistleblowers to assert their rights, often with different and conflicting rights and procedures. Enabling regulations to the SEC's Whistle-blower Program became effective on August 12, 2011 and are codified at 17 C.F.R. Parts 240 and 249.

A. Dodd-Frank Act Whistleblower Incentives

The Dodd-Frank Act provides powerful monetary incentives for whistleblowers to report securities and commodity law violations to the SEC and CFTC, as well as strong protections for doing so. Sections 748 and 922 of the Dodd-Frank Act provide that whistle-blowers who provide the respective Commissions with original information about violations of securities or commodity laws to be awarded a share of between 10 percent and 30 percent of monetary sanctions ultimately imposed by the Commissions in actions where sanctions exceed $1 million.

Section 924(d) of the Dodd-Frank Act directed the SEC to establish a separate office to administer the SEC's whistleblower program. The Office of the Whistleblower (OWB) is required to report annually to Congress on the office's activities, whistleblower complaints, and the SEC's response. In order to qualify for an award, whistleblowers must submit tips, complaints, and referrals to the OWB via e-mail, fax, or the SEC's website, using Form-TCR.

[14] S. REP. NO. 111-176 at 110–112 (2010).
[15] *Id.*
[16] *Id.*

The OWB issued its first full-year report in November 2012.[17] During fiscal year 2012, the OWB received 3,001 whistleblower TCR forms from individuals in all 50 states, the District of Columbia, Puerto Rico, and 49 other countries. The most common categories of complaints were Corporate Disclosures and Financials (18.2 percent), Offering Fraud (15.5 percent), and Manipulation (15.2 percent).[18] In fiscal year 2013, the OWB received 3,238 whistleblower TCRs, again with submissions from all 50 states, as well as the District of Columbia, the U.S. territories of Puerto Rico, Guam, and the U.S. Virgin Islands, and 55 foreign countries.[19] The most common complaint categories in fiscal year 2013 were Corporate Disclosures and Financials (17.2 percent), Offering Fraud (17.1 percent), and Manipulation (16.2 percent).[20]

The OWB posts a Notice of Covered Action for each SEC enforcement action in which a final judgment or order results in monetary sanctions exceeding $1 million. Once a Notice of Covered Action is posted, eligible whistleblowers have 90 days to submit a claim for an award.[21] Through fiscal year 2013, there were 431 final judgments or orders eligible for awards.[22]

The SEC issued its first award under the whistleblower program on August 21, 2012, paying the maximum 30 percent payout allowed by law to a whistleblower who provided information relating to an ongoing multi-million dollar fraud. A court awarded more than $1 million in sanctions, and the whistleblower was paid about $50,000, or 30 percent of the approximately $150,000 that had been collected by the end of the fiscal year. The whistleblower was also eligible for further payouts based on additional collections or any increase in the amount of sanctions.[23]

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[17] U.S. Securities and Exchange Commission, *Fiscal Year 2012 Annual Report on the Dodd-Frank Whistleblower Program* (Nov. 2012).
[18] SEC *Fiscal Year 2012 Annual Report on the Dodd-Frank Whistleblower Program* 4-5.
[19] U.S. Securities and Exchange Commission, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 8-10 (Nov. 2013).
[20] SEC, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 8.
[21] U.S. Securities and Exchange Commission, *Fiscal Year 2012 Annual Report on the Dodd-Frank Whistleblower Program 6* (Nov. 2012).
[22] SEC, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 13.
[23] SEC *Fiscal Year 2012 Annual Report on the Dodd-Frank Whistleblower Program* 8.

Subsequently, several more whistleblowers have received awards. In August and September 2013, the SEC awarded approximately $125,000 to three whistleblowers for information they provided to help the SEC and the U.S. Department of Justice stop a sham hedge fund.[24] On October 1, 2013, the SEC announced its largest whistleblower bounty to date, an award of more than $14 million to a whistleblower who provided information leading to an SEC enforcement action that recovered substantial investor funds.[25] And on October 30, 2013, the SEC announced an award of more than $150,000 to a whistleblower whose information assisted in halting a scheme that was defrauding investors.[26]

While these recent bounties will likely encourage more whistleblowers to come forward with information, a New York state lawyer's association recently issued an opinion concluding that attorneys cannot ethically obtain such awards by providing confidential information about their clients.[27] The New York County Lawyers' Association analyzed the duties of attorneys under the New York Rules of Professional Conduct, concluding that participation in the whistleblower bounty program would create a conflict of interest between attorneys and their clients.[28]

B. Dodd-Frank Act Whistleblower Protections

Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 (Exchange Act) to add a new Section 21F, containing anti-retaliation protections for whistleblowers who report possible securities law violations.[29] The statute prohibits retaliation against whistleblowers who provide information to the SEC; initiate, testify in, or assist any investigation or judicial or administrative action of the SEC related to such information; or make disclosures required or protected under SOX, the Exchange Act, 18 U.S.C. section 1513(e), and any other law, rule, or regulation subject to the SEC's jurisdiction.[30]

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[24] Press Release, S.E.C. Office of the Whistleblower, SEC Awards More Than $14 Million to Whistleblower (Oct. 1, 2013), available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258.
[25] *Id.*
[26] Press Release, S.E.C. Office of the Whistleblower, SEC Rewards Whistleblower With $150,000 Payout (Oct. 30, 2013), available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540158194.
[27] New York County Lawyers' Association Committee on Professional Ethics, Formal Opinion 746, *Ethical Conflicts Caused by Lawyers as Whistleblowers under the Dodd-Frank Wall Street Reform Act of 2010* (Oct. 7, 2013), p. 1.
[28] *Id.*
[29] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010).
[30] Dodd-Frank Act, § 922(h); 15 U.S.C. § 78u-6(h)(1)(A).

An employee claiming retaliation under the Dodd-Frank Act may bring an action directly in federal district court (as opposed to the procedure under SOX, where a complainant is first required to file an administrative complaint with the Department of Labor, OSHA), and can take advantage of a longer statute of limitations and broader remedies than those available under SOX.[31] Alternatively, the SEC has taken the position that it can also enforce Dodd-Frank's anti-retaliation protections on a whistleblower's behalf.[32]

The remedies available under Section 21F are more generous than those available to whistleblowers under SOX. Upon a finding of retaliation, Section 21F provides for the whistleblower's reinstatement, *double* backpay (as opposed to just backpay, as under SOX), attorneys' fees and other costs.[33] There is no explicit provision for the recovery of non-pecuniary damages, such as emotional distress or loss of reputation damages.[34] The Act does not provide for a trial by jury or for recovery of punitive damages.[35]

1. Retroactivity

In *Jones v. Southpeak Interactive Corp.*, a district court addressed the question of whether Dodd-Frank's anti-retaliation provision, which became effective on July 22, 2010, could be applied retroactively to an alleged retaliatory discharge that occurred in August 2009.[36] The court held that the statute did not apply retroactively. First, the court examined the text and history of the law and found that there was no clear congressional intent respecting retroactivity. The court then considered whether retroactive application would affect substantive rights, liabilities, or duties on the basis of conduct prior to the statute's enactment. Because the Dodd Frank Act authorizes double-back pay, it increased the liability imposed under Sarbanes-Oxley, and thus retroactive application was not appropriate.

In *Ott v. Fred Alger Mgmt., Inc.*, another district court considered the application of the Dodd-Frank Act to whistleblowing occurring both before and after the effective date of the statute.[37] The plaintiff provided information to the SEC about an allegedly unlawful trading policy both before and after the law became effective. The parties did not dispute that the anti-retaliation provision does not apply retroactively. However, the defendant argued that the plaintiff did not engage in "protected activity" under the Dodd-Frank Act because she did not provide "new" information to the SEC since she had already made the SEC aware of the policy before the statute's enactment. The defendants cited a comment in which the SEC took the position that applying Section 21F prospectively, "for new information provided to the Commission after the statute's enactment and not to information previously submitted," was

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[31] 15 U.S.C. §§ 78u-6(h)(1)B)(i), (iii).
[32] 17 C.F.R. § 240.21F-2(b)(2).
[33] 15 U.S.C. § 78u-6(h)(1)(C).
[34] *See id.*; *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, *7 (D. Conn. Sept. 25, 2012) (granting motion to strike demand for compensatory and punitive damages under the Dodd-Frank Act).
[35] *See, e.g.*, *Pruett v. BlueLinx Holdings, Inc.*, No. 1:13-cv-02607-JOF (N.D. Ga. Nov. 12, 2013) (granting motion to dismiss punitive damages claim and striking demand for jury trial).
[36] *Jones v. Southpeak Interactive Corp.*, No. 3:12cv443, 2013 WL 1155566, *7 (E.D. Va. Mar. 19, 2013).
[37] *Ott v. Fred Alger Mgmt., Inc.*, No. 11 Civ. 4418 LAP, 2012 WL 4767200, *4 (S.D.N.Y. Sept. 27, 2012).

most consistent with the statutory language and congressional intent.[38] The court rejected this argument, noting that the SEC comment upon which the defendants relied was made in the context of the "bounty" provision of Section 21F, not the anti-retaliation provision, and that SEC regulations state that "the anti-retaliation protections apply whether or not [a whistleblower satisfies] the requirements, procedures and conditions to qualify for an award."[39] The court also noted that even if the plaintiff's reporting had occurred entirely before the Dodd-Frank Act's effective date, she might still have been protected under the anti-retaliation provision because the alleged adverse actions occurred after the statute's effective date.

2. Courts Split Over Reconciling Whistleblower Definition and Anti-Retaliation Protections

Many of the recent cases interpreting the Dodd-Frank Act have focused on an apparent inconsistency between the statute's definition of the term "whistleblower" and the scope of the statute's anti-retaliation whistleblower protections. Section 922 of the Dodd-Frank Act defines a whistleblower as "any individual who provides, or two 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."[40]

Based on this statutory language, it would appear that the anti-retaliation provision only covers individuals who provide information "to the Commission." However, both the SEC and the first federal district courts to address the issue interpreted scope of the Act's protections far more broadly.

On May 4, 2011, a district court judge in the Southern District of New York issued the first decision interpreting the scope of Dodd-Frank's whistleblower anti-retaliation provisions. In *Egan v. TradingScreen, Inc.*, Judge Leonard Sand interpreted the anti-retaliation provisions of Section 21F of the Dodd-Frank Act as covering not only whistleblowers who provide information to the SEC, but also individuals whose disclosures are "required or protected" under the Sarbanes-Oxley Act ("SOX"), the Securities Exchange Act, 18 U.S.C. § 1513(e), or any other law, rule, or regulation subject to the SEC's jurisdiction.[41]

Egan claimed that his employment was terminated after he informed the company's President that its CEO was diverting the company's corporate assets to another company that the CEO solely owned. Egan asserted that his termination under these circumstances constituted unlawful retaliation under Section 21F. The defendants moved to dismiss Egan's retaliation claim on the ground that he was not a "whistleblower" covered by Dodd-Frank, because Egan made his reports to TradingScreen, not to the SEC.

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[38] *See id.* (quoting Exchange Act Release No. 34-64545 at 19).
[39] *Id.* at *5 (quoting 17 C.F.R. § 240.21F-2(b)(1)(iii)).
[40] *See* 15 U.S.C. §78u-6(a)(6).
[41] *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202 (LBS), 2011 WL 1672066, *3-7 (S.D.N.Y. May 4, 2011).

The court noted that Dodd-Frank's definition of "whistleblower," found at 15 U.S.C. section 78u-6(a)(6), defines the term to mean individuals who provide information to the SEC. The court acknowledged that if Congress wanted to extend whistleblower protections to individuals beyond those who report to the SEC, it could have explicitly done so. But the court then looked the statute's anti-retalation provision, found at 15 U.S.C. section 78u-6(h)(1)(A), and noted that, in addition to protecting lawful acts done by the whistleblower to provide information or testimony to the SEC, sub-section 78u-6(h)(1)(A)(iii) protects whistleblower disclosures that are required or protected under: (1) the Sarbanes-Oxley Act; (2) the Securities Exchange Act; (3) 18 U.S.C. § 1513(e); and (4) any other law, rule, or regulation subject to the jurisdiction of the Commission.

The court determined that this created a contradiction in the statute, as "a literal reading of the definition of the term 'whistleblower' in 15 U.S.C. § 78 u-6(a)(6), requiring reporting to the SEC, would effectively invalidate § 78u-6(h)(1)(A)(iii)'s protection of whistleblower disclosures that do not require reporting to the SEC." The court then determined that "[t]he contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)'s definition of a whistleblower as one who reports to the SEC."

Thus, under the court's reading of the statute, a plaintiff asserting a section 21F retaliation claim must either:

> allege that his information was reported to the SEC, or that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes-Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC.

The court dismissed Egan's claim without prejudice, permitting Egan to amend his complaint to include factual allegations in accordance with the standards it articulated.[42]

The SEC, in its final regulations adopted on May 25, 2011, took the same position as the district court in *Egan* that a whistleblower need not make a disclosure to the SEC to be protected under section 21F. Rather, under the agency's interpretation, an individual is a protected whistleblower if he or she provides covered information in a manner described in 15 U.S.C. section 78u-6(h)(1)(A), i.e., the individual either provides the information to the SEC or in a disclosure otherwise required or protected under SOX, the Exchange Act, 18 U.S.C. 1513(e), or any other law, rule, or regulation subject to the SEC's jurisdiction.[43]

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[42] Egan amended his complaint, and the defendants subsequently moved to dismiss the amended complaint. On September 12, 2011, the court granted the defendants' motion to dismiss, finding that Egan had not pleaded facts in accordance with the standards it articulated.

[43] 17 C.F.R. § 240.21F-2(b).

The implications of this interpretation adopted by the SEC and the district court in *Egan* are significant: if any SOX-protected disclosures fall within the scope of Dodd-Frank's whistleblower provisions whether or not the employee reports to the SEC (despite the statutory definition of "whistleblower" as someone who reports "to the Commission"), employees in any SOX matter will arguably be able to bring their whistleblower retaliation claims under Dodd-Frank instead of SOX. Dodd-Frank has an expansive six to ten-year statute of limitations (as opposed to SOX's 180-day statute of limitations), a direct right of action in federal district court, as opposed to having to exhaust remedies before OSHA, and double back-pay damages. Thus, based on this interpretation of the Act, plaintiffs may opt to pursue SOX claims under the more employee-favorable provisions of Dodd-Frank, including claims that might otherwise be time-barred under SOX, instead of under OSHA's administrative scheme. Such a shift in strategy could greatly diminish OSHA's role in investigating and adjudicating SOX cases going forward, and could lead to the 180-day SOX statute of limitations becoming obsolete. The comments to the SEC's regulations did not address these implications with respect to the existing SOX statutory scheme. Nor did the court's opinion in *Egan* address the issue, probably because TradingScreen was not a SOX-covered entity.

A number of other district courts have followed *Egan* and the SEC and interpreted Dodd-Frank's anti-retaliation provision to protect internal reporting.[44] Several courts have concluded that the statute is ambiguous and have given *Chevron* deference to the SEC's interpretation.[45] However, the Fifth Circuit and at least one district court have taken a narrower view. In *Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit explained that, when "faced with questions of statutory construction, [courts] must first determine whether the statutory text is plain and unambiguous, and if it is . . . must apply the statute according to its terms."[46] In addition, "a court should give effect, if possible, to every word and every provision Congress used." Applying these principles to the Dodd-Frank Act, the *Asadi* court "start[ed] and end[ed] [its] analysis with the text of the relevant statute—15 U.S.C. § 78u-6." First, the Fifth Circuit found that the statute's definition of a whistleblower "expressly and unambiguously requires that an individual provide information to the SEC to qualify as a 'whistleblower' for purposes of § 78u-6." Next, the Fifth Circuit held that the "perceived conflict" between this definition and the anti-retaliation provision recognized by various district courts and the SEC "rests on a misreading of the operative provisions of § 78u-6." The Fifth Circuit explained that under the "plain language and structure" of the statute, there is only one category of Dodd-Frank whistleblowers: "individuals who provide information relating to a securities law violation to the SEC." The categories of activity protected by the anti-retaliation provision of section

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[44] *See, e.g., Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, *3-5 (D. Conn. Sept. 25, 2012); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1105 (D. Colo. 2013); *Murray v. UBS Securities, LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, *3-7 (S.D.N.Y. May 21, 2013); *Ellington v. Giacoumakis*, No. 13-11791-RGS, --- F. Supp. 2d ---, 2013 WL 5631046, *2-3 (D. Mass. Oct. 16, 2013); *Rosenblum v. Thomson Reuters (Markets) LLC*, No. 13 CIV. 2219 (SAS), 2013 WL 5780775, *3-5 (S.D.N.Y. Oct. 25, 2013).

[45] *See Kramer*, 2012 WL 4444820 at *5; *Murray*, 2013 WL 2190084, *4-7; *Ellington*, 2013 WL 5631046, *2-3; *Rosenblum*, 2013 WL 5780775 at *3-5.

[46] *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 622 (5th Cir. 2013) (quotation marks and alteration omitted).

78u-6(h)(1)(A) do not conflict with the whistleblowing provision; they define the scope of the protection available to whistleblowers. The plaintiff's interpretation, the court said, would impermissibly read the words "to the Commission" out of the definition of "whistleblower" for purposes of the anti-retaliation provision, violating the principle that every word is to be given effect.

The Fifth Circuit also noted that to construe the Dodd-Frank Act's anti-retaliation provision to extend beyond the statutory definition of "whistleblowers" would render SOX's whistleblower provision moot for practical purposes. The court explained that individuals would be unlikely to file SOX anti-retaliation claims, with their administrative exhaustion requirement, much shorter statute of limitations, and more limited damages, instead of simply filing Dodd-Frank Act claims, if the Dodd-Frank Act's anti-retaliation provision overlapped with SOX in covering reports to company management. Finally, the Fifth Circuit held that it did not owe deference to the SEC's broader interpretation of the anti-retaliation provision as covering internal reports to company management because the statute was clear and unambiguous.

Post-*Asadi* district court decisions have split over the proper interpretation of these provisions. At least two district courts in other circuits have expressly disagreed with the Fifth Circuit, finding the statute to be ambiguous and granting deference to the SEC's interpretation.[47] By contrast, two district courts in the District of Colorado and Northern District of California followed the *Asadi* court's reasoning, holding that the statute is not ambiguous and does not protect individuals who do not meet the statute's definition of a whistleblower.[48]

3. Extraterritoriality

At least two district courts have taken the position that the Dodd-Frank Act's anti-retaliation provision does not cover employees working outside the United States. The lower court in the *Asadi* case dismissed the plaintiff's claim on the ground that the provision does not apply extraterritorially, an issue not reached by the Fifth Circuit in its decision.[49]

The plaintiff in the case alleged that he was a U.S.-based employee who was working in Jordan pursuant to a temporary relocation when he became aware of a possible violation of the Foreign Corrupt Practices Act ("FCPA") by G.E. Energy (USA), LLC in Iraq.[50] The plaintiff alleged that, after reporting his concern to the company, he received a negative performance review, was pressured to step down, and was ultimately terminated from his position. In analyzing whether the Dodd-Frank Act's anti-retaliation provision could apply extraterritorially, the court cited the "longstanding principle" that congressional legislation does not apply outside the United States "unless a contrary intent appears." The court explained that the Dodd-Frank Act's anti-retaliation provision is silent on the question, creating a presumption

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[47] *See Ellington*, 2013 WL 5631046 at *2-3; *Rosenblum*, 2013 WL 5780775 at *4-5.
[48] *Wagner v. Bank of America Corp.*, 2013 WL 3786643 (D. Colo. July 19, 2013); *Banko v. Apple Inc.*, No. CV 13-02977 RS, 2013 U.S. Dist. LEXIS 149686, *9-18 (N.D. Cal. Sept. 26, 2013).
[49] *See* 720 F.3d at 621, 630 n.13.
[50] *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, *1 (S.D. Tex. June 28, 2012).

that it does not apply extraterritorially. The court further noted that other sections of the act explicitly address their extraterritorial scope in limited contexts, which strengthened the conclusion that the anti-retaliation provision does not apply extraterritorially.

The court also rejected the plaintiff's argument that SOX or the FCPA could extend the application of the Dodd-Frank Act. Regarding SOX, the court held that the provisions upon which the plaintiff relied were either inapplicable or themselves did not apply extraterritorially. The court found the plaintiff's reliance on the FCPA misplaced because the FCPA does not "protect" or "require" reporting of violations, and thus the plaintiff's allegations of FCPA violations could not constitute "disclosures that are required or protected" under the relevant law. Thus, the court held that the Dodd-Frank Act's anti-retaliation provision did not cover Asadi.

The court in *Liu v. Siemens A.G.* reached a similar conclusion.[51] In *Liu*, a Taiwanese citizen alleged that he had been terminated for reporting possible violations of the FCPA in North Korea and China by Siemens China, a subsidiary of Siemens A.G., a German corporation. The court followed the reasoning of the *Asadi* court in holding that the Dodd-Frank Act's anti-retaliation provision does not apply extraterritorially.

4. Pre-Dispute Arbitration Agreements/Waivers of Claims

Section 21F does not explicitly ban pre-dispute arbitration agreements or waivers of claims. However, in the comments to the regulations, the SEC has taken the position that such language is unnecessary because section 29(a) of the Exchange Act provides that "any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder . . . shall be void."[52] The comments conclude, "Thus, under Section 29(a), employers may not require employees to waive or limit their anti-retaliation rights under Section 21F."[53]

In the first two federal district court decisions to address the issue, however, the courts in *Ruhe v. Masimo Corp.* and *Murray v. UBS Securities, LLC* compelled arbitration of retaliation claims under Section 21F, holding that the plain wording of the statute contains no provision rendering pre-dispute arbitration agreements unenforceable.[54] The courts determined that they could not read such a provision into the statute where it did not exist. It remains to be seen whether other courts will follow the reasoning in *Ruhe* and *Murray* or whether they will find the comments to the SEC's regulations persuasive.

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[51] *Liu v. Siemens A.G.*, No. 13 Civ. 317(WHP), --- F. Supp. 2d ---, 2013 WL 5692504, *2-4 (S.D.N.Y. Oct. 21, 2013).
[52] 76 Fed. Reg. at 34,304.
[53] *Id.*
[54] *Ruhe v. Masimo Corp.*, No. SACV 11-00734-CJC(JCG), 2011 WL 4442790, *4 (C.D. Cal. Sept. 16, 2011); *Murray v. UBS Secs., LLC*, 12 Civ. 5914 (KPF), 2014 U.S. Dist LEXIS 9696 (S.D.N.Y. Jan 27, 2014).

C. New Consumer Financial Whistleblower Protections

The Dodd-Frank Act also creates a new whistleblower cause of action for employees performing tasks related to the offering or provision of consumer financial products or services. Section 1057 of the Dodd-Frank Act prohibits retaliation against employees who provide information to their employers or to the government they reasonably believe to be a violation of the Consumer Financial Protection Act of 2010 (which is Title X of the Dodd-Frank Act) or any other provision of law subject to the jurisdiction of the Bureau of Consumer Financial Protection. This provision also protects employees who object to, or refuse to participate in, any activity that the employee reasonably believes to be a violation of any law, rule, or standard of the Bureau, who testify in proceedings relating to same, or who file, institute or cause to be filed any proceeding under any Federal consumer financial law. Aggrieved employees are required to file a complaint with the Department of Labor, OSHA within 180 days of an alleged violation, and the procedure for handling such complaints, as well as the burdens of proof, remedies, and ability of a complainant to file an action in federal district court and demand a jury trial, are somewhat similar to the scheme to which employers and employees have become accustomed under SOX.

Employees may not waive their rights and remedies under Section 1057 by any "agreement, policy, form or condition of employment, including any pre-dispute arbitration agreement."[55] Thus, employers will typically be unable to compel arbitration of claims under Section 1057 based on pre-dispute arbitration agreements.

[55] 12 U.S.C. §5567 (d)(1)-(3).

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 11(c) of the Occupational Safety & Health Act (OSHA) (1970) *[29 U.S.C. § 660(c)]. Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA or their employers, participating in an inspection, etc.* **29 CFR 1977**	*30*	*Private sector U.S. Postal Service Certain tribal employers*	*90*	*No*	*Yes*	*No*	*Yes*	*Yes*	*15*	*OSHA*	*Motivating*
Asbestos Hazard Emergency Response Act (AHERA) (1986) *[15 U.S.C. § 2651]. Protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems.* **29 CFR 1977**	*90*	*Private sector State and local government Certain DoD schools Certain tribal schools*	*90*	*No*	*Yes*	*No*	*Yes*	*Yes*	*15*	*OSHA*	*Motivating*
International Safe Container Act (ISCA) (1977) *[46 U.S.C. § 80507]. Protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act.* **29 CFR 1977**	*60*	*Private sector Local government Certain state government and interstate compact agencies*	*30*	*No*	*Yes*	*No*	*Yes*	*Yes*	*15*	*OSHA*	*Motivating*
Surface Transportation Assistance Act (STAA) (1982), as amended by the 9/11 Commission Act of 2007 (Public Law No. 110-053) *[49 U.S.C. § 31105]. Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, etc.* **29 CFR 1978**	*180*	*Private sector*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250K cap*	*30*	*ALJ*	*Contributing*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Safe Drinking Water Act (SDWA) (1974) *[42 U.S.C. § 300j-9(i)]. Protects employees from retaliation for, among other things, reporting violations of the Act, which requires that all drinking water systems assure that their water is potable as determined by the Environmental Protection Agency.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal Indian tribes*	*30*	*No*	*Yes*	*No*	*Yes*	*Yes*	*30*	*ALJ*	*Motivating*
Federal Water Pollution Control Act (FWPCA) (1972) *[33 U.S.C. § 1367]. Protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act.* **29 CFR 24**	*30*	*Private sector State and municipal Indian tribes Federal sovereign immunity bars investigation of FWPCA complaints filed by federal employees*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*
Toxic Substances Control Act (TSCA) (1976) *[15 U.S.C. § 2622]. Protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA).* **29 CFR 24**	*30*	*Private sector*	*30*	*No*	*Yes*	*No*	*Yes*	*Yes*	*30*	*ALJ*	*Motivating*
Solid Waste Disposal Act (SWDA) (1976) *[42 U.S.C. § 6971]. Protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal Indian tribes*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Clean Air Act (CAA) (1977) *[42 U.S.C. § 7622]. Protects employees from retaliation for reporting violations of the Act, which provides for the development and enforcement of standards regarding air quality and air pollution.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) *[42 U.S.C. § 9610] A.k.a. "Superfund," this statute protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. The Act also protects employees who report violations related to the clean up of uncontrolled or abandoned hazardous waste sites.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 2005 (Public Law No. 109-58) (ERA) *[42 U.S.C. § 5851]. Protects certain employees in the nuclear industry from retaliation for reporting violations of the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission, and employees of contractors working with the Department of Energy under a contract pursuant to the Atomic Energy Act.* **29 CFR 24**	*180*	*Statute provides coverage of NRC and its contractors and subcontractors, NRC licensees and applicants for licenses, including contractors and subcontractors Agreement state licensees Applicants for licenses from agreement states, including their contractors and subcontractors DOE and its contractors and subcontractors. However, ARB case law indicates federal sovereign immunity will bar investigation of ERA complaints filed against many but not all federal agencies.*	*30*	*365*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2000) *[49 U.S.C. § 42121]. Protects employees of air carriers and contractors and subcontractors of air carriers from retaliation for, among other things, reporting violations of laws related to aviation safety.* **29 CFR 1979**	*90*	*Air carriers and their contractors and subcontractors*	*60*	*No*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Sarbanes-Oxley Act (SOX) (2002), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Public Law No. 111-203) *[18 U.S.C. § 1514A]. Protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violations of federal laws related to fraud against shareholders. The Act covers employees of publically traded companies, including those companies' subsidiaries, and employees of nationally recognized statistical rating organizations, as well as contractors, subcontractors, and agents of these employers.* **29 CFR 1980**	*180*	*Companies registered under §12 or required to report under §15(d) of the SEA and their consolidated subsidiaries or affiliates, contractors, subcontractors, officers, and agents, and nationally recognized statistical rating organizations*	*60*	*180*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Pipeline Safety Improvement Act (PSIA) (2002) *[49 U.S.C. § 60129]. Protects employees from retaliation for reporting violations of federal laws related to pipeline safety and security or for refusing to violate such laws.* **29 CFR 1981**	*180*	*Private sector employers, states, municipalities, and individuals owning or operating pipeline facilities, and their contractors and subcontractors*	*60*	*No*	*Yes*	*Yes*	*Yes*	*No*	*60*	*ALJ*	*Contributing*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Federal Railroad Safety Act (FRSA), as amended by Section 1521 of the 9/11 Commission Act of 2007 (Public Law No. 110-053), and Section 419 of the Rail Safety Improvement Act of 2008 (Public Law No. 110-432) *[49 U.S.C. § 20109]. Protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a work-place injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition.* **29 CFR 1982**	*180*	*Railroad carriers and their contractors, subcontractors, and officers*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250K Cap*	*30*	*ALJ*	*Contributing*
National Transit Systems Security Act (NTSSA), enacted as Section 1413 of the 9/11 Commission Act of 2007 (Public Law No. 110-053) *[6 U.S.C. §1142]. Protects transit employees from retaliation for reporting a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees from retaliation for refusing to work when confronted by a hazardous safety or security condition, or refusing to violate a federal law related to public transportation safety.* **29 CFR 1982**	*180*	*Public transportation agencies and their contractors and subcontractors, and officers*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250K Cap*	*30*	*ALJ*	*Contributing*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Product Safety Improvement Act (CPSIA) (2008) *[15 U.S.C. § 2087]. Protects employees from retaliation for reporting to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Product Safety Commission (CPSC). CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers.* **29 CFR 1983**	*180*	*Manufacturing, private labeling, distribution, and retail employers in the United States*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Affordable Care Act (ACA) (2010) *[29 U.S.C. § 218c]. Protects employees from retaliation for reporting violations of any provision of title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium.* **29 CFR 1984**	*180*	*Private and public sector employers*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Seaman's Protection Act, as amended by § 611 of the Coast Guard Authorization Act of 2010 (Public Law No. 111-281) (SPA) *[46 U.S.C. § 2114]. Protects seamen from retaliation for reporting to the Coast Guard or another federal agency a violation of a maritime safety law or regulation. Among other things, the Act also protects seamen from retaliation for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public.* **29 CFR 1986**	*180*	*Private-sector employers—vessel on which seaman was employed must be American-owned, as defined; world-wide coverage*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250 K Cap*	*30*	*ALJ*	*Contributing*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Financial Protection Act (CFPA) (Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203) (2010) *[12 U.S.C. § 5567]. Protects employees performing tasks related to consumer financial products or services from retaliation for reporting reasonably perceived violations of any provision of title X of the Dodd-Frank Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard, or prohibition prescribed by the Bureau.*	*180*	*Any person engaged in offering or providing a consumer financial product or service, a service provider to such person, or such person's affiliate acting as a service provider to it*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
FDA Food Safety Modernization Act (FSMA) (2011) *[21 U.S.C. § 1012]. Protects employees of food manufacturers, distributors, packers, and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the Act. Employees are also protected from retaliation for refusing to participate in a practice that violates the Act.*	*180*	*Any entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (a provision of Division C's Title I, the Motor Vehicle and Highway Safety Improvement Act of 2012) (2012). *Protects employees from retaliation by motor vehicle manufacturers, part suppliers, and dealerships for providing information to the employer or the U.S. Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA), or for engaging in related protected activities as set forth in the provision.*	*180*	*Motor vehicle manufacturer, part supplier, or dealership*	*60*	*210*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

No. 79

Wendy Webb-Weber,
Appellant,
v.
Community Action for Human Services, Inc., et al.,
Respondents,
et al.,
Defendants.

Stephen Bergstein, for appellant.
Dennis A. Lalli, for respondents.

PIGOTT, J.:

Labor Law § 740 (2), commonly referred to as the "whistleblower statute," provides, in relevant part, that "[a]n employer shall not take any retaliatory personnel action against an employee because such employee . . . discloses, or threatens

to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation" that either "creates and presents a substantial and specific danger to the public health or safety, or . . . constitutes health care fraud" (Labor Law § 740 [2] [a]). The narrow issue on this appeal is whether a complaint asserting a claim under that provision must identify the specific "law, rule or regulation" allegedly violated by the employer. We conclude that there is no such requirement.

Plaintiff was the chief operating officer for defendant Community Action for Human Services, Inc. (Community Action), a not-for-profit corporation that provides social services to the mentally and physically disabled and is subject to oversight by the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD). Plaintiff reported to Community Action's chief executive officer, defendant David Bond.

After plaintiff was terminated from her position in September 2009, she commenced suit against, among others,[1] both Community Action and Bond (hereinafter, defendants), claiming that she had been terminated in violation of Labor Law § 740 for registering complaints with public agencies concerning policies

[1] The complaint against Community Action's Board of Directors and David Bond has been dismissed and they are not parties to this appeal.

and practices of Community Action.[2]

Defendants moved pursuant to CPLR 3211 to dismiss the complaint for failure to state a cause of action, asserting, as relevant here, that the complaint was deficient because it failed to identify the particular "law, rule or regulation" defendants are claimed to have violated. Plaintiff cross-moved for leave to serve an amended verified complaint. Supreme Court granted plaintiff's cross motion,[3] and partially granted defendants' motion to dismiss, leaving intact plaintiff's Labor Law § 740 claim. The Appellate Division reversed and dismissed the section 740 claim, holding that the complaint did not state a cause of action because it failed to "identify a specific law, rule or regulation that defendants purportedly violated" (98 AD3d 923, 924 [1st Dept 2012] [citations omitted]). This Court granted plaintiff leave to appeal and we now reverse.

The plain language of Labor Law § 740 (2) (a) does not impose any requirement that a plaintiff identify the specific "law, rule or regulation" violated as part of a section 740 claim. Subdivision 2 (a) prohibits an employer from taking

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[2] Plaintiff also brought a claim pursuant to Labor Law § 741 that was eventually dismissed by the Appellate Division, but she has abandoned that claim on this appeal and asks for reinstatement of only the section 740 claim.

[3] In light of plaintiff's cross motion, Supreme Court had given defendants an opportunity to submit an additional brief in support of their motion to dismiss, but defendants opted to rely on their original submission.

retaliatory personnel action against an employee because she either discloses or threatens to disclose the employer's "activity, policy or practice." The reasonable interpretation is that, in order to recover under a section 740 claim, plaintiff must show that she reported or threatened to report the employer's "activity, policy or practice," but need not claim that she cited any particular "law, rule or regulation" at that time. As one commentator has observed, "[m]erely the practice - not the legal basis for finding it to be a violation - appears to be what must be reported" (Richard A. Givens, Practice Commentaries, McKinneys Cons Laws of NY, Book 30, Labor Law § 740, at 549 [1988 ed] [emphasis in original]). Plaintiff reasons that, just as an employee need not cite the actual law, rule or regulation violated when the complaint is made, her pleading is, correspondingly, not required to identify the "law, rule or regulation" violated. We agree.

To be sure, in order to recover under a Labor Law § 740 theory, the plaintiff has the burden of proving that an actual violation occurred, as opposed to merely establishing that the plaintiff possessed a reasonable belief that a violation occurred (Bordell v General Elec. Co., 88 NY2d 869, 871 [1996] [dismissing section 740 claim on summary judgment where the plaintiff conceded that the employer did not violate any law, rule or regulation]). And, the violation must be of the kind that "creates a substantial and specific danger to the public health

or safety" (Remba v Federation Empl. & Guidance Serv., 76 NY2d 801, 802 [1990]). However, for pleading purposes, the complaint need not specify the actual law, rule or regulation violated, although it must identify the particular activities, policies or practices in which the employer allegedly engaged, so that the complaint provides the employer with notice of the alleged complained-of conduct. To the extent that Appellate Division authority can be read as requiring a plaintiff to plead the actual law, rule or regulation the employer violated, it should no longer be followed for that proposition (see Deshpande v TJH Med. Servs., P.C., 52 AD3d 648, 650 [2d Dept 2008], lv denied 12 NY3d 704 [2009]; Blumenreich v North Shore Health Sys., 287 AD2d 529, 530 [2d Dept 2001]; Connolly v Macklowe Real Estate Co., 161 AD2d 520, 522-523 [1st Dept 1990]).

According to the amended verified complaint, plaintiff apprised Bond and other Community Action representatives about issues she claims endangered the welfare and safety of Community Action patients. Specifically, plaintiff registered complaints about the falsification of patient medication and treatment records, inadequate fire safety, mistreatment of Community Action residents, and deficiencies in patient care and in the facility itself. When those conditions continued unabated, plaintiff notified the OMRDD and the New York City Fire Department. The OMRDD conducted a survey of the Community Action premises and issued a "60-Day Order"; when a follow-up survey indicated that

the violations had not been remedied, Community Action was placed under sanctions by the New York State Department of Health. Moreover, the New York City Fire Department issued three violations against defendants.

Affording plaintiff's complaint a liberal construction, as we must on a motion to dismiss, and giving the plaintiff's allegations every favorable inference, we conclude that the complaint is sufficient to state a cause of action under section 740 (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]). The substantive allegations in the complaint, particularly those that assert that sanctions and violations were issued by public bodies, allegedly as a result of plaintiff's complaints, sufficiently support plaintiff's allegation that defendants violated various laws, rules or regulations. Moreover, defendants can request in a bill of particulars that plaintiff identify the particular laws, rules and regulations allegedly violated.

Nor should the complaint be dismissed on the ground that plaintiff failed to plead that the alleged violations created and presented "a substantial and specific danger to the public health or safety" or constituted health care fraud. Under the circumstances of this case, the complaint adequately met the pleading requirements.

Accordingly, the order of the Appellate Division insofar as appealed from should be reversed, with costs, and the

motion by defendants Community Action and David G. Bond to dismiss the Labor Law § 740 cause of action as against them should be denied.

* * * * * * * * * * * * * * * * *

Order, insofar as appealed from, reversed, with costs, and motion by defendants Community Action for Human Services, Inc. and David G. Bond to dismiss the first cause of action as against them denied. Opinion by Judge Pigott. Chief Judge Lippman and Judges Graffeo, Read, Smith, Rivera and Abdus-Salaam concur.

Decided May 13, 2014

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LOCAL LAWS
OF
THE CITY OF NEW YORK

Three City Laws (46 of 2013, and 6 & 7 of 2014) conformed in a single document by Gerald T. Hathaway, Mitchell Silberberg & Knupp (gth@msk.com)

UNOFFICIAL COMPILATION

EARNED SICK TIME ACT

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§ 20-911 Short title.

This chapter shall be known and may be cited as the "Earned Sick Time Act."

§ 20-912 Definitions.

When used in this chapter, the following terms shall be defined as follows:

a. "Calendar year" shall mean a regular and consecutive twelve month period, as determined by an employer.

b. "Chain business" shall mean any employer that is part of a group of establishments that share a common owner or principal who owns at least thirty percent of each establishment where such establishments (i) engage in the same business or (ii) operate pursuant to franchise agreements with the same franchisor as defined in general business law section 681; provided that the total number of employees of all such establishments in such group is at least five.

c. "Child" shall mean a biological, adopted or foster child, a legal ward, or a child of an employee standing in loco parentis.

d. "Domestic partner" shall mean any person who has a registered domestic partnership pursuant to section 3-240 of the code, a domestic partnership registered in accordance with executive order number 123, dated August 7, 1989, or a domestic partnership registered in accordance with executive order number 48, dated January 7, 1993.

e. "Domestic worker" shall mean any "domestic worker" as defined in section 2(16) of the labor law who is employed for hire within the city of New York for more than eighty hours in a calendar year who performs work on a full-time or part-time basis.

f. "Employee" shall mean any "employee" as defined in section 190(2) of the labor law who is employed for hire within the city of New York for more than eighty hours in a calendar year who performs work on a full-time or part-time basis, including work performed in a transitional jobs program pursuant to section 336-f of the social services law, but not including work performed as a participant in a work experience program pursuant to section 336-c of the social services law, and not including those who are employed by (i) the United States government; (ii) the state of New York, including any office, department, independent agency, authority, institution, association, society or other body of the state including the legislature and the judiciary; or (iii) the city of New York or any local government, municipality or county or any entity governed by general municipal law section 92 or county law section 207.

g. "Employer" shall mean any "employer" as defined in section 190(3) of the labor law, but not including (i) the United States government; (ii) the state of New York, including any office, department, independent agency, authority, institution, association, society or other body of the state including the legislature and the judiciary; or (iii) the city of New York or any local government, municipality or county or any entity governed by general municipal law section 92 or county law section 207. In determining the number of employees performing work for an employer for compensation during a given week, all employees performing work for

compensation on a full-time, part-time or temporary basis shall be counted, provided that where the number of employees who work for an employer for compensation per week fluctuates, business size may be determined for the current calendar year based upon the average number of employees who worked for compensation per week during the preceding calendar year, and provided further that in determining the number of employees performing work for an employer that is a chain business, the total number of employees in that group of establishments shall be counted.

h. "Family member" shall mean an employee's child, spouse, domestic partner, parent, sibling, grandchild or grandparent, or the child or parent of an employee's spouse or domestic partner.

i. "Health care provider" shall mean any person licensed under federal or New York state law to provide medical or emergency services, including, but not limited to, doctors, nurses and emergency room personnel.

j. "Hourly professional employee" shall mean any individual (i) who is professionally licensed by the New York state education department, office of professions, under the direction of the New York state board of regents under education law sections 6732, 7902 or 8202, (ii) who calls in for work assignments at will determining his or her own work schedule with the ability to reject or accept any assignment referred to them and (iii) who is paid an average hourly wage which is at least four times the federal minimum wage for hours worked during the calendar year.

k. "Paid sick time" shall mean time that is provided by an employer to an employee that can be used for the purposes described in section 20-914 of this chapter and is compensated at the same rate as the employee earns from his or her employment at the time the employee uses such time, except that an employee who volunteers or agrees to work hours in addition to his or her normal schedule will not receive more in paid sick time compensation than his or her regular hourly wage if such employee is not able to work the hours for which he or she has volunteered or agreed even if the reason for such inability to work is one of the reasons in section 20-914 of this chapter. In no case shall an employer be required to pay more to an employee for paid sick time than the employee's regular rate of pay at the time the employee uses such paid sick time, except that in no case shall the paid sick time hourly rate be less than the hourly rate provided in section 652(1) of the labor law.

l. "Parent" shall mean a biological, foster, step- or adoptive parent, or a legal guardian of an employee, or a person who stood in loco parentis when the employee was a minor child.

m. "Public disaster" shall mean an event such as fire, explosion, terrorist attack, severe weather conditions or other catastrophe that is declared a public emergency or disaster by the president of the United States, the governor of the state of New York or the mayor of the city of New York.

n. "Public health emergency" shall mean a declaration made by the commissioner of health and mental hygiene pursuant to section 3.01(d) of the New York city health code or by the mayor pursuant to section 24 of the executive law.

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o. "Public service commission" shall mean the public service commission established by section 4 of the public service law.

p. "Retaliation" shall mean any threat, discipline, discharge, demotion, suspension, reduction in employee hours, or any other adverse employment action against any employee for exercising or attempting to exercise any right guaranteed under this chapter.

q. "Sick time" shall mean time that is provided by an employer to an employee that can be used for the purposes described in section 20-914 of this chapter, whether or not compensation for that time is required pursuant to this chapter.

r. "Spouse" shall mean a person to whom an employee is legally married under the laws of the state of New York.

s. "Department" shall mean the department of consumer affairs or such other agency as the mayor shall designate pursuant to section 20-925 of this chapter.

t. "Grandchild" shall mean a child of an employee's child.

u. "Grandparent" shall mean a parent of an employee's parent.

v. "Sibling" shall mean an employee's brother or sister, including half-siblings, step-siblings and siblings related through adoption.

§ 20-913 Right to sick time; accrual.

a. All employees have the right to sick time pursuant to this chapter.

1. All employers that employ five or more employees and all employers of one or more domestic workers shall provide paid sick time to their employees in accordance with the provisions of this chapter.

2. All employees not entitled to paid sick time pursuant to this chapter shall be entitled to unpaid sick time in accordance with the provisions of this chapter.

b. All employers shall provide a minimum of one hour of sick time for every thirty hours worked by an employee, other than a domestic worker who shall accrue sick time pursuant to paragraph 2 of subdivision d of this section. Employers shall not be required under this chapter to provide more than forty hours of sick time for an employee in a calendar year. For purposes of this subdivision, any paid days of rest to which a domestic worker is entitled pursuant to section 161(1) of the labor law shall count toward such forty hours. Nothing in this chapter shall be construed to discourage or prohibit an employer from allowing the accrual of sick time at a faster rate or use of sick time at an earlier date than this chapter requires.

c. An employer required to provide paid sick time pursuant to this chapter who provides an employee with an amount of paid leave, including paid time off, paid vacation, paid personal days or paid days of rest required to be compensated pursuant to section 161(1) of the labor law, sufficient to meet the requirements of this section and who allows such paid leave to be used for

the same purposes and under the same conditions as sick time required pursuant to this chapter, is not required to provide additional paid sick time for such employee whether or not such employee chooses to use such leave for the purposes included in subdivision a of section 20-914 of this chapter. An employer required to provide unpaid sick time pursuant to this chapter who provides an employee with an amount of unpaid or paid leave, including unpaid or paid time off, unpaid or paid vacation, or unpaid or paid personal days, sufficient to meet the requirements of this section and who allows such leave to be used for the same purposes and under the same conditions as sick time required pursuant to this chapter, is not required to provide additional unpaid sick time for such employee whether or not such employee chooses to use such leave for the purposes set forth in subdivision a of section 20-914 of this chapter.

d. 1. For an employee other than a domestic worker, sick time as provided pursuant to this chapter shall begin to accrue at the commencement of employment or on the effective date of this local law, whichever is later, and an employee shall be entitled to begin using sick time on the one hundred twentieth calendar day following commencement of his or her employment or on the one hundred twentieth calendar day following the effective date of this local law, whichever is later. After the one hundred twentieth calendar day of employment or after the one hundred twentieth calendar day following the effective date of this local law, whichever is later, such employee may use sick time as it is accrued.

2. In addition to the paid day or days of rest to which a domestic worker is entitled pursuant to section 161(1) of the labor law, such domestic worker shall also be entitled to two days of paid sick time as of the date that such domestic worker is entitled to such paid day or days of rest and annually thereafter, provided that notwithstanding any provision of this chapter to the contrary, such two days of paid sick time shall be calculated in the same manner as the paid day or days of rest are calculated pursuant to the provisions of section 161(1) of the labor law.

e. Employees who are not covered by the overtime requirements of New York state law or regulations, including the wage orders promulgated by the New York commissioner of labor pursuant to article 19 or 19-A of the labor law, shall be assumed to work forty hours in each work week for purposes of sick time accrual unless their regular work week is less than forty hours, in which case sick time accrues based upon that regular work week.

f. The provisions of this chapter do not apply to (i) work study programs under 42 U.S.C. section 2753, (ii) employees for the hours worked and compensated by or through qualified scholarships as defined in 26 U.S.C. section 117, (iii) independent contractors who do not meet the definition of employee under section 190(2) of the labor law, and (iv) hourly professional employees.

g. Employees shall determine how much earned sick time they need to use, provided that employers may set a reasonable minimum increment for the use of sick time not to exceed four hours per day.

h. Except for domestic workers, up to forty hours of unused sick time as provided pursuant to this chapter shall be carried over to the following calendar year; provided that no

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employer shall be required to (i) allow the use of more than forty hours of sick time in a calendar year or (ii) carry over unused paid sick time if the employee is paid for any unused sick time at the end of the calendar year in which such time is accrued and the employer provides the employee with an amount of paid sick time that meets or exceeds the requirements of this chapter for such employee for the immediately subsequent calendar year on the first day of such year.

i. Nothing in this chapter shall be construed as requiring financial or other reimbursement to an employee from an employer upon the employee's termination, resignation, retirement, or other separation from employment for accrued sick time that has not been used.

j. If an employee is transferred to a separate division, entity or location in the city of New York, but remains employed by the same employer, such employee is entitled to all sick time accrued at the prior division, entity or location and is entitled to retain or use all sick time as provided pursuant to the provisions of this chapter. When there is a separation from employment and the employee is rehired within six months of separation by the same employer, previously accrued sick time that was not used shall be reinstated and such employee shall be entitled to use such accrued sick time at any time after such employee is rehired, provided that no employer shall be required to reinstate such sick time to the extent the employee was paid for unused accrued sick time prior to separation and the employee agreed to accept such pay for such unused sick time.

§ 20-914 Use of sick time.

a. An employee shall be entitled to use sick time for absence from work due to:

1. such employee's mental or physical illness, injury or health condition or need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care; or

2. care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or who needs preventive medical care; or

3. closure of such employee's place of business by order of a public official due to a public health emergency or such employee's need to care for a child whose school or childcare provider has been closed by order of a public official due to a public health emergency.

b. An employer may require reasonable notice of the need to use sick time. Where such need is foreseeable, an employer may require reasonable advance notice of the intention to use such sick time, not to exceed seven days prior to the date such sick time is to begin. Where such need is not foreseeable, an employer may require an employee to provide notice of the need for the use of sick time as soon as practicable.

c. For an absence of more than three consecutive work days, an employer may require reasonable documentation that the use of sick time was authorized by subdivision a of this

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section. For sick time used pursuant to paragraphs 1 and 2 of subdivision a of this section, documentation signed by a licensed health care provider indicating the need for the amount of sick time taken shall be considered reasonable documentation and an employer shall not require that such documentation specify the nature of the employee's or the employee's family member's injury, illness or condition, except as required by law.

d. Nothing herein shall prevent an employer from requiring an employee to provide written confirmation that an employee used sick time pursuant to this section.

e. An employer shall not require an employee, as a condition of taking sick time, to search for or find a replacement worker to cover the hours during which such employee is utilizing sick time.

f. Nothing in this chapter shall be construed to prohibit an employer from taking disciplinary action, up to and including termination, against a worker who uses sick time provided pursuant to this chapter for purposes other than those described in this section.

§ 20-915 Changing schedule.

Upon mutual consent of the employee and the employer, an employee who is absent for a reason listed in subdivision a of section 20-914 of this chapter may work additional hours during the immediately preceding seven days if the absence was foreseeable or within the immediately subsequent seven days from that absence without using sick time to make up for the original hours for which such employee was absent, provided that an adjunct professor who is an employee at an institute of higher education may work such additional hours at any time during the academic term. An employer shall not require such employee to work additional hours to make up for the original hours for which such employee was absent or to search for or find a replacement employee to cover the hours during which the employee is absent pursuant to this section. If such employee works additional hours, and such hours are fewer than the number of hours such employee was originally scheduled to work, then such employee shall be able to use sick time provided pursuant to this chapter for the difference. Should the employee work additional hours, the employer shall comply with any applicable federal, state or local labor laws.

§ 20-916 Collective bargaining agreements.

a. The provisions of this chapter shall not apply to any employee covered by a valid collective bargaining agreement if (i) such provisions are expressly waived in such collective bargaining agreement and (ii) such agreement provides for a comparable benefit for the employees covered by such agreement in the form of paid days off; such paid days off shall be in the form of leave, compensation, other employee benefits, or some combination thereof. Comparable benefits shall include, but are not limited to, vacation time, personal time, sick time, and holiday and Sunday time pay at premium rates.

b. Notwithstanding subdivision a of this section, the provisions of this chapter shall not apply to any employee in the construction or grocery industry covered by a valid collective bargaining agreement if such provisions are expressly waived in such collective bargaining agreement.

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[NOTE: "Section 7 of local law number 46 for the year 2013 is amended to read as follows: S 7. This local law shall take effect on April 1, 2014, provided that in the case of employees covered by a valid collective bargaining agreement in effect on such date, this local law shall take effect on the date of termination of such agreement."]

§ 20-917 Public disasters.

In the event of a public disaster, the mayor may, for the length of such disaster, suspend the provisions of this chapter for businesses, corporations or other entities regulated by the public service commission.

§ 20-918 Retaliation and interference prohibited.

No employer shall engage in retaliation or threaten retaliation against an employee for exercising or attempting to exercise any right provided pursuant to this chapter, or interfere with any investigation, proceeding or hearing pursuant to this chapter. The protections of this chapter shall apply to any person who mistakenly but in good faith alleges a violation of this chapter. Rights under this chapter shall include, but not be limited to, the right to request and use sick time, file a complaint for alleged violations of this chapter with the department, communicate with any person about any violation of this chapter, participate in any administrative or judicial action regarding an alleged violation of this chapter, or inform any person of his or her potential rights under this chapter.

§ 20-919 Notice of rights.

a. An employer shall provide an employee either at the commencement of employment or within thirty days of the effective date of this section, whichever is later, with written notice of such employee's right to sick time pursuant to this chapter, including the accrual and use of sick time, the calendar year of the employer, and the right to be free from retaliation and to bring a complaint to the department. Such notice shall be in English and the primary language spoken by that employee, provided that the department has made available a translation of such notice in such language pursuant to subdivision b of this section. Such notice may also be conspicuously posted at an employer's place of business in an area accessible to employees.

b. The department shall create and make available notices that contain the information required pursuant to subdivision a of this section and such notices shall allow for the employer to fill in applicable dates for such employer's calendar year. Such notices shall be posted in a downloadable format on the department's website in Chinese, English, French-Creole, Italian, Korean, Russian, Spanish and any other language deemed appropriate by the department.

c. Any person or entity that willfully violates the notice requirements of this section shall be subject to a civil penalty in an amount not to exceed fifty dollars for each employee who was not given appropriate notice pursuant to this section.

§ 20-920 Employer records.

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Employers shall retain records documenting such employer's compliance with the requirements of this chapter for a period of three years unless otherwise required pursuant to any other law, rule or regulation, and shall allow the department to access such records, with appropriate notice and at a mutually agreeable time of day, in furtherance of an investigation conducted pursuant to this chapter.

§ 20-921 Confidentiality and nondisclosure.

No person or entity may require the disclosure of details relating to an employee's or his or her family member's medical condition as a condition of providing sick time under this chapter. Health information about an employee or an employee's family member obtained solely for the purposes of utilizing sick time pursuant to this chapter shall be treated as confidential and shall not be disclosed except by the affected employee, with the permission of the affected employee or as required by law.

§ 20-922 Encouragement of more generous policies; no effect on more generous policies.

a. Nothing in this chapter shall be construed to discourage or prohibit the adoption or retention of a sick time policy more generous than that which is required herein.

b. Nothing in this chapter shall be construed as diminishing the obligation of an employer to comply with any contract, collective bargaining agreement, employment benefit plan or other agreement providing more generous sick time to an employee than required herein.

c. Nothing in this chapter shall be construed as diminishing the rights of public employees regarding sick time as provided pursuant to federal, state or city law.

§ 20-923 Other legal requirements.

a. This chapter provides minimum requirements pertaining to sick time and shall not be construed to preempt, limit or otherwise affect the applicability of any other law, regulation, rule, requirement, policy or standard that provides for greater accrual or use by employees of sick leave or time, whether paid or unpaid, or that extends other protections to employees.

b. Nothing in this chapter shall be construed as creating or imposing any requirement in conflict with any federal or state law, rule or regulation, nor shall anything in this chapter be construed to diminish or impair the rights of an employee or employer under any valid collective bargaining agreement.

§ 20-924 Enforcement and penalties.

a. The department shall enforce the provisions of this chapter. In effectuating such enforcement, the department shall establish a system utilizing multiple means of communication to receive complaints regarding non-compliance with this chapter and investigate complaints received by the department in a timely manner.

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b. Any person alleging a violation of this chapter shall have the right to file a complaint with the department within two years of the date the person knew or should have known of the alleged violation. The department shall maintain confidential the identity of any complainant unless disclosure of such complainant's identity is necessary for resolution of the investigation or otherwise required by law. The department shall, to the extent practicable, notify such complainant that the department will be disclosing his or her identity prior to such disclosure.

c. Upon receiving a complaint alleging a violation of this chapter, the department shall investigate such complaint and attempt to resolve it through mediation. Within thirty days of written notification of a complaint by the department, the person or entity identified in the complaint shall provide the department with a written response and such other information as the department may request. The department shall keep complainants reasonably notified regarding the status of their complaint and any resultant investigation. If, as a result of an investigation of a complaint or an investigation conducted upon its own initiative, the department believes that a violation has occurred, it shall issue to the offending person or entity a notice of violation. The commissioner shall prescribe the form and wording of such notices of violation. The notice of violation shall be returnable to the administrative tribunal authorized to adjudicate violations of this chapter.

d. The department shall have the power to impose penalties provided for in this chapter and to grant an employee or former employee all appropriate relief. Such relief shall include: (i) for each instance of sick time taken by an employee but unlawfully not compensated by the employer: three times the wages that should have been paid under this chapter or two hundred fifty dollars, whichever is greater; (ii) for each instance of sick time requested by an employee but unlawfully denied by the employer and not taken by the employee or unlawfully conditioned upon searching for or finding a replacement worker, or for each instance an employer requires an employee to work additional hours without the mutual consent of such employer and employee in violation of section 20-915 of this chapter to make up for the original hours during which such employee is absent pursuant to this chapter: five hundred dollars; (iii) for each instance of unlawful retaliation not including discharge from employment: full compensation including wages and benefits lost, five hundred dollars and equitable relief as appropriate; and (iv) for each instance of unlawful discharge from employment: full compensation including wages and benefits lost, two thousand five hundred dollars and equitable relief, including reinstatement, as appropriate.

e. Any entity or person found to be in violation of the provisions of sections 20-913, 20-914, 20-915 or 20-918 of this chapter shall be liable for a civil penalty payable to the city not to exceed five hundred dollars for the first violation and, for subsequent violations that occur within two years of any previous violation, not to exceed seven hundred and fifty dollars for the second violation and not to exceed one thousand dollars for each succeeding violation.

f. The department shall annually report on its website the number and nature of the complaints received pursuant to this chapter, the results of investigations undertaken pursuant to this chapter, including the number of complaints not substantiated and the number of notices of violations issued, the number and nature of adjudications pursuant to this chapter, and the average time for a complaint to be resolved pursuant to this chapter.

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§ 20-925 Designation of agency.

a. The mayor may designate an agency other than the department of consumer affairs to enforce the provisions of this chapter. Upon such designation, such agency shall be deemed to have all powers as set forth in this chapter relating to the receipt, investigation, and resolution of complaints thereunder regarding earned sick time, and the power to conduct investigations regarding violations of such chapter upon its own initiative. Such agency, in the performance of such functions, shall be authorized to hold public and private hearings, administer oaths, take testimony, serve subpoenas, receive evidence, render decisions and orders, and to receive, administer, pay over and distribute monies collected in and as a result of actions brought for violations of this chapter, and to promulgate, amend and modify rules and regulations necessary to enforce the provisions of this chapter.

b. Notwithstanding any inconsistent provision of law, such agency shall be authorized, upon due notice and hearing, to impose civil penalties for any violation of the provisions of this chapter, and to order equitable relief for and payment of monetary damages in connection with enforcement of this chapter. All proceedings authorized pursuant to this section shall be conducted in accordance with rules promulgated by such agency.

c. Notwithstanding any inconsistent provision of law, powers conferred upon such agency by this section may be exercised by the office of administrative trials and hearings consistent with any orders of the mayor issued in accordance with subdivisions two and three of section one thousand forty-eight of the charter.

NOTE:

§ 13 [of Law 7 for 2014]. Notwithstanding any other provision of law, an employer with fewer than twenty employees or an employer that is a business establishment classified in sector 31, 32 or 33 of the North American Industry Classification System shall not be subject to a civil penalty for any violation of chapter 8 of title 20 of the administrative code of the city of New York or any rule promulgated thereunder, if such violation occurs before October 1, 2014; provided, however, that the department may order any other remedy authorized pursuant to such chapter, including equitable relief, for such a violation. A first time violation of any provision of chapter 8 of title 20 of the administrative code of the city of New York, or any rule promulgated thereunder, by an employer with fewer than twenty employees or an employer that is a business establishment classified in sector 31, 32 or 33 of the North American Industry Classification System, that occurs before October 1, 2014, shall not serve as a predicate for the purposes of imposing penalties for subsequent violations occurring on or after October 1, 2014 pursuant to section 20-924 of the administrative code of the city of New York, but any second or subsequent violation of the same provision by such an employer that occurs before October 1, 2014, shall serve as a predicate for the purposes of imposing penalties for subsequent violations that occur on or after October 1, 2014.

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Act Now Advisory: It's Official ... New York City's Earned Sick Time Act Will Become Effective April 1, 2014

1/6/2014

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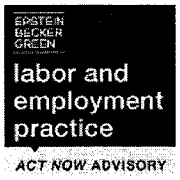

As we previously reported (see the *Act Now* Advisory titled "New York City Paid Sick Time Law Will Likely Become Effective"), on May 8, 2013, the New York City Council passed the Earned Sick Time Act ("ESTA"), requiring private employers to guarantee sick time to employees who work in New York City. When the law was passed, City legislators established a timetable for the ESTA's effective date, depending on the economic conditions of the City, pursuant to a New York City economic index. If the City's economy in December 2013 fell below the January 2012 level, the effective date of the ESTA would have been postponed.

On December 13, 2013, however, the New York City Independent Budget Office confirmed that the City's economic indicators met the requisite threshold so that the ESTA will, indeed, go into effect on the earliest possible date—April 1, 2014. Further, in his inaugural address, New York City's new mayor, Bill de Blasio, vowed to expand the ESTA "because no one should be forced to lose a day's pay, or even a week's pay, simply because illness strikes."

Accordingly, beginning April 1, 2014, New York City employers must provide sick time pursuant to the ESTA.

Under the ESTA:

- Full-time and part-time employees who work at least 80 hours in a calendar year[1] in New York City will accrue one hour of sick time for every 30 hours worked, up to a maximum of 40 hours in that year;
- NYC employers with 20 or more employees must provide this time as paid sick time; and
- NYC employers with fewer than 20 employees must provide this time as unpaid sick time.

Sick time pursuant to the ESTA will begin to accrue upon the later of (a) the commencement of employment, or (b) April 1, 2014. Further, an employee may begin using the earned sick time under the ESTA on the later of (a) the 120th day following commencement of his or her employment, or (b) July 30, 2014.

As of October 1, 2015, the *paid* sick time provisions of the ESTA will apply to employers with 15 or more employees. Employers with fewer than 15 employees will continue to be required to provide *unpaid* sick time. Further, effective October

1, 2015, employers that employ domestic workers who work at least 80 hours in a calendar year must provide two days of paid sick time, in addition to statutory paid days of rest, regardless of the number of domestic workers employed.

As we previously reported, employees can use sick time for their own physical or mental illness, injury, or health condition, or for medical diagnosis treatment or preventive care, and when caring for a spouse, domestic partner, children, or parents. Earned sick time may also be used during declared public health emergencies. Additionally, if an employer's existing policy already provides for paid sick time or other paid time off ("PTO") that can be used for the reasons set forth under the ESTA, the paid leave offered under that policy will be sufficient to comply with the ESTA, but only so long as the policy satisfies all of the ESTA's requirements, including carry-over rules and rules pertaining to part-time employees. Importantly, "use it or lose it" sick day or PTO policies technically will not comply with the ESTA.

Importantly, employees covered by a valid collective bargaining agreement ("CBA") in effect on April 1, 2014, will not become subject to the ESTA until the expiration date of such CBA. Further, when entering into a new CBA or renewing an expiring CBA, the CBA should comply with the ESTA, or alternatively, the requirements of ESTA will be deemed satisfied if (i) the provisions of the ESTA are expressly waived in such CBA, and (ii) such CBA provides for a comparable benefit for the covered employees. Such a "comparable benefit" can be in the form of paid days off, such as vacation time, personal days, sick days, holidays and Sunday time pay at premium rates, or some combination thereof. Finally, the ESTA does not apply to any employee in the construction or grocery industry covered by a valid CBA if such provisions are expressly waived in such CBA.

What Employers Should Do Now

- Determine how many individuals are employed in New York City for more than 80 hours in a calendar year in order to determine whether the paid or unpaid provisions of the ESTA apply to your NYC workforce.
- Consider whether existing working arrangements with part-time, seasonal, or other short-term employees should be revised so as to comply with (or avoid the need to comply with) the ESTA.
- Review existing sick, PTO, and other policies addressing time off from work to see if they encompass all requirements set forth in the ESTA, including those pertaining to:
    - the carry-over of sick days;
    - the availability of sick time to part-time employees; and
    - providing time off for the reasons set forth in the ESTA (including to care for the illnesses of family members and time off in case of a public emergency).
- When entering into a new CBA or renegotiating a CBA that will become effective after April 1, 2014, ensure that the CBA complies with the requirements of the ESTA or that it both waives employees' rights under the ESTA and provides for comparable benefits.
- Keep an eye out for expanded protections under the ESTA, as promised by Mayor de Blasio.

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ENDNOTE

[1] A "calendar year" is defined as a regular and consecutive 12-month period, as determined by the employer (e.g., anniversary year).

For more insights on labor and employment, read the Epstein Becker Green Blogs.

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Overview of the ACA and its Impact on Collective Bargaining Negotiations

Catherine E. Livingston

May 22, 2014

The ACA Alters the Landscape of Bargaining Over Health Benefits

- Critically important issue now is more complicated
- Numerous pre-bargaining decisions need to be made
  - Whether to play or pay
  - What benefits to offer, which employees to cover, and when to cover them
  - What's it going to cost, and who's going to cover it
- Having a clear bargaining strategy is essential
  - Achieving desirable contract terms
  - Using the strategic opportunities that the ACA creates
  - Avoiding the ACA's pitfalls

PRE-BARGAINING DECISIONS

Whether to play or pay?

- Your threshold decision is whether to provide coverage at all.
- A new penalty applies under the Internal Revenue Code beginning in 2015 (IRC § 4980H). There are two ways it can apply:
  - No coverage penalty
  - Inadequate coverage penalty

PRE-BARGAINING DECISIONS

- ***Who* must be offered coverage to avoid a penalty?**
  - Requirement to offer coverage to at least 95% of full-time employees (70% for 2015) to avoid a no coverage penalty.
    - Employee is considered full-time if employee works 30 hours per week or more or 130 hours per month or more.
  - Must offer to children of full-time employees up to age 26 to avoid a no coverage penalty, but not required to offer to spouses of full-time employees.

PRE-BARGAINING DECISIONS

What to offer if you play and want to avoid an insufficient coverage penalty?

- Affordability test
- Minimum value test

Also need to meet group health plan requirements

- Mandatory coverage of preventive services without cost-sharing
- Mandatory coverage of clinical trials
- Dental and vision need to be separate to avoid most rules (either separate insurance contract or separate election for benefits under self-insured plan)

PRE-BARGAINING DECISIONS

When does coverage have to start?

- Maximum 90-day waiting period
- "Look back" measurement rules may be used for determining whether workers on variable schedules are full-time.
- "Look back" measurement rules also may be used for determining whether new hires and seasonal workers are full-time.
- For new hires working variable schedules, may take 12 months to determine whether they are full-time.

What are the some bargaining objectives for employers to consider in negotiating health benefits under the ACA?

Key Contract Terms

- Flexibility to make plan design changes mid-term
  - "Me-too" provisions and waivers
  - Accommodate future changes in the ACA or regulations
- Compliance with the ACA
  - Minimum value and affordability
  - Required benefits
  - Defining "full-time employees"
  - Setting measurement and stability periods
  - Setting a trigger for changes to ensure compliance

Key Contract Terms

- Cost control measures
  - Leveraging market plans and essential health benefit benchmarks
  - Avoiding the Cadillac Tax
  - Cost-sharing
  - Wellness programs and surcharges/incentives
- Additional benefits (e.g., dental, vision)
- Contract Duration, including likely impact of timing of benefit changes

The Cadillac Tax becomes effective in 2018. Should employers be concerned about that now?

Anticipate the Cadillac Tax *Now*

- The 40% excise tax, if triggered, is huge and non-deductible
- Given the growth in health costs and generosity of benefits in the industry, employers need a strategy now to avoid triggering the tax in 2018.
- To avoid a "cliff" effect, employer should negotiate reductions in benefits now, even if implemented over time, or bargain a trigger.
- Leverage benefits that can be offered without adding to the cost of coverage for purposes of the Cadillac tax (e.g., standalone dental and vision).

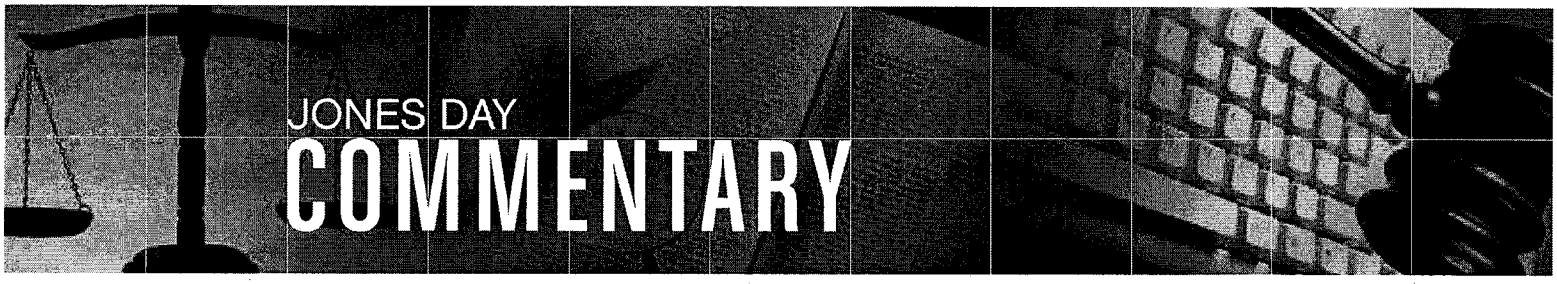
Does the ACA provide any new strategic opportunities for bargaining?

Leveraging the ACA's Requirements and Costs

- Exchange coverage provides benchmarks to assess union proposals
  - Generosity of cost-sharing
  - "Essential health benefits" vs. optional health benefits
- Looming Cadillac Tax should offer effective ceiling on cost of health plans
- ACA opens opportunity to review entire plan and cost-sharing structure
- Dropping coverage may become a possibility (assuming public exchanges function properly)

JONES DAY

MARCH 2014



THE AFFORDABLE CARE ACT: CONSIDERATIONS FOR EMPLOYERS WITH UNIONIZED WORKERS

The Affordable Care Act ("ACA") infuses new complexities into collective bargaining negotiations over health insurance benefits. In past years, the challenge for many employers at the bargaining table has been to control escalating health insurance costs and to shift an increasing share of those costs onto employees. Those challenges were hard enough. But now, with the advent of the ACA, employers face entirely new challenges as they develop their bargaining positions on health benefits. The ACA forces unionized employers to reassess the health benefits that they provide employees and determine which employees should be eligible to receive them. In addition, employers must develop new strategies for negotiating health benefits, with the goal of minimizing their exposure to ACA penalties, satisfying the ACA's coverage and benefit requirements, and preserving flexibility to make changes to comply with the ACA's complex and evolving requirements.

These challenges begin with fundamental decisions about the ACA's employer "play or pay" provision. These "play or pay" decisions implicate any number of mandatory bargaining issues, including whether to provide health insurance, what types and levels of health insurance to provide, how to address coverage of part-time employees, and how to deal with employee costs. The ACA's "Cadillac tax" also creates the potential for new costs that employers will need to take into account as they consider what health benefits they want to offer. Regardless of what employers have negotiated into past labor contracts, the landscape has dramatically changed. Employers need to take a fresh look at their health insurance provisions and prepare new strategies for negotiating future contracts in light of the ACA.

This *Commentary* gives an overview of the employer play or pay penalty and the Cadillac tax. It then lays out a variety of bargaining considerations for employers that flow from these provisions. Employers will want to have these in mind as they prepare themselves for negotiations.

THE EMPLOYER PLAY OR PAY PENALTY

Almost half of the American population gets health coverage through an employer. To keep that coverage in place and keep the new premium tax credit subsidy created by the ACA focused on those who do not currently have access to affordable insurance, the ACA creates adverse consequences for large employers who drop or fail to offer health coverage to their employees.[1]

The employer play or pay penalty (enacted as section 4980H of the Internal Revenue Code) goes into effect on January 1, 2015.[2] It requires large employers to offer health coverage to full-time employees and their children up to age 26 or risk paying a penalty. A large employer is an employer with an average of 50 or more full-time employees or full-time equivalents in the preceding year. Where an employer is part of a controlled group, all of the employees of the controlled group are counted for purposes of determining whether each member of the controlled group is a large employer.

Large employers will be forced to make a choice: to either "play" by offering affordable health coverage that provides minimum value or "pay" by potentially owing a penalty to the Internal Revenue Service if they fail to offer such coverage. This "play or pay" scheme, called "shared responsibility" in the statute, has become known as the Employer Mandate. Although the Employer Mandate generally will first be enforced on January 1, 2015, for employers with fiscal year plans that meet certain requirements, the effective date is deferred to the start of the plan year during 2015. To "play" under the Employer Mandate, a large employer must offer health coverage that is "minimum essential coverage," is "affordable," and satisfies a "minimum value" requirement to its full-time employees and certain of their dependents. "Minimum essential coverage" is defined in the same way for this penalty as it is for the individual coverage requirement. It includes coverage under an employer-sponsored group health plan, whether it be fully insured or self-insured, but does not include stand-alone dental or vision coverage, or flexible spending accounts. Coverage is "affordable" if an employee's required contribution for the lowest cost self-only coverage option offered by the employer does not exceed 9.5 percent of the employee's household income. Coverage provides "minimum value" if the plan's share of the actuarially projected cost of covered benefits is at least 60 percent. If a large employer does not "play" for some or all of its full-time employees, the employer will have to pay a penalty in two scenarios.

The first scenario occurs when an employer does not offer health coverage to "substantially all" of its full-time employees and any one of its full-time employees both enrolls in health coverage offered through an insurance exchange, which is also being called a marketplace (an "exchange"), and receives a premium tax credit. "Substantially all" means 95 percent or more of the full-time employees. (For 2015, transition relief is provided so that substantially all means 70 percent or more.) In this scenario, the employer will owe a "no coverage penalty." The no coverage penalty is $2,000 per year (although projected to be $2,120 for 2015 after adjusting for inflation) for each of the employer's full-time employees (excluding the first 30). The penalty is actually computed month by month for each calendar year, taking account of changes in full-time headcount from month to month and changes in what may be offered during the calendar year.

The second scenario occurs when an employer does offer health coverage to its employees, but such coverage is deemed inadequate for Employer Mandate purposes, either because it is not "affordable," does not provide at least "minimum value," or the employer offers coverage to substantially all (but not all) of its full-time employees and one or more of its full-time employees both enrolls in exchange coverage and receives an exchange subsidy. In this second scenario, the employer will owe an "inadequate coverage penalty." The inadequate coverage penalty is $3,000 per person (projected to be $3,180 in 2015 after adjusting for inflation) and is calculated not based on the employer's total number of full-time employees but based on each full-time employee who receives a premium tax credit. (Furthermore, the penalty is capped each month by the maximum potential "no coverage penalty" discussed above). Again, the penalty is actually computed month by month, taking account of changes in who is a full-time employee and who is receiving the premium credit in a given month.

Exchange subsidies will not be available to any employee whose employer offers the employee affordable coverage that provides minimum value. Thus, by "playing" for employees who would otherwise be eligible for an exchange subsidy, employers can ensure they are not subject to any penalty, even if they don't "play" for all employees. However, employers will want to take care to avoid any impermissible discrimination in setting rules for eligibility.[3]

Who is a Full-Time Employee? Managing compliance for an employer depends on being able to identify who is a full-time employee. For purposes of the play or pay penalty, an employee is full-time if he works an average of 30 hours per week or 130 hours per month. An employer may use one of two available methods to determine whether an employee is full time: the monthly measurement method, which depends on an employee's actual hours of service, and the look-back measurement method, which depends on measuring an employee's hours of service over a measurement period of anywhere from three to 12 months, determining whether the employee is full-time based on the hours of service in that period, and then labeling the employee as full-time or part-time for a subsequent stability period based on the results in the measurement period. Under either method, the employer must track hours of service, which are defined as hours for which an employee is paid, or entitled to payment, including vacation, holidays, illness, incapacity, and military duty.

Is Coverage Affordable? Under the statute, coverage is affordable if the employee's share for self-only coverage under the lowest cost employer-sponsored health plan is no more than 9.5 percent of the employee's household income. Employers do not know their employees' household incomes, making it impossible to know whether they are offering affordable coverage. In response to this dilemma, the Treasury regulations provide employers with three safe harbors they may use to determine whether the coverage they offer is affordable. Employer coverage is considered affordable for purposes of the employer play or pay penalty if the employee's share for self-only coverage under the lowest cost employer-sponsored health plan is (i) no more than 9.5 percent of the wages shown on Box 1 of the employee's W-2; (ii) no more than 9.5 percent of the employee's wages if the employee were assumed to work 30 hours per week at the applicable rate of pay; and (iii) no more than 9.5 percent of the amount that is 100 percent of the federal poverty level.

Multiemployer Plans. Employers who have unionized employees can know whether the employees are offered coverage if it is provided through a single employer plan with terms of eligibility that the employer negotiates. However, an employer may not know whether any particular employee will be offered coverage if it is provided through a multiemployer plan to which the employer contributes. Furthermore, even if the multiemployer plan does offer coverage to the employee, the employer itself is not offering the coverage. Treasury and IRS have addressed each of these issues in the final regulations implementing the employer play or pay penalty. First, the final regulations offer interim relief in the preamble to employers that are required to make contributions to multiemployer plans under their collective bargaining agreements. As long as the multiemployer plan offers coverage that is affordable and provides minimum value and is offered to the children of individuals who are otherwise eligible, the employer will not be penalized, regardless of whether the employer's employee is in fact eligible for the coverage under the multiemployer plan. The interim relief will remain in effect until at least six months after superseding guidance is published. Second, the Treasury regulations implementing the play or pay penalty provide that coverage offered by a multiemployer plan to which the employer contributes that is affordable and provides minimum value is considered coverage offered "on behalf of" the employer. Employers may use the same safe harbors that are available for coverage they offer themselves in determining whether the multiemployer plan's coverage is affordable.

THE CADILLAC TAX

In addition to the penalty associated with whether health coverage is offered and to whom, the ACA imposes new taxes and fees on employers that will affect bargaining over health benefits. Some of these new costs, such as the Patient-Centered Outcomes Research Institute Fee and the Transitional Reinsurance Program applicable to plan issuers and sponsors, are already effective or will be in 2014.

Starting in 2018, the ACA imposes another new tax, often called the "Cadillac tax." It is a nondeductible 40 percent excise tax on any excess in the cost of employer-sponsored health care coverage provided to an enrollee over specified dollar thresholds. For purposes of the Cadillac tax, employer-sponsored coverage includes major medical coverage and pharmaceutical coverage but excludes separate dental and vision plans. Where an enrollee participates in more than one type of employer-sponsored coverage, the cost of those plans is aggregated for purposes of calculating the Cadillac tax. As employers prepare for labor contract negotiations, they need a strategy for bargaining over health benefits with the looming Cadillac tax in mind.

Insurance companies are liable for the excise tax for insured plans. Plan administrators—who may be the employers themselves—are liable for the excise tax for self-insured plans. Employers are likely to bear the cost regardless of who is liable for paying the tax because insurers or outside plan administrators are highly likely to pass along the costs imposed by the excise tax to the employer sponsors of the plan through higher rates and fees. Employers will also face administrative costs because the plan sponsor (usually, the employer) is responsible for calculating the excess benefit subject to the tax and allocating the excess among the insurers and plan administrators. Employers are subject to penalties if they fail to make these computations accurately. Given all this, employers and insurers have a significant incentive to keep the costs of employer-sponsored health plans below the trigger point for the excise tax.

All employer-sponsored health care plans are potentially subject to the excise tax; there is no exception for plans negotiated as part of a collective bargaining agreement. In fact, unionized employers must address the excise tax earlier than nonunion employers. While nonunion employers may have the flexibility to adjust benefits anywhere between now and 2018 to get the cost below the threshold and avoid the excise tax (even though waiting may be inadvisable), unionized employers need to address the potential excise tax in their upcoming rounds of bargaining in order to ensure that the contractual changes necessary to avoid the excise tax are in place before 2018.

The excise tax is expected to have the most significant impact on the type of rich health care plans that labor unions have fought to obtain and protect over the years. Even though the government has yet to issue regulations giving specific details on how to compute the cost of coverage, employers can project the problem they will be facing by using their COBRA premiums, which must be computed to reflect the cost of coverage. The ACA imposes the tax on the portion of the annual value of health plan costs for employees that exceed in 2018 the following amounts: $10,200 for single coverage and $27,500 for family coverage, with higher amounts for certain retirees and employees in high-risk professions. These thresholds for 2018 will increase if the cost of coverage in a specified option in the Federal Employee Health Benefits Program goes up by more than 55 percent between 2010 and 2018.

In the meantime, the thresholds are a valuable point of reference. According to the Kaiser Family Foundation annual survey, the average annual premium cost in 2012 for single coverage at employers with at least some unionized workers was $5,734 per year (or $4,466 below the threshold) and $16,073 for family coverage (or $11,427 below the threshold). These average amounts, which remain significantly below the trigger for the excise tax, are somewhat misleading, due to the tremendous variation in the costs of health benefit programs across the country. Employers in the Northeast and West often pay significantly more for health care plans than employers in the South. In addition, employers in certain industries, such as health care and in the public sector, usually pay health benefit costs that are significantly above the average. In fact, for certain unionized employers, the current cost of health benefits already exceeds the value that would trigger the excise tax in 2018. Based on a study conducted by SEIU regarding the likely application of the excise tax on the most commonly offered health plans among its represented members, eight out of 14 health plans are expected to trigger the excise tax in 2018.[4]

BARGAINING CONSIDERATIONS

The ACA adds new consequences to some fundamental decisions about providing employee health coverage, directly affecting bargaining strategies. While providing

health insurance benefits to unionized employees has been a fundamental term of most labor contracts for decades, the ACA forces employers to reconsider and readjust their arrangements if they want to avoid penalties and account for new costs imposed under the law. The threshold questions that employers must answer include:

The "Play Or Pay" Decision. Whether to offer health coverage or drop health coverage for employees and their dependents is a complicated economic, practical, and policy decision that unionized employers must make, taking into account the economic impact of that decision, the structure of their health benefit programs (e.g., existing coverage of union and non-union employees under the same plans), the employers' bargaining leverage, and the effect of the decision on employee morale, recruitment, and retention. In making the economic analysis of the ACA's penalties and costs for bargaining purposes, employers should:

- **Evaluate the costs of continuing coverage versus the costs of dropping coverage for employees, including all employees averaging 30 or more hours a week.** Employers that drop coverage may face a substantial penalty under the ACA. If the employees who both work full-time (i.e., on average 30 hours per week or 130 hours per month) and are not offered health coverage constitute more than 5 percent of the employer's work force, the employer is subject to the "no coverage penalty" equal to $2,000 multiplied by the number of the employer's full-time employees (less the first 30) if any full-time employee enrolls in health coverage through an exchange and receives a premium tax credit.

- **Evaluate the costs of making coverage "affordable" for lower-wage employees.** In many instances, to make coverage affordable and avoid penalties under the ACA, employers may have to bear a significant part of the coverage costs for their lower-wage employees.

- **Evaluate the costs of making the ACA's required changes in health plans.** Employers need to account for the cost of making changes to comply with ACA rules for group health plans. These changes affect the design of the plan. Many, such as the requirement to cover children up to age 26, have been in effect since 2010. For 2014, changes newly in effect include review of annual dollar limits on benefits in light of recent guidance defining essential health benefits that cannot have annual limits, the maximum 90-day waiting period for coverage, and the cap on out-of-pocket maximums.[5]

- **Consider the cost of providing coverage to children and providing (or not providing) coverage to spouses.** The ACA as implemented by the Treasury regulations does not require employers to provide coverage for spouses and does not penalize employers for excluding spouses from coverage, so employers will need to evaluate the potential savings from excluding spouses from eligibility for health coverage. The ACA, however, treats children differently: employers face a penalty under the ACA if they do not offer coverage to their full-time employees' children, including adult children up to age 26.

- **Consider the added cost of the ACA's various fees.** Self-insured employers will owe a "transitional reinsurance fee" in 2015, 2016, and 2017; for the first year, the fee is at the rate of $63 per covered life. For the second year, the fee is at the rate of $44 per covered life. In addition, for a single-employer plan, the employer must pay a "patient-centered outcomes research institute fee," which is $2 per covered life payable in the years 2014–2020.

Coverage Levels and Plan Design. Employers who decide, for economic and other reasons, to "play" and offer health insurance to employees must determine the level of benefits that they want to offer their union-covered employees. Employers need to meet the "minimum value" threshold to avoid ACA penalties but also should stay under the cost threshold to avoid triggering the Cadillac tax in the future. For many large employers, given the complexity of the ACA and its penalties, what the employer plans to provide all employees, whether unionized or not, on a company-wide basis will drive its proposals on benefit levels at the bargaining table, which makes preserving the right to make company-wide plan design changes a high priority. Some considerations include:

- **Consider using the minimum value standard and the Cadillac plan threshold as points of reference for the overall richness of the proposed plan.** Many if not most existing employer health plans generously exceed the "minimum value" standard (i.e., the standard that requires that the plan's share of the actuarially projected cost of covered benefits is at least 60 percent). On the other end of the spectrum, however, some employer plans, if not trimmed, risk triggering the Cadillac tax given their current cost and historic rate of growth. While unions may resist efforts to curtail employee benefits in the near term, employers should consider the leverage that avoiding the Cadillac tax provides at the bargaining table. Failure to address this problem could result in diverting economic resources to substantial taxes in 2018 that could otherwise be added to the economic package at the bargaining table or used for other business purposes.

- **Consider using one of the essential health benefits package benchmarks (e.g., the federal employee plan) as a point of reference for what benefits the employer will cover.** Under the ACA, all qualified health plans offered through the state exchanges must offer the essential health benefits package, and each state has a benchmark plan that is used to define the package of benefits. While employers are not required to offer an essential health benefits package in their group health plans, they need to be familiar with at least one benchmark plan for purposes of ensuring they do not impose impermissible annual limits on benefits. Employers can evaluate any benefits that unions may demand against one or more state benchmark plans, since those plans set the standard for comprehensive sound coverage that an individual is guaranteed to be able to purchase on the exchanges. The comparison gives employers an opportunity to identify particular benefit requests as exceeding a norm and either reject them or bargain for concessions in other areas in return for providing them.

- **Consider what additional benefits to offer employees, like dental, vision, disability, and long-term care.** The ACA requires employers to provide minimum essential coverage, meaning the core major medical coverage, but they can certainly offer more options. Offering these additional health benefits will not help the employer avoid a play or pay penalty, as they do not count toward the computation of minimum value; nor would they constitute minimum essential coverage if offered by themselves. These types of added benefits may be useful leverage in negotiations, since they do not contribute to the cost of coverage that can trigger the Cadillac tax if they are offered through separate fully insured policies. However, the same is not true for dental and vision coverage that is self-insured. Both employers and unions may see strategic value in negotiating over these added benefits.

- **Consider strategies for including wellness programs and related surcharges and incentives, including tobacco surcharges**. ACA regulations have reaffirmed that employers may attach economic rewards and penalties to wellness programs without violating the group health plan nondiscrimination rules that originated in HIPAA.[6] Wellness programs can include economic incentives that are based on achieving certain health outcomes, provided that the employer makes a reasonable alternative available. The regulations specifically permit an employer to impose a tobacco surcharge; however, certain state laws may limit an employer's ability to impose a tobacco surcharge. In addition, the EEOC has yet to give clear assurance that wellness program economic incentives are permissible under federal law, including the Americans with Disabilities Act, for wellness programs involving a medical examination or disability-related inquiry. Particularly if an employer is making wellness programs available to non-union employees, the employer will want a strategy for how to handle wellness programs when negotiating over health benefits for union-covered employees.

Part-Time Employees. The ACA's "full-time employee" definition sweeps in many workers who have long been considered part-time employees for purposes of providing health coverage. For those employers that currently provide insurance only to employees who work 40 hour per week, their covered populations will expand, potentially dramatically, when they treat part-time employees averaging 30 hours a week as full-time employees in order to avoid the ACA play or pay penalty. Bargaining priorities include:

- **Ensuring that part-time employees who meet the ACA's test of "full-time employees" are eligible for coverage.**

- **Addressing the look-back and stability method for determining who is a full-time employee under the ACA.** Employers should preserve the ability to take advantage of this method to determine whether variable-hour employees or seasonal employees are treated as full-time employees, particularly if they do not want to offer coverage to part-time employees or want to offer them different coverage. Employers should consider retaining discretion not only to use the method but also to adjust the length of the measurement periods and stability periods that are used for determining whether an employee is full-time for purposes of the play or pay penalty.

- **Preserving the flexibility to modify the definition of who is considered full-time under the ACA, in case there is a legislative change.** Bipartisan legislation has been introduced that would raise the full-time standard for purposes of the play or pay penalty from 30 hours per week to 40 hours per week.

Cadillac Tax. It is critical for employers to assess now whether they are likely to trigger the excise tax, based on the current costs of their benefit plans as well as the projected rate of increase for the cost of those plans through 2018. Absent a significant legislative change to the ACA, it is unlikely that these thresholds for the excise tax will increase before 2018 other than by the adjustment that corresponds to the increase in rates for federal employees. After 2018, the dollar thresholds will be indexed for inflation as follows—for 2019: the consumer price index, plus one percentage point; for 2020 and after, by the consumer price index.

Trim Now in Anticipation of Cadillac Tax. Absent waiver language, employers with open or soon-to-open contracts need to consider trimming their plans, as necessary, now. Most existing employer health plans generously exceed the minimum value standard. Some employer plans, if not trimmed, risk triggering the excise tax given their current cost and the historic rate of growth of coverage costs. Unions are likely to resist efforts to curtail employee benefits in the near term, but unions (one hopes) will understand that a failure to address the excise tax could divert resources that otherwise might be available to be added to the economic package at the bargaining table.

Cost Trigger to Protect Against Cadillac Tax. Even if employers are able to achieve health plan cost containment measures during contract negotiations, employers should also seek to include a provision in their labor contracts that would trigger cost reductions necessary to avoid the excise tax. The specifics of this provision would need to be addressed between the parties, such as the benefits that would be reduced or the process by which the union and the employer would agree on such changes. Such a provision would help employers avoid the worst-case scenario regarding the excise tax, i.e., an obligation to pay a 40 percent nondeductible tax with no way to avoid it due to restrictions imposed by the labor contract.

LAWYER CONTACTS

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ENDNOTES

1 The premium tax credit is available under Internal Revenue Code (IRC) §36B. To be eligible, an individual must be enrolled in coverage through an exchange, have household income between 100% and 400% of the federal poverty level, and not be eligible for or enrolled in government-sponsored minimum essential coverage or employer-sponsored minimum essential coverage.

2 The statutory effective date for the penalty is January 1, 2014. The government elected to defer enforcement until 2015.

3 Self-insured plans are subject to rules that prohibit discrimination against highly compensated employees under IRC §105(h). Failure to comply with the rules can result in loss of the tax exclusion for excess benefits provided to highly compensated employees.

4 *See* SEIU, "FAQs: Excise Tax on High-Cost Health Plans", *available at* http://www.seiu.org/images/pdfs/NHCR_FAQ%20Excise%20Tax-1.pdf (last visited March 20, 2014).

5 For an explanation of how these provisions apply to self-insured plans, *see* "FAQs on the Affordable Care Act, Part XII," Questions 1 and 2, *available at* http://www.dol.gov/ebsa/faqs/faq-aca12.html (last visited March 20, 2014).

6 For more information on requirements applicable to wellness programs, *see Jones Day Commentary*, "Employer Wellness Programs: What Financial Incentives Are Permitted Under the Law?" *available at* http://www.jonesday.com/employer-wellness-programs-what-financial-incentives-are-permitted-under-the-law-08-01-2013/.

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Jonathan Ben-Asher is a partner in Ritz Clark & Ben-Asher LLP in New York. He represents executives, professionals and other employees in employment disputes, including those involving employment contracts, executive compensation, whistleblowing, retaliation and employment discrimination. He also has particular expertise in disputes concerning executive compensation in the financial services sector, Sarbanes-Oxley whistleblowing cases, and cases under the False Claims (Qui Tam) Act and Dodd-Frank Act.

Jonathan is the current Chair of the New York State Bar Association's Labor and Employment Section. He has also held numerous leadership positions in the American Bar Association's Section of Labor and Employment Law, in which he is Chair of the CLE / Meetings and Institutes Committee. From 2007 - 2010, he was Employee Chair of the Section's Employment Rights and Responsibilities Committee. He was also Employee Chair of the Section's Sixth Annual CLE Conference (2012) and former Employee Chair of the Section's Annual Meeting Subcommittee. He is currently Employee Chair of the Employment Rights and Responsibilities Committee's Contracts and Executive Compensation Subcommittee. Jonathan was formerly Vice President of the National Employment Lawyers Association / New York, and a member of its Executive Board. He is a member of the Advisory Board of the New York University School of Law Center for Labor and Employment Law.

Jonathan is a fellow of the College of Labor and Employment Lawyers. He is AV rated by Martindale-Hubbell, and has repeatedly been named as a New York Super Lawyer and one of the Best Lawyers in America and in the New York Area. He is a frequent speaker on employment law issues for professional groups, including the American Bar Association, New York State Bar Association, New York City Bar Association, Workshop on Employment Law for Federal Judges of the New York University School of Law Center for Labor and Employment Law, and the Practising Law Institute.

He received his J.D. from New York University School of Law (1980) and his B.A. from Columbia University (1974).

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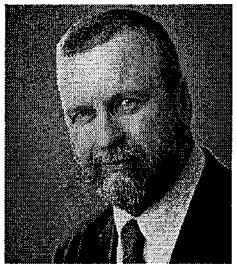

Practice Area

Fashion Industry
Labor & Employment

Legal Expertise

Representation of domestic and international corporations of all sizes, including Fortune 500 and Global Fortune 500 companies, in major labor and employment matters. Advising multi-national corporations regarding the labor and employment issues that apply to local, national and international corporate transactions and financial restructuring as well as massive reductions in force, including Worker Adjustment and Retraining Notification Act (WARN) and Older Workers Benefit Protection Act compliance. Counseling management on avoiding employment litigation and grievances. Representing management in collective bargaining, arbitrations and contentious litigation, as well as pursuing remedies to enjoin unlawful picketing. Defends Equal Employment Opportunity Commission and National Labor Relations Board charges and private lawsuits, including discrimination class actions, Fair Labor Standards Act collective actions and claims related to The Americans with Disabilities Act, The Age Discrimination in Employment Act, The National Labor Relations Act, The Labor Management Relations Act, Section 1981 and Title VII.

Industry Focus

Advertising; banking; entertainment - film, television and theater; music; finance; healthcare; hospitality; luxury goods; newspaper; private equity; and transportation

Representative Matters

- In a $750 million acquisition by a private equity fund, uncovered in due diligence an undisclosed labor liability that resulted in a price adjustment of $12.5 million.
- Conducted national labor/employment due diligence in $4.9 billion acquisition by a foreign company, and mapped out post-closing labor strategy for plants that had poor relationships with production unions.
- In a potential acquisition of a retailer by a private equity fund, uncovered serious non-compliance with labor laws, which upon correction would have major impact on the target company's stated EBITDA. When the seller refused to make a price adjustment, the private equity fund declined to go forward with the deal.

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USDC, Eastern District of Pennsylvania
USDC, Northern District of Texas
USDC, Central District of Illinois
USDC, Eastern District of Arkansas
USDC, Western District of Arkansas
U.S. Court of Appeals, Second Circuit
U.S. Court of Appeals, Third Circuit
U.S. Supreme Court

EDUCATION

University of Pittsburgh School of Law, J.D., 1979
LaSalle University, B.A., 1976

- Engaged by a major defense contractor that had a dispute with one of its major unions on a single complex issue that had not been resolved for over 8 years (despite the efforts of three law firms engaged over that time), and strategized and then implemented a satisfactory resolution, obtained with court approval.
- Engaged by a private equity fund to take over the representation of a portfolio company in a long-lingering dispute with the EEOC, and resolved matter for less than the amount of legal fees that would have been incurred to defend the case.
- Assessed WARN issues in a national layoff involving over 30,000 employees at hundreds of sites, resulting in only one lawsuit that the company won on summary judgment.
- Assessed complex WARN issues in dozens of national layoffs ranging in size from hundreds to tens of thousands of employees.
- Engaged by client to take over defense of a WARN class action lawsuit, and upon sharing a damages analysis with counsel for the plaintiff class, settled the lawsuit for a small fraction of the initial plaintiff demand.
- Won a pay grade reclassification case in arbitration for a major newspaper, where other newspapers with same contract language had lost on reclassification issues involving the same positions.
- Won dozens of arbitrations for a major newspaper opposite its various guilds.
- Engaged to assess and then resolve a unit clarification case opposite the Newspaper Guild of America that had been lingering for years, with the publisher achieving its desired exclusions from the bargaining unit.
- In a contentious discrimination lawsuit with a recalcitrant plaintiff against a foreign media company, the plaintiff immediately accepted the employer's last offer upon hearing the company's opening statement to the jury.

Professional Recognition

- "Best Lawyers in America, Labor & Employment Law," *Best Lawyers* (2010-2014)
- "International Who's Who of Management Labour & Employment Lawyers," *Who's Who Legal* (2011-2012, 2014)
- "100 Most Powerful Corporate Employment Lawyers," *Human Resources Executive* (2011-2013)
- "Top 5% of lawyers in New York," New York *Super Lawyers* (2006-2013)
- Fellow, College of Labor & Employment Lawyers
- AV® Preeminent™ Rating, Martindale-Hubbell

Publications and Presentations

- Contributing Editor, "Subjects of Bargaining," *The Developing Labor Law*, 6th Ed., Chapter 16, ABA Section of Labor and Employment Law, BNA Books, 2012
- Speaker, "Unpaid Internships in the Sports and Entertainment Industries: Playing with Fire?," The American Bar Association Forum on the Entertainment and Sports Industries (October 2013)
- Speaker, Practising Law Institute (PLI) "Employment Discrimination Law & Litigation 2013" Program (June 2013)
- Speaker, Labor Law and Employment Law Issues Impacting Talent and Employers in the Entertainment and Sports Industries, ABA Third Annual International Legal Symposium on the World of Music, Film, Television and Sports (May 2012)
- Speaker, "Publicity in the Context of Employment Discrimination Cases," Practicing Law Institute, June 2011
- Speaker, "Lesser Known/Emerging Discrimination Issues," Practicing Law Institute, June 2010
- Author, "Botched Layoffs Can Prove Costly to Employers," *The National Law Journal*, September 2008
- Co-Author, "Subjects of Bargaining," *The Developing Labor Law*, Supplement, Chapter 16, ABA Section of Labor and Employment Law, BNA Books, 2008-2010
- Contributing Editor, "Effect of Change in the Employing Unit: Successorship," *The Developing Labor Law*, Supplement,

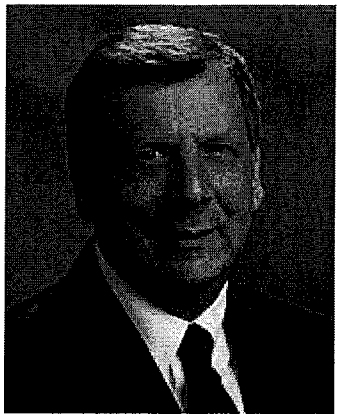
Chapter 15, 3rd Edition, ABA Section of the Labor and Employment Law, BNA Books, 1993

Professional, Business, and Civic Affiliations

- Co-Chair, Committee on Employment and Labor Relations, Commercial and Federal Litigation Section - New York State Bar Association (2004-2010)
- Member, Executive Committee, Commercial and Federal Litigation Section - New York State Bar Association (2004-2010)
- Member, International Committee, Labor Section - American Bar Association
- Member, International Committee, Labor Section - New York State Bar Association
- President, Board of Trustees, Barrow Group Theatre (2002-2007)
- Member, Board of Visitors, University of Pittsburgh School of Law
- Member, Board of Trustees, LaSalle College High School
- Member, Board of Managers, St. James Condominium
- Pro Bono Counsel, Labor and Employment - New York Shakespeare Festival

Other Career Experience

- Littler Mendelson P.C., Shareholder (2003-2012)
- Bingham McCutchen LLP, Partner (1997-2003)
- Former stagehand who worked in professional theaters and entertainment venues through IATSE hiring hall while in college and law school.



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Bruce S. Levine joined the firm in 2001, became a partner in 2002, and became of counsel in 2013

Mr. Levine specializes in labor and employment law, representing unions in collective bargaining, grievance administration, and litigation before the NLRB and federal and bankruptcy courts.

He has more than 20 years of private practice experience principally representing unions and union-affiliated employee benefit plans. He has developed a special expertise in alter ego and related litigation on behalf of both unions and benefit trust funds.

Mr. Levine began his career with the Solicitor's Office of the United States Department of Labor, where he litigated wage and hour, prevailing wage, equal employment and workplace safety cases, among others.

Mr. Levine has taught labor law and collective bargaining classes for Cornell University Extension and the Dowling College of Labor Studies, and is a regular speaker at bar association and other professional events. He is also the co-chair of the New York State Bar Association's Committee on Labor Relations Law.

Mr. Levine is a 1981 graduate of Cornell University's School of Industrial and Labor Relations and a 1986 *cum laude* graduate of the University of Wisconsin Law School.

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Cathy Livingston is a leading authority on the Affordable Care Act. She has in-depth knowledge of the multitude of tax provisions contained in the act, including the employer coverage requirement, the individual coverage requirement, the premium tax credit, insurance reforms, insurer fees, the medical device excise tax, and new requirements for tax-exempt hospitals.

Prior to joining Jones Day in 2013, Cathy was Health Care Counsel in the IRS Office of Chief Counsel where she served as principal legal advisor to IRS senior leadership on all aspects of the Affordable Care Act and its implementation. She was instrumental in advising the IRS team building the systems and operational protocols needed to integrate tax subsidies and tax information with the new system of health insurance exchanges and to incorporate the individual coverage requirement in the tax filing system. She worked closely with the White House and the Department of Health and Human Services in all aspects of Affordable Care Act implementation. She also worked closely with the Department of Justice on the cases challenging the constitutionality of the Affordable Care Act from the district courts through the Supreme Court. Prior to working on the Affordable Care Act, Cathy supervised all IRS legal work with respect to tax-exempt organizations, employment taxes, and government entities.

Cathy also served at the Office of Tax Policy at the Treasury Department where she handled matters affecting tax-exempt organizations and charitable giving.

Cathy is a Fellow of the American College of Tax Counsel.

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Tax

HONORS & DISTINCTIONS

IRS Commissioner's Award (2013)

IRS Chief Counsel's Distinguished Service Award (2013)

U.S. Department of the Treasury Meritorious Service Award (2013)

Winner, Secretary's Award, U.S. Department of Treasury (1997)

EDUCATION

Yale University (J.D. 1991; Thurman Arnold Prize for Best Moot Court Argument; Potter Stewart Prize for Best Moot Court Brief; C. LaRue Munson Prize for Work in Clinical Program; B.A. in History summa cum laude 1987; Phi Beta Kappa; McClintock Prize for Best Senior Essay in Western Americana)

BAR ADMISSIONS

District of Columbia, Massachusetts, U.S. Tax Court, and U.S. Supreme Court

CLERKSHIPS

Law Clerk to Judge Stanley Sporkin, U.S. District Court, District of Columbia (1991-1992)

GOVERNMENT SERVICE

Served with the Office of Chief Counsel, Internal Revenue Service in the following positions: Health Care Counsel (2010-2013) and Deputy Division Counsel/Deputy Associate Chief Counsel, Tax Exempt and Government Entities Division (2002-2010); served with the Office of Tax Policy, U.S. Department of Treasury (1994-1998) in the following positions: Deputy Tax Legislative Counsel (Legislative Matters), Associate Tax Legislative Counsel, and Attorney Advisor

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Frances Nicastro is Head of Employment, Incentives Pensions Legal for Barclays covering all business clusters in the Americas (including the Investment Bank, Private Wealth Business, Barclaycard, Corporate Banking and the Bank's Retail and Business Banking technology hub operations). Prior to joining Barclays, she worked at Paul Hastings where she specialized in employment law and executive compensation, where she leveraged her prior experience as an employment litigator at Littler Mendelson and before that as a tax attorney at Cadwalader, Wickersham & Taft.

Related Practice Areas

- Employment Law & Litigation
- Discrimination, Harassment & Retaliation
- Traditional Labor Law
- Wage-and-Hour
- Corporate Whistleblowing

Education

- J.D., University of Chicago Law School, 1986
- A.B., *cum laude*, Princeton University, 1983

Honors

- Consistently ranked by *Chambers USA* as a Leading Employment Lawyer
- *The Recorder* California Labor & Employment Department of the Year (2013-2014)
- *The Recorder* California Litigation Department of the Year (2013-2014)
- *The International Who's Who of Management Labour and Employment Lawyers* (2014)
- *Euromoney* Leading Women in Business Law, Labor and Employment (2013)
- *Euromoney* The Best of the Best USA, Labor and Employment (2007)
- College of Labor and Employment Lawyers, Fellow
- Lawyers Division of UJA Federation of New York, *The James H. Fogelson Young Leadership Award*

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Jill Rosenberg, a New York employment law partner, is a nationally recognized employment litigator and counselor. Ms. Rosenberg has significant experience defending and advising employers in discrimination, sexual harassment, whistleblowing, wrongful discharge, affirmative action, wage-and-hour and traditional labor matters. She handles complex individual cases, as well as class actions and systemic government investigations. She represents a broad range of companies, including employers in the securities industry, banks and financial institutions, accounting firms, law firms, and employers in the food service and publishing industries. Ms. Rosenberg also has particular expertise in the representation of nonprofit entities, including colleges, universities, hospitals, foundations and cultural institutions.

Ms. Rosenberg's notable engagements include:

- **Employment Arbitrations for Securities Industry Employers.** Ms. Rosenberg has tried to decision more than 30 employment arbitrations before FINRA (formerly NASD and NYSE), JAMS and AAA involving claims for bonuses and other forms of compensation, wrongful termination, sexual harassment, discrimination and whistleblowing/retaliation. She has also litigated important issues in the field of arbitration, including the permissibility of mandatory arbitration, the scope of judicial review of arbitration awards and the availability of certain remedies.
- **Higher Education Litigation.** Ms. Rosenberg was lead trial counsel representing a university in a federal court jury trial involving allegations of gender discrimination arising out of a denial of tenure. This two-week trial resulted in a defense verdict for our client, which was upheld on appeal by the Second Circuit. Ms. Rosenberg also counsels and litigates on behalf of higher education clients with regard to Title IX athletics compliance, student discipline, sexual harassment,

disabilities issues and other issues unique to higher education settings.

- **Whistleblower Defense.** Ms. Rosenberg frequently defends employers against Sarbanes-Oxley and other whistleblower and retaliation claims. She is also retained by employers to conduct internal investigations and advise on whistleblowing and retaliation issues.

She designs and conducts training programs for clients and frequently speaks on employment law issues for employer and bar association groups such as National Employment Law Institute, Practising Law Institute, National Association of College and University Attorneys and the New York State Bar Association.

Ms. Rosenberg is the firmwide Partner in Charge of Pro Bono Programs, and serves on the firm's Personnel Development, Risk Management, and Diversity Committees.

Before joining the firm, Ms. Rosenberg was an associate at Baer Marks & Upham in New York from 1986 to 1991.

Admitted in

- New York

Memberships

- Advisory Board Member, National Employment Law Institute
- Co-Chair, Diversity and Leadership Committee and Executive Committee Member, New York State Bar Association, Labor and Employment Law Section
- Board Member and Secretary, New York Legal Assistance Group
- Member, Board of Directors, UJA-Federation of New York
- Former Vice-Chair and Board Member, Lawyers Alliance for New York
- National Association of College and University Attorneys
- Member of ADR Committee, American Bar Association, Labor and Employment Law Section

- American Bar Association, Litigation Section
- Association of the Bar of the City of New York

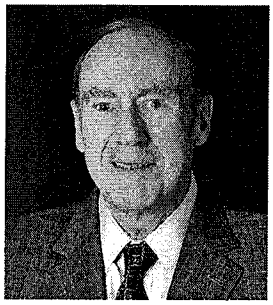
Publications

- "Babysitters at the Gate: The Supreme Court's Radical Expansion of SOX's Whistleblower Protections," Orrick's Employment Law & Litigation Blog, March 5, 2014
- "Where the Whistle Blows: SEC Invites Circuit Split Over Reach of Dodd-Frank Anti-Retaliation Provision," Orrick's Employment Law & Litigation Blog, March 4, 2014
- "Off the Playground, Out of the Locker Room, and into the Office: How to Combat Workplace Bullies," Orrick's Employment Law & Litigation Blog, November 27, 2013.
- "ENDA Prevails in the Senate, but Will it End in the House?," Orrick's Employment Law & Litigation Blog, November 13, 2013.
- "A Welcome 'Waive' of Second Circuit Cases: Class Action Waivers Deemed Enforceable," Orrick's Employment Law & Litigation Blog, August 20, 2013.
- "The Buck Stops Here!: Gristedes Foods CEO May Be Personally Liable for FLSA Claims," Orrick's Employment Law & Litigation Blog, July 16, 2013.
- "U.S. Supreme Court Rejects the Mixed-Motive Analysis in Retaliation Claims," Orrick's Employment Law & Litigation Blog, June 27, 2013.
- "U.S. Supreme Court Adopts a Narrow Definition of a Supervisor in Harassment Claims," Orrick's Employment Law & Litigation Blog, June 27, 2013.
- "Fifth Circuit to Consider *In Re D.R. Horton* in Light of Recent Court of Appeal Decisions Striking Down Recess Appointments to NLRB," Orrick's Employment Law & Litigation Blog, February 5, 2013.
- "Duty to Disclose for Employers Claiming 'Competitive Disadvantage' in Labor Negotiations," Orrick's Employment Law & Litigation Blog, December 7, 2012.
- "Governor Cuomo Signs Amendment to New York Wage

Deduction Law," Orrick's Employment Law & Litigation Blog, September 11, 2012.

- "Ringing in the New Year: New California Laws Taking Effect in 2013," Orrick's Employment Law & Litigation Blog, December 4, 2012.
- "Recent NLRB Decisions Challenge At-Will Disclaimers and May Impact HR Investigations," Orrick's Employment Law & Litigation Blog, August 27, 2012.
- "The New York Court of Appeal Latest Word on Bonus Compensation Disputes," Orrick's Employment Law & Litigation Blog, May 18, 2012.
- Chapter Chair, Sexual and Other Forms of Harassment, Lindemann and Grossman *Employment Discrimination Law* (BNA) Fourth Edition (2007), Fifth Edition (2012) and First and Second Supplements (forthcoming 2014).
- Chapter Author, Arbitration: Post-Hearing Stage, ADR in Employment (BNA) (forthcoming 2014)

EPSTEIN
BECKER
GREEN



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Evan J. Spelfogel

Member of the Firm

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EVAN J. SPELFOGEL is a Member of Epstein Becker & Green, P.C., in the labor, employment, and employee benefits practices. Based in the firm's New York office, he represents management and benefit providers in all areas of employment law, labor, and employee relations.

Mr. Spelfogel's experience includes the following:

- Representing management in all aspects of employment law, including age, sex, race, religion, national origin and disability discrimination before the EEOC and deferral agencies, and in state and federal courts
- Counseling clients and litigating concerning FLSA and state wage and overtime, Davis-Bacon Act and prevailing rate matters; affirmative action plans; human resource audits; employee handbooks and policies; drug and alcohol programs; wrongful discharge claims; breach of employment, confidentiality and noncompete contracts; National Labor Relations and Railway Labor Act matters; union avoidance strategies, organizational campaigns and decertification proceedings; strikes and picketing; union negotiations and arbitration; safety laws and regulations; workplace violence, negligent hiring and/or retention; independent contractor vs. employee issues; due diligence in acquisitions and mergers; and employee benefits/ERISA/fiduciary and MPPAA withdrawal liability matters
- Conducting grievance and arbitration hearings, advising on the creation and implementation of non-union alternative dispute resolution procedures (ADR) and the mediation and arbitration of statutory employment discrimination claims.

After graduating from Harvard College and the Columbia University Law School, Mr. Spelfogel served five years with the United States Department of Labor, Office of the Solicitor and the National Labor Relations Board in Washington, D.C., Boston, and New York.

Mr. Spelfogel has served as an adjunct professor at Baruch College of the City College of New York, and as a lecturer in labor law at St. John's University, and at annual labor and employment institutes of New York University, Southern Methodist University, Boston University, and the University of Washington. He has written, edited and published numerous articles, books and book chapters on a broad range of issues, including wage and hour collective actions, comparable worth and pay equity, employment discrimination, wrongful discharge, retiree health care, plant closings and reductions in work force, e-mail and workplace privacy, union picketing and handbilling on private property, NLRB representation

and unfair labor practice proceedings, the interaction of ERISA, the ADA and the NLRA, pregnancy disability, sexual harassment and alternative dispute resolution.

A Former Chair of the New York State Bar Association's (NYSBA) Labor & Employment Law Section, Mr. Spelfogel continues to serve on its Executive Committee. He's also a member of the Executive Committee of the NYSBA's Dispute Resolution Section.

Mr. Spelfogel has been selected to receive the 2014 Samuel M. Kaynard Award for Excellence in the Fields of Labor & Employment Law, given annually in recognition of those who hold strong ideals, display keen legal acumen, and make outstanding contributions to the fields of labor and employment law. He has also been elected to the College of Labor and Employment Lawyers as a Fellow, the highest recognition by one's colleagues of sustained outstanding performance in the profession, exemplifying integrity, dedication, and excellence. Mr. Spelfogel is currently listed in *The Best Lawyers in America; New York Super Lawyers - Metro Edition; PLC Which Lawyer? Yearbook; Who's Who in America; Who's Who in American Education; Who's Who in Industry and Finance; Who's Who Legal: The International Who's Who of Management Labour & Employment Lawyers;* and *Who's Who in the World.*

PRACTICES

Labor and Employment

- ADA and Disability Law
- Employee Benefits/ERISA-Related Litigation
- Employment Litigation
- Employment Training, Practices and Procedures
- Labor Management Relations
- Occupational Safety and Health (OSHA)
- Wage and Hour

EDUCATION

J.D., Columbia University School of Law, 1959
A.B., Harvard University, 1956

BAR ADMISSIONS

Massachusetts
New York

COURT ADMISSIONS

Supreme Court of the United States
U.S. Court of Appeals for the First Circuit
U.S. Court of Appeals for the Second Circuit
U.S. Court of Appeals for the Fourth Circuit
U.S. Court of Appeals for the Ninth Circuit
U.S. District Court, District of Colorado
U.S. District Court, District of Massachusetts
U.S. District Court, District of Ohio
U.S. District Court, Eastern District of New York
U.S. District Court, Northern District of New York
U.S. District Court, Southern District of New York

MEMBERSHIPS

American Arbitration Association, National Panel of Labor Arbitrators
American Bar Association: Charter Member, Dispute Resolution Section
American Bar Association: past Council Member, Section of Labor and Employment Law
American Bar Association: Section Delegate, ABA House of Delegates
New York City Bar Association, Labor and Employment, Employee Benefits and Enhance Diversity Committees
New York State Bar Association: Charter Member, Dispute Resolution Section
New York State Bar Association: Co-Founder, Past Chair, Section of Labor and Employment Law
New York State Bar Association: Executive Committee Member, Section of Labor and Employment Law
New York State Bar Association: Section Delegate to the NYSBA House of Delegates
New York State Bar Association: Special Committee on the New York State Bar Examination

ANNOUNCEMENTS & PRESS RELEASES

8/15/2013	25 Epstein Becker Green Attorneys Selected for *The Best Lawyers in America* 2014
8/30/2012	24 Epstein Becker Green Attorneys Selected for *The Best Lawyers in America* 2013
10/5/2011	Sixteen Epstein Becker Green Attorneys Named in *New York Super Lawyers - Metro Edition*

ARTICLES

08/29/11	The Benefits of Arbitration in Employment Law, *as appeared in* NYSBA New York Dispute Resolution Lawyer
07/22/10	Class-Action Arbitration Cannot Be Compelled Absent Evidence of Consent – Supplemental Material, *as appeared in* ABA
11/15/09	Emerging Trends in Class Action and Collective Action Lawsuits *as appeared in* L&E Newsletter

CLIENT ADVISORIES

1/25/2013	*Act Now* Advisory: NLRB Recess Appointments "Invalid From Their Inception" and "Void" for Lack of Constitutional Authority Rules the D.C. Circuit
6/9/2011	*Act Now* Advisory: The Future of Employment Arbitration Agreements – The Legacy of *AT&T Mobility LLC v. Concepcion*
12/23/2010	*Act Now* Advisory: New York Department of Labor Issues New Wage-Hour Regulations Covering the Hospitality Industry - Restaurants, Hotels and Clubs

CLIENT ALERTS

5/4/2010	Class-Action Arbitration Cannot Be Compelled Absent Evidence of Consent

2/9/2010	President Obama Backs Department of Labor Misclassification Fight
4/21/2009	Economic Stimulus Projects: Are Prevailing Wage Rates Required?

EBG IN THE NEWS

5/7/2014	Evan Spelfogel Quoted in "Vanguard Hit With Suit Over Ex-Employee's Dyslexia"
1/25/2013	Evan Spelfogel Quoted in Article "D.C. Circuit Finds NLRB Appointments Invalid and Leaves Board Without Quorum for Action"
5/13/2011	Epstein Becker Green's Wage & Hour Defense Blog Selected as One of the Top 10 Blogs in Compensation and Benefits, by *HR Daily Advisor*

EVENTS

3/18/2014	Commercial Mediation Training: NYSBA Dispute Resolution Section
3/12/2013	NYSBA Dispute Resolution Commercial Mediation Training Program
11/14/2012	Labor, Employment, and Benefits Implications of ACA - the New Healthcare Law

Teri M. Wigger is the Assistant Regional Administrator for OSHA's Region 2 Whistleblower Protection Programs. Region 2's geographical territory includes: New York, New Jersey, Puerto Rico and the Virgin Islands. The program enforces 22 whistleblower provisions the Secretary of Labor has been delegated the authority to investigate. Teri began her career with OSHA in 1988 as a Safety Compliance Officer before transferring to the Whistleblower Program in 1990 as an investigator. Teri worked in the field as an investigator until advancing to a Regional Supervisory Investigator. Teri was recently promoted to Assistant Regional Administrator. Teri is a graduate from Binghamton University with a degree in Political Science with a concentration in Public Policy.