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THE SARBANES-OXLEY ACT: EMPLOYMENT IMPLICATIONS FOR PRIVATELY HELD AND PUBLICLY TRADED COMPANIES

By: Allen B. Roberts

After corporate scandals shook investor confidence in 2001-2002, Congress reacted at lightning speed, passing the Sarbanes-Oxley Act.[1] The law seemed correct for its time, passing in the Senate with no negative votes[2] and overwhelmingly in the House.[3] As Sarbanes-Oxley is tested, there are some indications that the combination of speed and apparently universal support in its passage may conceal fundamental compliance problems for companies and mask enforcement problems for regulators. Even the potential of a new bonanza of profitable litigation for lawyers in the plaintiffs' bar and their clients is less certain. Nevertheless, the employment provisions of Sarbanes-Oxley present substantive and procedural challenges to companies within its reach, and preparedness for compliance and appropriate response are essential to averting the adverse consequences of some uncommon statutory provisions and remedies.

Because of the pace at which the legislation proceeded, there is scant legislative history to explain statutory provisions. Some Sarbanes-Oxley terms suffer from competition with each other. Sorting out interrelationships and grasping necessary interpretation and understanding may come at substantial economic and organizational expense to many of the businesses selected by litigants to test the parameters of Sarbanes-Oxley.

This paper endeavors to present a working understanding of the employment law provisions of Sarbanes-Oxley contained in Title VIII, the Corporate and Criminal Fraud Accountability Act of 2002, and to sound an alert that Sarbanes-Oxley is far more complex, far-reaching and enigmatic than its ease of passage and much of the early popular comment suggest.

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1 Pub. L. No. 107-204, 116 Stat. 745 (2002).
2 The Senate vote was 99 yeas and 0 nays. 148 Cong. Rec. S7365 (July 25, 2002).
3 The House vote was 423 yeas and 3 nays. 148 Cong. Rec. H5480 (July 25, 2002).

For perspective on the Sarbanes-Oxley whistleblower provisions, the whistleblower laws of New York, New Jersey, Connecticut and California are referenced.

OVERVIEW OF EMPLOYMENT PROVISIONS

Certain Sarbanes-Oxley features are familiar from the exposure and comment they have received. There is civil whistleblower protection, as well as rules governing hot line reporting of questionable accounting or audit matters, chief financial officer ethics, and attorney rules of professional responsibility. Each of these is crafted with fair precision and each applies only to companies having publicly traded securities.

Away from the spotlight lurk sweeping criminal provisions imposing obligations and liability not only on publicly traded companies but on privately held businesses and individuals, as well. Without regard to whether a company has publicly traded securities, serious criminal sanctions apply to employers and individuals for such matters as: (1) retaliating against a person providing truthful information to a law enforcement officer concerning a federal offense; (2) tampering with a record or otherwise impeding an official proceeding; and (3) destruction, alteration or falsification of records in federal investigations and bankruptcy proceedings.

PROTECTIONS AND SANCTIONS RELATING TO
INFORMATION DISCLOSURES AND DOCUMENTS

(A) CIVIL PROTECTIONS FOR WHISTLEBLOWERS - PUBLICLY TRADED COMPANIES

The employment law feature of Sarbanes-Oxley receiving the most attention is the civil whistleblower provision. Section 806 of Sarbanes-Oxley adds a new Section 1514A to Title 18, granting protection to employees of companies with publicly traded securities who provide evidence of certain types of fraud and establishing an elaborate scheme for early relief.[4]

(1) Prohibited Conduct

In language common to anti-discrimination and anti-retaliation employment legislation,[5] Sarbanes-Oxley protects employees from the

[4] 18 U.S.C. § 1514A.

[5] Anti-discrimination and anti-retaliation features abound in laws protecting employees from adverse employment actions. A sampling of statutes providing protections against discrimination and retaliation for invoking protected rights suggests that Sarbanes-Oxley does not break new ground:

(a) Occupational Safety and Health Act ("OSHA") (29 U.S.C. § 660(c))
(b) Aviation Investment and Reform Act for the 21st Century ("AIR21") (49 U.S.C. § 42121)
(c) Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 623)
(d) Title VII of the Civil Rights Act of 1964 ("Title VII") (42 U.S.C. § 2000(e))
(e) Fair Labor Standards Act ("FLSA") (29 U.S.C. § 201)
(f) National Labor Relations Act ("NLRA") (29 U.S.C. § 158(a)(4))
(g) Family and Medical Leave Act ("FMLA") (29 U.S.C. § 2615)
(h) Employee Retirement Income Security Act ("ERISA") (29 U.S.C. § 1140)
(i) Consumer Credit Protection Act (15 U.S.C. § 1674(a))
(j) Job Training and Partnership Act (29 U.S.C. § 1574)
(k) Migrant and Seasonal Worker Protection Act (29 U.S.C. § 1855)

unfavorable personnel actions of discharge, demotion, suspension, threats, harassment and other forms of discrimination in employment terms and conditions.[6]

(2) The Classes of Protected Disclosures

Employee activity will be protected only if the employee acts lawfully to address wrongs within a category of express unlawful activity or matters subject to securities regulation. To be protected, the activity must relate to mail frauds and swindles (18 U.S.C. § 1341), fraud by wire, radio or television (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344) or securities fraud (18 U.S.C. § 1348),[7] or to any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders.[8]

Because the Sarbanes-Oxley Section 307 obligation for attorneys appearing and practicing before the SEC to make certain disclosures is activated by SEC rule making, there may be a bootstrapping of Section

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(l) Federal Water Pollution Control Act ("FWPCA" or the "Clean Water Act") (33 U.S.C. § 1367)
(m) Toxic Substances Control Act ("TSCA") (15 U.S.C. § 2622)
(n) Solid Waste Disposal Act ("SWDA") (42 U.S.C. § 6971)
(o) Clean Air Act (42 U.S.C. § 7622)
(p) Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (42 U.S.C. § 9610)
(q) Energy Reorganization Act of 1974 (42 U.S.C. § 5851, as amended by Section 2902, PL 102-486 (106 Stat. 2776))
(r) International Safe Container Act (46 App. U.S.C.A. § 1506)
(s) Asbestos Hazard Emergency Response Act (15 U.S.C. § 2651)
(t) Surface Transport Assistance Act (49 U.S.C. § 31105)
(u) Federal Deposit Insurance Corporation Improvement Act (105 Stat. 2236)
(v) Federal Credit Union Act (12 U.S.C. § 1751)
(w) Whistleblower Protection Act of 1989 (5 U.S.C. § 1201 et seq.)
(x) Federal Employers' Liability Act ("FELA") (45 U.S.C. § 51)
(y) False Claims Act (31 U.S.C. § 3730(h))
(z) Federal Surface Mining Control and Reclamation Act (30 U.S.C. § 1293)
(aa) Vessels and Seamen Act (46 U.S.C. § 2114(a))
(bb) Asbestos School Hazard Detection and Control Act (20 U.S.C. § 3608)
(cc) Federal Mine Safety & Health Act (30 U.S.C. § 815(c))
(dd) Safe Drinking Water Act (42 U.S.C. § 300j-9(i)(1))
(ee) Civil Rights of Institutionalized Persons Act (42 U.S.C. § 1997)
(ff) Conspiracy to Obstruct Justice Act (42 U.S.C. § 1985(2))
(gg) Department of Defense Authorization Act (10 U.S.C. § 2409(a))
(hh) Jury Duty Act (28 U.S.C. § 1875(a))
(ii) Office of Research Integrity (42 U.S.C. § 289b(a)(e))
(jj) State Long-Term Care Ombudsman Program (42 U.S.C. § 3058g(2))
(kk) Public Contracts Act (41 U.S.C. § 265(a)).

[6] 18 U.S.C. § 1514A(a).

[7] These acts were identified by sponsoring Senator Leahy as all the types of "schemes and artifices" that may be devised by "inventive criminals" to defraud. See Legislative History of Title VIII of HR 2673: The Sarbanes-Oxley Act of 2002, Congressional Record: July 26, 2002, section-by-section analysis of sponsoring Senator Patrick Leahy, 148 Cong. Rec. at S7421.

[8] 18 U.S.C. § 1514A(a).

806 protection for a limited class of attorney-employees claiming retaliation for their disclosures mandated by Section 307.[9]

(3) Protected Employee Activity

An employee will be protected in two types of activity:

(a) providing information, causing information to be provided or otherwise assisting in an investigation regarding any conduct within the specified classes of information when the information or assistance is provided to one of three classes of recipients: (i) a federal regulatory or law enforcement agency, (ii) any member of Congress or any committee of Congress or (iii) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).[10]

Protection is available so long as the employee acts on a reasonable belief that there has been a prohibited violation.[11]

(b) filing, causing to be filed, or testifying, participating in, or otherwise assisting in a proceeding filed or about to be filed regarding any conduct within the specified classes of information when the employer has "any knowledge" of the proceeding.[12]

Unlike the protection for participation in a federal, congressional or internal investigation, the class of permissible recipients -- some with interests potentially adverse to the employer[13] -- is unlimited, and there is no reasonable belief provision.[14]

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9 See discussion of Section 307 infra.

10 18 U.S.C. § 1514A(a)(1). An indication of judicial receptiveness to protections for employees stepping outside the employing organization to air issues may be seen in a decision of the Ninth Circuit Court of Appeals. On First Amendment grounds, that could yield a different result than under a Sarbanes-Oxley analysis, the court held that a governmental employer, the Salem, Oregon Public Works Department, unlawfully retaliated against employees who made disclosures to the media and to state and local governments regarding raw sewage spills and unsafe working conditions. Coszalter v. Salem, 320 F.3d 968 (9th Cir. 2003).

11 18 U.S.C. § 1514A(a)(1).

12 18 U.S.C. § 1514A(a)(2).

13 There is no suggestion that permitted recipients could not include competitors, customers and vendors.

14 18 U.S.C. § 1514A(a)(2). While whistleblowers may urge that protection attaches to disclosures even if their belief is found unreasonable, employers can be expected to argue against that proposition. Opposing such license, employers will posit that an employee invoking the protection should be held to a stricter standard and a reasonable but mistaken belief is not sufficient.

(4) Covered Employers

The civil protections apply with respect to companies with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) or required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. § 78o(d)).[15] Adding an element of personal liability and liability beyond the corporate employer, Section 806 extends also to any officer, employee, contractor, subcontractor or agent of such company.[16]

(5) Relief Available to Whistleblowers

Whistleblowers may obtain conventional "make-whole" relief by way of reinstatement to the former position with full seniority, together with back pay, interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees and reasonable attorneys' fees.[17]

(6) Procedure by Which a Whistleblower May Obtain Administrative Relief[18]

Responsibility for receiving and investigating Section 806 complaints has been conferred on the Occupational Safety and Health Administration ("OSHA").[19] OSHA has issued a Final Rule setting forth procedures for whistleblower complaints ("Final Rule").[20] Respecting the statutory allowance for commencement of a federal court action if the administrative process has not produced a final decision within 180 days,[21] the Final Rule sets forth a rigorous schedule for the administrative processing of whistleblower complaints, contemplating completion within 180 days.[22]

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15 18 U.S.C. § 1514A(a).

16 18 U.S.C. § 1514A(a).

17 18 U.S.C. § 1514A(c).

18 For administrative proceedings brought by whistleblowers, Sarbanes-Oxley adopts the "rules and procedures" -- but not other features -- of the Aviation Investment and Reform Act for the 21st Century ("AIR21") (49 U.S.C. § 42121). 18 U.S.C. § 1514A(b)(2)(A).

19 Secretary of Labor's Order 5-2002, 67 Fed. Reg. 65008 (October 22, 2002). OSHA has such jurisdiction for 13 other whistleblower statutes.

20 Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Final Rule. 69 Fed. Reg. 52104 (August 24, 2004).

21 18 U.S.C. § 1514A(b)(1)(B).

22 Speaking at an American Bar Association conference August 9, 2004, Department of Labor Solicitor, Howard Radzely, remarked that there is "no way" DOL can handle most Sarbanes-Oxley cases in 180 days, especially given their complexity and the high level of employees involved. *Corporate Accountability Report* Vol. 2 No. 33 at 870 (August 13, 2004).

(a) Complaint Filing, Investigation, Findings and Preliminary Order

(i) The Final Rule provides that a complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but it may be filed with any OSHA officer or employee.[23] No particular form of complaint is required, so long as the complaint is in writing, although a statement of acts and omissions, with pertinent dates is preferred.[24] To be timely, the complaint is subject to an unusually short statute of limitations -- 90 days after the date on which the alleged violation occurs.[25] The date of an alleged violation will be considered the date when the allegedly discriminatory decision has been both made and communicated to the complainant.[26]

(ii) By statute, not later than 60 days after the date of receipt of a complaint, the Secretary of Labor is to:

- afford the person named in the complaint an opportunity to submit a written response to the complaint and an opportunity to meet with a representative of the Secretary of Labor to present statements from witnesses;
- conduct an investigation;
- determine whether there is "reasonable cause;" and
- issue findings accompanied by a preliminary order providing for relief.[27]

The Final Rule sets forth the timing and sequence of events in the investigation:

- Upon receipt of a complaint in the investigating office, OSHA will notify the person(s) named in the complaint of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants), and a copy

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23 29 C.F.R. § 1980.103(c).
24 29 C.F.R. § 1980.103(b).
25 49 U.S.C. § 42121(b)(1); 29 C.F.R. § 1980.103(d) (The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.).
26 29 C.F.R. § 1980.103(d). See Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498, 504 (1980).
27 49 U.S.C. § 42121(b)(2)(A).

of the notice to the named person will be provided also to the SEC.[28]

- Before an investigation proceeds, a complaint is to be dismissed unless the complaint, supplemented as appropriate by interviews of the complainant, makes a *prima facie* showing of facts and evidence giving rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged.[29] A *prima facie* showing is based upon a set of factors common to employment cases:
  - The employee engaged in a protected activity or conduct;
  - The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;
  - The employee suffered an unfavorable personnel action; and
  - The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.[30]
- Notwithstanding the complainant's *prima facie* showing, an investigation will not be conducted if the named person produces, within 20 days of receipt of notice of the filing of the complaint, affidavits or documents demonstrating by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.[31]
- If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior, the Assistant Secretary of Labor for Occupational Safety and Health ("Assistant Secretary") will proceed to conduct an investigation.[32]

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[28] 29 C.F.R. § 1980.104(a).
[29] 29 C.F.R. § 1980.104(b)(2).
[30] 29 C.F.R. § 1980.104(b)(1).
[31] 29 C.F.R. § 1980.104(c). Within the same 20-day period, the named person may request a meeting to present its position. Id.
[32] 29 C.F.R. § 1980.104(d).

- If the investigation gives the Assistant Secretary reasonable cause to believe there has been a violation and that preliminary employment reinstatement is warranted, the named person is to be provided with relevant evidence supporting the allegations and an opportunity to submit within 10 business days a written response and to meet with the investigators and present witnesses and legal and factual arguments.[33]

- Within 60 days after the complaint is filed, the Assistant Secretary is to issue written findings as to whether there is reasonable cause to believe there has been a violation.[34] A reasonable cause finding will be accompanied by a preliminary order providing make-whole relief to the complainant, including back pay with interest and compensation for any special damages, including litigation costs, expert witness fees and reasonable attorneys' fees.[35] The make-whole relief will include an order of reinstatement with the same seniority that will be effective immediately, absent one of two circumstances allowing for exception: (1) the employer is able to establish that such relief is not appropriate by showing with available or after-acquired information such facts as the complainant is, or has become, a security risk;[36] or (2) the employer is able to show to OSHA's satisfaction that preliminary reinstatement is "inadvisable" for some reason so that "economic reinstatement" providing pay and benefits, instead of preliminary job reinstatement, may be substituted.[37] Absent either of those exceptions, the portion of any preliminary order requiring reinstatement will be effective immediately upon the employer's receipt of the findings and preliminary order, regardless of the filing of any objections to the order,[38] unless, on motion to the Office of Administrative Law Judges, the employer obtains a stay of the preliminary order of reinstatement.[39] The Department of Labor cautions that a stay of the

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33 29 C.F.R. § 1980.104(e).
34 29 C.F.R. § 1980.105(a).
35 29 C.F.R. § 1980.105(a)(1).
36 29 C.F.R. § 1980.105(a)(1). Preliminary reinstatement may be denied for the limited reason that the employee is, or has become, a security risk – a term borrowed from the AIR21 regulations (the regulations for the aviation industry adopted after September 11, 2001) – meaning "reinstatement of an employee might result in physical violence against persons or property." 69 Fed. Reg. at 52108-09.
37 69 Fed. Reg. at 52109.
38 29 C.F.R. § 1980.105(c); 29 C.F.R. § 1980.106(b)(1).
39 29 C.F.R. § 1980.106(b)(1); 69 Fed. Reg. at 52109.

preliminary order of reinstatement will be available only in "exceptional" circumstances where an employer affirmatively shows "necessary criteria for equitable injunctive relief, *i.e.* irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public."[40]

(iii) Within 30 days after the date of receipt of the Assistant Secretary's findings and preliminary order, any party who desires review, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file objections and a request for a hearing on the record.[41] The objection or request for attorney's fees and request for a hearing must be in writing and filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.[42] The writing must state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees.[43] The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is considered filed upon receipt.[44]

If a timely objection is filed, all provisions of the preliminary order will be stayed, except the portion requiring preliminary reinstatement, which is not subject to automatic stay.[45] This means reinstatement relief in favor of an employee may be directed by way of a preliminary order before there has been an evidentiary hearing, an opportunity to hear testimony, to cross examine, or to create or review a record.

(iv) If no objection has yet been filed, at any time before the expiration of the 30-day objection period, the Assistant Secretary may withdraw his or her findings or a

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40 69 Fed. Reg. at 52109.
41 29 C.F.R. § 1980.106(a).
42 29 C.F.R. § 1980.106(a).
43 29 C.F.R. § 1980.106(a).
44 29 C.F.R. § 1980.106(a).
45 29 C.F.R. § 1980.106(b)(1); 49 U.S.C. § 42121(b)(2)(A).

preliminary order and substitute new findings or a new preliminary order.[46] If this happens, the date of receipt of the substituted findings or order will begin a new 30-day objection period.[47]

(v) Unless a timely objection is filed with respect to either the findings or the preliminary order, the findings and preliminary order will become the final decision of the Secretary of Labor, and there will be no further opportunity for judicial review.[48]

(b) Proceedings before the Administrative Law Judge

(i) Whatever the outcome of the administrative investigation, upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time and place of hearing.[49] Any hearing on the objections must be conducted "expeditiously," except upon a showing of good cause or unless otherwise agreed to by the parties.[50] Proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at Subpart A, Part 18 of Title 29 of the Code of Federal Regulations.[51] The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties.[52] Contemplating that there will be discovery requests, the Final Rule provides that administrative law judges are

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46 29 C.F.R. § 1980.111(b).

47 29 C.F.R. § 1980.111(b).

48 29 C.F.R. § 1980.106(b)(2).

49 29 C.F.R. § 1980.107(b). For Sarbanes-Oxley cases, OSHA is not authorized to perform a gatekeeper function analogous to the final authority exercised by an administrative agency in the investigation of complaints or charges under other statutory schemes, and a complainant may obtain a hearing *de novo* before an administrative law judge as a matter of right, irrespective of an adverse determination at the investigative stage. Compare Occupational Safety and Health Act, 29 U.S.C. § 659(f)(1),(2) (following inspection based upon employee or employee representative's notice, determination that there are no reasonable grounds to believe that a violation or danger exists is to be followed by notice from Secretary of Labor to employee or employee representative with written statement of reasons for final disposition of case); National Labor Relations Act, 29 U.S.C. § 153(d) (National Labor Relations Board's General Counsel has final authority with respect to the investigation of charges and issuance of complaints to be heard by administrative law judges). In the event of such a Section 806 hearing, OSHA's Whistleblower Investigations Manual suggests that a Department of Labor attorney normally will not be involved in the litigation. Directive Number: DIS 0-0.9 (Effective August 22, 2003).

50 29 C.F.R. § 1980.107(b); 49 U.S.C. § 42121(b)(2)(A).

51 29 C.F.R. § 1980.107(a).

52 29 C.F.R. § 1980.107(b).

vested with broad discretion to limit discovery in order to expedite the hearing.[53]

(ii) The administrative law judge will hear the case on the merits, without review of the Assistant Secretary's investigation or determination.[54] Hearings will be conducted on the record, as hearings *de novo*.[55] The administrative law judge is to apply rules or principles designed to assure production of the most probative evidence, but formal rules of evidence will not apply.[56] The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.[57]

(iii) The administrative law judge is to issue a decision containing appropriate findings, conclusions, and an order providing for any appropriate remedy.[58] A determination that a violation has occurred may not be made unless the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.[59] However, relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior.[60]

(iv) If the administrative law judge concludes that the party charged has violated the law, the order will provide all relief necessary to make the complainant whole, including reinstatement to the former position with the seniority status that the complainant would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.[61] The administrative law judge is authorized to rule on a request by a named person to determine that a complaint was frivolous or was brought in bad faith and award a "reasonable attorney's fee"

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53 29 C.F.R. § 1980.107(b).
54 29 C.F.R. § 1980.109(a).
55 29 C.F.R. § 1980.107(b).
56 29 C.F.R. § 1980.107(d).
57 29 C.F.R. § 1980.107(d).
58 29 C.F.R. § 1980.109(a).
59 29 C.F.R. § 1980.109(a).
60 29 C.F.R. § 1980.109(a).
61 29 C.F.R. § 1980.109(b).

requested by a named person – but the amount may not exceed $1,000.[62]

(v) The decision of the administrative law judge will become the final order of the Secretary unless, within 30 days of the filing of a petition for review, the Administrative Review Board issues an order notifying the parties that the case has been accepted for review.[63] Any decision of the administrative law judge requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the named person,[64] unless it is stayed on motion to the Administrative Review Board.[65] All other portions of the administrative law judge's order will be effective 10 business days after the date of the decision, unless a timely petition for review has been filed with the Administrative Review Board.[66]

(c) Proceedings before the Administrative Review Board

(i) The decision of the administrative law judge will become the final order of the Secretary unless a petition for review is timely filed with the Administrative Review Board within 10 business days after the date of the decision of the administrative law judge.[67] A party desiring review of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board.[68] The petition for review must specifically identify the findings, conclusions or orders to which exception is

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62 29 C.F.R. § 1980.109(b); 49 U.S.C. § 42121(b)(2)(C). The Secretary of Labor has delegated authority to issue final administrative decisions in cases arising under Section 806 to the Administrative Review Board. Secretary's Order 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002).

63 29 C.F.R. § 1980.110(b).

64 29 C.F.R. § 1980.109(c).

65 29 C.F.R. § 1980.110(b).

66 29 C.F.R. § 1980.109(c).

67 29 C.F.R. § 1980.110(a) (The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed, and copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210.).

68 29 C.F.R. § 1980.110(a).

taken, and any exception not specifically urged ordinarily will be deemed to have been waived by the parties.[69]

(ii) The Administrative Review Board has discretion to accept a petition for review, and a party may not obtain review as a matter of right.[70] If a case is accepted for review, the decision of the administrative law judge will be inoperative unless and until the Administrative Review Board issues an order adopting the decision, except that a preliminary order of reinstatement will remain effective during the review period unless a motion staying the order is granted.[71] The Administrative Review Board will specify the terms under which any briefs are to be filed.[72] Its review of the factual determinations of the administrative law judge will be subject to the "substantial evidence" standard.[73]

(iii) Within 120 days after the conclusion of the hearing before the administrative law judge, the Administrative Review Board is to issue its final decision.[74] If the Administrative Review Board concludes that a named party has violated the law, the final order will provide all relief necessary to make the complainant whole, including reinstatement to his/her former position with the seniority status that he/she would have had but for the discrimination, back pay with interest, and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.[75] If the Administrative Review Board determines that the named person has not violated the law, it will issue an order denying the complaint.[76] If, in response to a request by a named person, the Administrative Review Board determines that a complaint was frivolous or was brought in bad faith, it may award to the named person a reasonable attorney's fee, not exceeding $1,000.[77]

(7) Federal Agency Participation in Proceedings

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69 29 C.F.R. § 1980.110(a).
70 29 C.F.R. § 1980.110(b).
71 29 C.F.R. § 1980.110(b).
72 29 C.F.R. § 1980.110(b).
73 29 C.F.R. § 1980.110(b).
74 29 C.F.R. § 1980.110(c); 49 U.S.C. § 42121(b)(3)(A).
75 29 C.F.R. § 1980.110(d).
76 29 C.F.R. § 1980.110(e).
77 29 C.F.R. § 1980.110(e).

(a) In addition to the participation of the complainant and each named person as parties in the proceedings, the Assistant Secretary may participate as a party or as *amicus curiae* at any time in the proceedings.[78] Although it may not participate as a party, the SEC may participate as *amicus curiae* at any time in the proceedings.[79]

(b) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C., 20210.[80] At the request of the SEC, copies of all pleadings in a case must be sent to the SEC, whether or not the SEC is participating in the proceeding.[81]

(8) Supervised Settlement of Proceedings

(a) Once a proceeding has been commenced, it may be terminated on the basis of a settlement agreement only if the settlement between the complainant and the person alleged to have committed the violation is supervised.[82]

(b) At any time prior to the filing of objections to findings or preliminary order, a complainant may withdraw his or her complaint by filing a written withdrawal with the Assistant Secretary who will then determine whether to approve the withdrawal and enter into a settlement agreement with the complainant and the named person.[83]

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Administrative Review Board.[84] If the withdrawal of objections is approved, the administrative law judge or the Administrative Review Board also will enter into a

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78 29 C.F.R. § 1980.108(a)(1) (The right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, to dismiss a complaint or to issue an order encompassing the terms of the settlement.).

79 29 C.F.R. § 1980.108(b).

80 29 C.F.R. § 1980.108(a)(2).

81 29 C.F.R. § 1980.108(b).

82 49 U.S.C. § 42121(b)(3)(A).

83 29 C.F.R. §§ 1980.111(a) and (d)(1).

84 29 C.F.R. § 1980.111(c).

settlement agreement with the complainant and the named person.[85]

(d) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Administrative Review Board, will constitute the final order of the Secretary.[86]

(9) Judicial Review of Administrative Orders

(a) Within 60 days after the issuance of a final order of the Administrative Review Board, any person adversely affected or aggrieved may obtain review of the order in a United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.[87]

(b) According to the Final Rule, whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.[88]

(c) A final order of the Administrative Review Board is not subject to judicial review in any other civil proceeding or in any criminal proceeding.[89]

(10) Whistleblower Access to Federal Court

If the Administrative Review Board has not issued a final decision within 180 days of the filing of a whistleblower's administrative complaint and there is no showing that the delay is due to the whistleblower's bad faith, the whistleblower may bring an action at law or in equity in a United States district court and obtain *de novo* review.[90] However, 15 days in

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85 29 C.F.R. § 1980.111(c); 29 C.F.R. § 1980.111(d)(2).

86 29 C.F.R. § 1980.111(e).

87 29 C.F.R. § 1980.112(a).

88 29 C.F.R. § 1980.113. AIR21 Regulations concerning judicial enforcement, 29 C.F.R. § 1979.113, are identical to those in the Final Rule, the Final Rule having adopted verbatim its counterpart in the AIR21 Regulations. However, the express legislative authorization of AIR21 provides for the judicial enforcement of final orders – but not for a preliminary order of reinstatement. See 49 U.S.C. § 42121(b)(5), 49 U.S.C. § 42121(b)(6)(A). In contrast, other statutes make express provision for judicially granted preliminary injunctive relief. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(f)(2), 2000e-6(a); Fair Labor Standards Act, 29 U.S.C. § 217; Labor Management Relations Act, 29 U.S.C. §§ 160(1), 160(j).

89 29 C.F.R. § 1980.112(a); 49 U.S.C. § 42121(b)(4)(B).

90 18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114(a). Sarbanes-Oxley is silent concerning the availability of a jury trial. A jury trial was denied based on the silence of Sarbanes-Oxley on the express point and review of legislative history, analogy to Title VII prior to its 1991 amendment and the unavailability of legal claims for

advance of filing such a complaint in federal court, a complainant must file with the administrative law judge or the Administrative Review Board (depending upon where the proceeding is pending) a notice of his or her intention to file the complaint.[91]

(B) CRIMINAL PROVISIONS FOR RETALIATION AGAINST WHISTLEBLOWERS

The criminal provisions of Sarbanes-Oxley do not mirror the civil provisions. Far from repeating terms of the civil protections and overlaying criminal penalties, Section 1107 of Sarbanes-Oxley adds a new Section 1513(e) to Title 18, establishing criminal penalties for retaliation against a witness, victim or informant.[92]

(1) Prohibited Conduct

Criminal sanctions apply to action that is harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, if the action is taken knowingly and with the intent to retaliate.[93]

(2) The Class of Protected Disclosures

The sanctions apply with respect to truthful information relating to the commission or possible commission of any federal offense.[94]

(3) Protected Activity

The disclosure must be to a "law enforcement officer" -- a term defined broadly to mean an officer or employee of the federal government, or a person authorized to act for or on behalf of the federal government or serving the federal government as an adviser or consultant and (i) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or (ii) serving as a federal probation or pretrial services officer.[95]

The breadth of Sarbanes-Oxley's criminal whistleblower protections may be determined in part by construction of the term "federal offense." The

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exemplary damages and reputational injury. Murray v. TXU Corp., No. 03-0888, slip op. at 2-3, 5-7 (N.D. Tex. June 7, 2005).

91 29 C.F.R. § 1980.114(b) (The notice must be served upon all parties to the proceeding. If the Assistant Secretary is not a party, a copy of the notice must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C. 20210).

92 18 U.S.C. § 1513(e).

93 18 U.S.C. § 1513(e).

94 18 U.S.C. § 1513(e).

95 18 U.S.C. § 1515(a)(4).

term is not defined by Sarbanes-Oxley as either criminal or civil. It is customary that criminal acts are considered "offenses," while civil acts are labeled "violations." By this construction, Sarbanes-Oxley would reach only federal criminal offenses. If "federal offense" is interpreted to mean criminal offenses, Sarbanes-Oxley's criminal whistleblower protections will have important, but relatively limited, application. However, if "federal offense" is construed to include violation of federal civil law, the enforcement sanctions under the full panoply of federal regulation will be impacted by Sarbanes-Oxley and the anti-retaliation provisions of virtually all employment laws will receive unprecedented expansion.

(4) Criminal Sanctions

Violators may be fined or imprisoned for as much as ten years, or both.[96]

(5) Persons Subject to Criminal Sanctions

Unlike the civil whistleblower protections, the criminal whistleblower provisions of Sarbanes-Oxley are not restricted to companies having publicly traded securities. As with the civil provisions, there may be personal liability, although the class of individuals may be broader than the employees, officers and agents referenced in the civil whistleblower section.[97]

(C) CRIMINAL SANCTIONS FOR CORRUPTLY TAMPERING WITH A RECORD OR OTHERWISE IMPEDING AN OFFICIAL PROCEEDING

Expanding beyond criminalizing retaliation against truthful disclosures concerning federal offenses, Section 1102 of Sarbanes-Oxley adds a new Section 1512(c) to Title 18 and establishes sanctions for broadly defined activity that constitutes tampering with a record or impeding an official proceeding.[98]

(1) Prohibited Conduct

Criminal sanctions apply to anyone who corruptly (i) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding or (ii) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.[99]

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96 18 U.S.C. § 1513(e).
97 18 U.S.C. § 1514A(a).
98 18 U.S.C. § 1512(c).
99 18 U.S.C. § 1512(c). The terms "corrupt" and "corruptly" have been held to be "normally associated with wrongful, immoral, depraved, or evil," and a jury instruction that removed the element of dishonesty and allowed conviction for merely "impeding" was erroneous. Arthur Andersen LLP v. U.S., 544 U.S. 696, 703 (2005).

The term "official proceeding" is defined to mean --

(a) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a federal grand jury;

(b) a proceeding before the Congress;

(c) a proceeding before a federal government agency that is authorized by law; or

(d) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce.[100]

There is no express definition of the term "corruptly" as used in this new section, but reference to other sections of Title 18 may provide instructive guidance. Section 1515(b) provides: "As used in section 1505, the term 'corruptly' means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information."[101]

The expression "otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so" may be sweepingly broad. Unlike the more limited criminal whistleblower provisions of Section 1107, Section 1102 does not limit its reach to truthful disclosures concerning federal offenses. Its language is broad enough to include routine agency proceedings under laws having their own anti-retaliation provisions. Section 1102 appears to create new criminal exposure for employers -- and individuals acting as executives and managers -- for interfering with employee participation in a host of activities, including otherwise unexceptional administrative agency proceedings. This provision also raises the stakes, because criminal liability may attach as far down the corporate ladder as first-line supervisors not currently on the radar screen of corporations undertaking Sarbanes-Oxley compliance training. Of course, if the individual supervisor or manager can have personal liability, that liability can attach, as well, to the corporate employer.

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[100] 8 U.S.C. § 1515(a)(1). Section 1515(a)(6) provides that the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

[101] Although it may be logical to adopt the statutory definition, caution is warranted because Section 1515 is stated to relate exclusively to Section 1505 (Obstruction of proceedings before departments, agencies, and committees). 18 U.S.C. § 1515(b).

There is express protection for "lawful" and "bona fide" legal advice: "This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."[102]

(2) Criminal Sanctions

Violators may be fined or imprisoned for as much as 20 years, or both.[103]

(3) Persons Subject to Criminal Sanctions

Like the criminal whistleblower provisions of Sarbanes-Oxley, the criminal sanctions for tampering with a record or impeding an official proceeding are not restricted to companies, and exposure to sanctions applies to individuals, as well as corporate employers.

(D) CRIMINAL SANCTIONS FOR KNOWING DESTRUCTION, ALTERATION, OR FALSIFICATION OF RECORDS IN FEDERAL INVESTIGATIONS AND BANKRUPTCY CASES

Expanding beyond activity that constitutes tampering with a record or impeding an official proceeding, Section 802 of Sarbanes-Oxley adds a new Section 1519 to Title 18, establishing sanctions for broadly defined activity that constitutes destruction, alteration, or falsification of records in federal investigations and bankruptcy proceedings.[104]

(1) Prohibited Conduct

Criminal sanctions apply to anyone who knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any federal department or agency or any federal bankruptcy case.[105] The sanctions apply, also, to any actions in relation to or in contemplation of any such matter or case, so the timing of the act in relation to the beginning of the matter or investigation is not a bar to prosecution.[106]

Unlike Section 1102 relating to tampering with a record or impeding an official proceeding, Section 802 does not require that the activity be engaged in "corruptly" or in connection with an "official proceeding."

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[102] 18 U.S.C. § 1512(c).
[103] 18 U.S.C. § 1512(c).
[104] 18 U.S.C. § 1519.
[105] Sponsoring Senator Leahy expressed an intent that the law overcome the "patchwork" of prior law considered to have been interpreted too narrowly by federal courts. He did not consider it relevant that the actor may not understand "the precise nature of the agency or court's jurisdiction;" what mattered to him was that the accused defendant has acted with "the intent to obstruct." 148 Cong. Rec. at S7419.
[106] 148 Cong. Rec. at S7419.

(2) Criminal Sanctions

Violators may be fined or imprisoned for as much as 20 years, or both.[107]

(3) Persons Subject to Criminal Sanctions

Like the other criminal provisions of Sarbanes-Oxley, criminal sanctions for prohibited destruction, alteration or falsification of records are not restricted to companies, and exposure to sanctions applies to individuals, as well as corporate employers.

(E) A NEW DEFINITION OF PROHIBITED MISLEADING CONDUCT THAT AFFECTS PARTICIPATION IN AN OFFICIAL PROCEEDING

Section 1512(b) of Title 18,[108] protecting against the interference with participation in official proceedings, is not new to Sarbanes-Oxley, but Sarbanes-Oxley provides a new definition of the term "misleading conduct" used in that section.

Section 1512(b) provides:

> Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to --
>
> (a) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (b) cause or induce any person to--
>
> (i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (ii) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;
>
> (iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
>
> (iv) be absent from an official proceeding to which such person has been summoned by legal process; or
>
> (v) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible

[107] 18 U.S.C. § 1519.
[108] 18 U.S.C. § 1512(b).

> commission of a federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;
>
> shall be fined under this title or imprisoned not more than ten years, or both.

Sarbanes-Oxley adds a definition of the term "misleading conduct," providing that it means --

> (1) knowingly making a false statement;
>
> (2) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;
>
> (3) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;
>
> (4) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or
>
> (5) knowingly using a trick, scheme, or device with intent to mislead.[109]

COMPARISON TO STATE WHISTLEBLOWER PROTECTIONS

Even before Sarbanes-Oxley enactment, individual states had passed laws providing whistleblower protections. In significant respects, they vary from each other and from the civil and criminal provisions of Sarbanes-Oxley. For purposes of comparison, the laws of New York, New Jersey, Connecticut and California are addressed.

(A) NEW YORK

New York Labor Law Section 740 prohibits employers from taking "any retaliatory personnel action" against an employee, but the sanction applies within a narrow class of disclosures.[110] For the employee activity to be protected, there must be an actual or threatened disclosure involving "an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety."[111] The protected activity extends to (1) disclosing or threatening to disclose information to a supervisor or public body; (2) providing information to, or testifying

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[109] 18 U.S.C. § 1515(a)(3).

[110] N.Y. LAB. LAW § 740(2). Retaliatory personnel action includes discharge, suspension, demotion or other adverse employment action in terms or conditions of employment. Id. § 740(1)(e).

[111] N.Y. LAB. LAW § 740(2). Generalized suspicions are not protected. See Bordell v. General Electric Co., 88 N.Y.2d 869, 644 N.Y.S.2d 912, 667 N.E.2d 923 (1996).

before, a public body conducting an investigation hearing or inquiry; or (3) objecting to, or refusing to participate in, an activity, policy or practice presenting a substantial and specific danger to the public health or safety.[112]

The New York whistleblower provision has limited reach, protecting only those disclosures related to "a substantial and specific danger to the public health or safety." Courts have construed the public health and safety requirement narrowly.[113]

Health care service employees employed by health care service providers have additional whistleblower protection under New York Labor Law Section 741. It is unlawful to take retaliatory action against such an employee for (1) disclosing or threatening to disclose to a supervisor or public body an employer activity, policy or practice that the employee in good faith reasonably believes constitutes improper quality of patient care or (2) objecting to, or refusing to participate in, any employer activity, policy or practice that the employee in good faith reasonably believes constitutes improper quality of patient care.[114] Absent an imminent threat to public health or safety or to the health of a specific patient and the employee's reasonable belief in good faith that reporting to a supervisor would not result in corrective action, employee whistleblower protection is not available unless the employee has first brought the matter to the attention of a supervisor and afforded the employer a reasonable opportunity to correct the activity, policy or practice.[115]

An employee alleging a violation of Section 740 or 741 of New York Labor Law may bring a civil action seeking reinstatement with full fringe benefits and seniority, compensation for lost wages and benefits, costs of litigation and attorneys' fees.[116] In addition, injunctive relief is available to restrain continued violations.[117]

Section 215 of the New York Labor Law provides similar protections to employees making complaints to their employers or to the Labor Commissioner concerning violation of any provision of the New York Labor Law or instituting a proceeding or testifying in a proceeding under the New York Labor Law.[118]

(B) NEW JERSEY

New Jersey's whistleblower law, known as the Conscientious Employee Protection Act ("CEPA"),[119] is more comprehensive than the New York law. As with New York's statute,

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112 N.Y. LAB. LAW § 740(2).

113 See e.g., Schultz v. North American Ins. Group, 34 F. Supp. 2d 866, 870 (W.D.N.Y. 1999) (holding that claim alleging fraudulent economic practices by employer does not constitute danger to public health or safety under New York's whistleblower statute); Vail-Ballou Press Inc. v. Tomasky, 266 A.D. 2d 662, 698 N.Y.S.2d 98 (N.Y. App. Div., 3d Dep't 1999) (finding that employee failed to state claim for retaliation where underlying action for which employee allegedly was fired was complaint to the NLRB concerning union's failure to negotiate over workers' compensation pilot program; action complained of was not employer's and involved at most employee health, not public health or safety).

114 N.Y. LAB. LAW § 741(2).

115 N.Y. LAB. LAW § 741(3).

116 N.Y. LAB. LAW § 740(4)(d),(5).

117 N.Y. LAB. LAW § 740(5).

118 N.Y. LAB. LAW § 215.

119 N.J. STAT. ANN. 34:19-1 et seq.

protected activity includes disclosures to a supervisor or public body, providing information or testimony to a public body and objecting to, or refusing to participate in, certain activity. The significant point of departure from New York law is the scope of protection, extending significantly beyond law, rule and regulation related to public health and safety.

CEPA prohibits an employer from taking "any retaliatory action"[120] against an employee[121] because the employee (1) discloses or threatens to disclose to a supervisor or to a public body, an activity, policy or practice of the employer (or another employer with whom there is a business relationship) that the employee reasonably believes is a violation of a law, rule or regulation;[122] (2) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, rule or regulation;[123] or (3) objects to or refuses to participate in any activity, policy or practice that (a) the employee reasonably believes is a violation of a law, rule or regulation; (b) is fraudulent or criminal; or (c) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.[124]

The remedies available under CEPA include injunctive relief, reinstatement (with full benefits and seniority), compensation for lost wages and benefits, costs of litigation, attorneys' fees, punitive damages, and a civil fine of up to $1,000 for the first violation and $5,000 for each violation thereafter.[125] However, to obtain relief for disclosure to a public body, the employee must have given the employer written notice of the activity, policy or practice and afforded the employer a reasonable opportunity to correct the activity, policy or practice -- unless the employee is reasonably certain that the activity, policy or practice is known to one or more supervisors or the employee reasonably fears physical harm as a result of the disclosure and the situation is emergency in nature.[126] An employer prevailing against a claim that is without basis in law or in fact may recover its attorneys' fees and court costs.[127] CEPA operates to bar multiple or duplicative causes of action otherwise available so that once a CEPA claim is instituted, any rights or remedies are waived – whether based on contract of employment, collective bargaining agreement or state law (including discrimination claims based on the same operative facts).[128]

New Jersey employers must communicate and conspicuously post and annually distribute notices of CEPA protections and obligations, including identification of the person designated by the employer to receive written complaints of a violative activity, policy or practice.[129]

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120 N.J. STAT. ANN. 34:19-3.

121 Strict employee status may not be required, and an independent contractor may be considered an employee for CEPA purposes if the employer exercises control and direction over the individual. D'Annunzio v. Prudential Ins. Co. of Am., 383 N.J. Super 270, 278 (App. Div. 2006)..

122 N.J. STAT. ANN. 34:19-3(a).

123 N.J. STAT. ANN. 34:19-3(b).

124 N.J. STAT. ANN. 34:19-3(c) (this includes activity believed by employees who are licensed or certified health care professionals to constitute improper quality of patient care).

125 N.J. STAT. ANN. 34:19-5.

126 N.J. STAT. ANN. 34:19-4.

127 N.J. STAT. ANN. 34:19-6.

128 N.J. STAT. ANN. 34:19-8; Young v. Schering Corp., 141 N.J. 16, 29 (1995)

129 N.J. STAT. ANN. 34:19-7. Notices in English and Spanish are to be distributed by written or electronic means.

(C) CONNECTICUT

Connecticut's whistleblower statute prohibits an employer from discharging, disciplining or otherwise penalizing any employee because the employee reports a violation or suspected violation of any law, regulation or ordinance to a public body, or because the employee is requested by a public body to participate in any investigation, hearing or inquiry held by that public body, or in a court action.[130] Municipal employees have additional protection for reporting to a public body concerning the municipality's unethical practices, mismanagement or abuse of authority.[131]

An employee aggrieved under the Connecticut statute first must exhaust all available administrative remedies.[132] After doing so, the employee may bring a civil action seeking reinstatement, back pay and reestablishment of benefits.[133] Costs and attorneys' fees may be awarded to the prevailing party.[134]

Statutory protection is expressly denied to an employee who knows that the report of a violation is false,[135] and an employee knowingly making a false report is subject to disciplinary action by the employer up to and including discharge.[136]

(D) CALIFORNIA

California's Labor Code tracks the law of other states in certain respects, but it also expands its reach beyond them. The law protects (1) employee disclosures of information to a government or law enforcement agency based on a reasonable belief of a violation of state or federal statute or violation of, or noncompliance with, a state or federal rule or regulation and refusals to participate in any such violation or noncompliance;[137] and (2) internal safety or health complaints and employee participation in safety or health administrative proceedings or on a safety and health committee.[138] The law expressly does not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of statutorily recognized lawyer-client privilege and physician-patient privilege, or trade secret information.[139] Without delimiting the available relief, the statute provides that an employee may recover damage for the injury suffered as a consequence of a violation.[140] Employers violating the statute are subject to imprisonment for up to one year or a fine of up to

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130 CONN. GEN. STAT. § 31-51m(b).
131 CONN. GEN. STAT. § 31-51m(b).
132 CONN. GEN. STAT. § 31-51m(c).
133 CONN. GEN. STAT. § 31-51m(c).
134 CONN. GEN. STAT. § 31-51m(c).
135 CONN. GEN. STAT. § 31-51m(b).
136 CONN. GEN. STAT. § 31-51m(c).
137 CAL. LAB. CODE § 1102.5(a)-(d).
138 CAL. LAB. CODE § 6310(a).
139 CAL. LAB. CODE § 1102.5(g).
140 CAL. LAB. CODE § 1105.

$1,000, or both,[141] while corporations and limited liability companies are subject to a fine of up to $10,000.[142]

California's Labor Code Private Attorneys General Act of 2004 grants every employee of every California employer the authorization to bring a class action lawsuit seeking monetary penalties based on any violation of the California Labor Code, without any need to show that the plaintiff-employee was actually harmed or suffered any damage.[143] Additionally, for every provision in the California Labor Code for which no civil penalty currently exists, the Act establishes a penalty of $100 for the first violation and $200 for each subsequent violation, assessed on a per employee, per pay-period basis.[144] The magnitude of risk under the Act is substantial, given the fact that California's wage and hour laws, discrimination laws, safety, and other employment law provisions fall within its reach.[145]

California law also imposes criminal and civil penalties against an employer that discharges or discriminates against an employee for filing a bona fide complaint or instituting any proceeding in order to assert rights under the jurisdiction of the Labor Commissioner.[146]

In addition, the "California Whistleblower Protection Act"[147] protects public employees of the state when disclosing a violation of any state or federal law or regulation or disclosing activity that is "economically wasteful, or involves gross misconduct, incompetence, or inefficiency."[148]

The Attorney General's office maintains a whistleblower hotline to receive and refer to other governmental authorities for investigation calls relating to possible violations of state or federal statutes, rules, or regulations, or violations of fiduciary responsibility by a corporation or limited liability company to its shareholders, investors or employees.[149] To assure employee notification of whistleblower protections, employers are required to prominently display in lettering larger than size 14 point type a list of employees' rights and responsibilities under the whistleblower laws, including the telephone number of the Attorney General's whistleblower hotline.[150]

PROCEDURES FOR HOTLINE AND OTHER REPORTING TO THE AUDIT COMMITTEE

Considerable attention has been given to the provisions of Sarbanes-Oxley Section 301, which amends Section 10A of the Securities Exchange Act of 1934 to expressly require audit committees of listed issuers to "establish procedures for (A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or

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141 CAL. LAB. CODE § 1103.
142 CAL. LAB. CODE § 1102.5(f).
143 CAL. LAB. CODE §§ 2699(a), 2699.5.
144 CAL. LAB. CODE § 2699(f).
145 CAL. LAB. CODE § 2699(f).
146 CAL. LAB. CODE §§ 98.6-7.
147 CAL. GOV'T CODE § 8547 et seq.
148 CAL. GOV'T CODE § 8547.2(b).
149 CAL. LAB. CODE § 1102.7(a),(b).
150 CAL. LAB. CODE § 1102.8(a).

auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters."[151] Apart from domestic compliance difficulties of implementation, companies with global operations are encountering challenges outside the United States as personal and data privacy concerns are raised, frequently accompanied by "works council" obstacles to unilateral company action.

PROCEDURES APPLICABLE TO IN-HOUSE AND OUTSIDE ATTORNEYS HAVING KNOWLEDGE OF BREACHES OF SECURITIES LAW OR FIDUCIARY DUTIES

Section 307 of Sarbanes-Oxley directs the SEC to issue rules governing certain professional conduct of attorneys appearing and practicing before it.[152] The SEC's Final Rule,[153] specifically prevails over any inconsistent state laws, but it does not preempt ethical rules establishing more rigorous obligations.[154]

(A) MATTERS TO BE REPORTED

Evidence of a material violation[155] of securities law, breach of fiduciary duty,[156] or similar violation by the company or any of its agents, first must be reported by the attorney to the chief legal officer or the chief executive officer of the company. The Final Rule's internal reporting requirements are calculated to allow issuers to take necessary remedial action expeditiously, thereby reducing the adverse impact upon investors.[157]

The Final Rule makes clear that an attorney appearing and practicing before the SEC[158] in the representation of an issuer owes professional and ethical duties to the issuer as an organization; working with and advising the issuer's officers, directors or employees in the course of representing the issuer does not make those individuals the attorney's clients.[159]

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151 15 U.S.C. §78f (m)(4).

152 15 U.S.C. § 7245.

153 Final Rule: Implementations of Standards of Professional Conduct for Attorneys, Securities and Exchange Commission, 17 C.F.R. Part 205, January 29, 2003 (effective August 5, 2003), 68 Fed. Reg. 6296 (February 6, 2003).

154 17 C.F.R. § 205.1.

155 The SEC's Final Rule adopts an objective standard, meaning, "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing or is about to occur." 17 C.F.R. § 205.2(e).

156 Breach of fiduciary duty is defined to include such acts and omissions under federal or state statute or common law as misfeasance, nonfeasance, abdication of duty, abuse of trust and approval of unlawful transactions. 17 C.F.R. § 205.2(d).

157 SEC Final Rule, 17 C.F.R. Part 205, 68 Fed Reg. at 6296-97.

158 The SEC's Final Rule is applicable to attorneys who appear and practice before the SEC by (i) transacting any business with the SEC; (ii) representing an issuer in an SEC administrative proceeding or in connection with any SEC investigation, inquiry, information request or subpoena; or (iii) providing advice with respect to United States securities laws or SEC rules or regulations regarding any document that the attorney has notice will be filed with, submitted to, or incorporated into any document that will be filed with, or submitted to, the SEC. 17 C.F.R. § 205.2(a).

159 17 C.F.R. § 205.3(a).

(B) REPORTING TO THE CHIEF LEGAL OFFICER AND OTHERS

Once an attorney appearing and practicing before the SEC becomes aware of evidence of a material violation by the issuer or by any officer, director, employee or agent of the issuer, the attorney is required to report that evidence to the issuer's chief legal officer, or to both the chief legal officer and the chief executive officer[160] or to a "qualified legal compliance committee" established by the issuer -- provided such a committee had been established *prior to* the report of evidence of a material violation.[161]

A chief legal officer receiving a report is required to cause "appropriate inquiry" to determine whether the reported material violation has occurred, is ongoing or is about to occur.[162] Unless the chief legal officer reasonably believes that no material violation has occurred, is ongoing or is about to occur, he or she must take all reasonable steps to cause the issuer to adopt an appropriate response[163] and advise the reporting attorney thereof.[164] On the other hand, if the chief legal officer determines that no material violation has occurred, is ongoing or is about to occur, he or she is to notify the reporting attorney and advise the reporting attorney of the basis of that determination.[165]

The qualified legal compliance committee must have authority and responsibility to take all appropriate action, including the authority to notify the SEC in the event the issuer fails in any

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[160] 17 C.F.R. § 205.3(b)(1). An attorney supervising or directing another attorney who is appearing and practicing before the SEC in the representation of an issuer is responsible for complying with the reporting requirements when the subordinate attorney has reported to the supervisory attorney evidence of the material violation. 17 C.F.R. § 205.4(c).

[161] 17 C.F.R. § 205.3(c)(1). A qualified legal compliance committee must consist of at least one member of the issuer's audit committee and two or more independent members of the issuer's board of directors having authority and responsibility: (i) to inform the issuer's chief legal officer and chief executive officer of any report of evidence of a material violation; (ii) to determine whether an investigation of a material violation is necessary, and if so, (a) to notify the audit committee or the full board or directors, (b) to initiate an investigation to be conducted by either the chief legal officer or by outside attorneys, and (c) to retain such additional expert personnel as necessary; and (iii) at the conclusion of the investigation (a) to recommend implementation of an appropriate response to evidence of the material violation, and (b) to inform the chief legal officer, the chief executive officer and the board of directors of the results of the investigation and the appropriate remedial measures to be adopted. 17 C.F.R. § 205.2(k)(1),(2),(3).

[162] 17 C.F.R. § 205.3(b)(2).

[163] The SEC's Final Rule defines appropriate response to mean "a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes that (1) no material violation has occurred, is ongoing, or is about to occur; (2) the issuer has adopted appropriate remedial measures, including appropriate steps or sanctions to stop, prevent and remedy any material violation that is ongoing, has yet to occur or has occurred and to minimize the likelihood of its recurrence; or (3) the issuer has retained or directed an attorney to review reported evidence of a material violation and has either (i) substantially implemented remedial recommendations made by the attorney after a reasonable investigation and evaluation of the reported evidence or (ii) has been advised that such attorney may assert a colorable defense on behalf of the issuer in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation." 17 C.F.R. § 205.2(b).

[164] 17 C.F.R. § 205.3(b)(2).

[165] 17 C.F.R. § 205.3(b)(2). Alternatively, a chief legal officer may refer a report to a previously established qualified legal compliance committee and notify the reporting attorney of that referral. 17 C.F.R. § 205.3(c)(2).

material respect to implement an appropriate response that the qualified legal compliance committee had recommended the issuer to take.[166]

An attorney reasonably believing that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer, or reasonably believing that the chief legal officer or the chief executive officer of the issuer has not provided an appropriate response within a reasonable time must report the evidence of the material violation to: (1) the audit committee of the issuer's board of directors; (2) another committee of the issuer's board of directors consisting solely of directors who are not employed directly or indirectly by the issuer and who are not "interested persons;" or (3) the issuer's board of directors.[167]

An attorney receiving an appropriate and timely response to a report of a material violation has no further obligation with respect to that report.[168] However, if the attorney does not reasonably believe that the issuer has made an appropriate response within a reasonable time, he or she must explain his or her reasons therefor to the chief legal officer, the chief executive officer and directors to whom the attorney reported the evidence of a material violation.[169] An attorney who reports evidence of a material violation to a qualified legal compliance committee has satisfied his or her obligation to report the evidence and is not required to assess the issuer's response to the reported evidence of a material violation.[170]

An attorney who reasonably believes that he or she has been discharged for reporting evidence of a material violation may notify the issuer's board of directors, or any committee thereof, that he or she believes the discharge was for reporting evidence of a material violation.[171]

(C) DISCLOSURE OF CONFIDENTIAL INFORMATION

An attorney appearing and practicing before the SEC in the representation of an issuer may reveal to the SEC -- without the issuer's consent -- confidential information related to the representation to the extent the attorney reasonably believes necessary:

> (i) to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors; (ii) to prevent the issuer in an SEC investigation or administrative proceeding from committing perjury, suborning perjury or committing an act likely to perpetrate a fraud upon the SEC in violation of federal law; or (iii) to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property

166 17 C.F.R. § 205.2(k)(4); see n.149 for other qualified legal compliance committee authority and responsibilities.
167 17 C.F.R. § 205.3(b)(3),(4).
168 17 C.F.R. § 205.3(b)(8).
169 17 C.F.R. § 205.3(b)(9).
170 17 C.F.R. § 205.3(c). This means that there is no further obligation to report to the issuer's board or a committee of the board as is the case where the attorney has reported to the chief legal officer. Cf. § 205.3(b)(3).
171 17 C.F.R. § 205.3(b)(10).

of the issuer or investors in the furtherance of which the attorney's services were used.[172]

(D) PENALTIES AND REMEDIES

The SEC may seek civil penalties and remedies against attorneys appearing and practicing before it for a violation of federal securities law.[173] Also, the SEC may initiate administrative disciplinary proceedings seeking censure or temporary or permanent denial of the privilege of appearing or practicing before the SEC.[174]

Attorneys complying in good faith with the Final Rule are insulated by it, and they may not be subject to discipline or other liability under inconsistent standards that otherwise might be imposed by any state or other United States jurisdiction where the attorney is admitted or practices.[175]

Notwithstanding the elaborate and detailed procedures and protections the Final Rule affords reporting attorneys, the Final Rule does not create a private right of action against an attorney, law firm or issuer based upon compliance or noncompliance with its provisions; authority to enforce compliance is vested exclusively in the SEC.[176] Nevertheless, employee-attorneys appearing and practicing before the SEC who report pursuant to Section 307 and then suffer unfavorable personnel action may attempt to invoke Section 806 whistleblower protections. Section 806 protections expressly include the lawful act by an employee "to provide information, cause information to be provided or otherwise assist in an investigation regarding any activity which the employee reasonably believes constitutes a violation of … any rule or regulation of the Securities and Exchange Commission" if the disclosure is made to a person with supervisory authority over the employee or another person working for the employer and having authority to investigate, discover or terminate misconduct.[177] Because the reporting obligation is activated by the SEC's Final Rule, employee-attorneys having an obligation to report internally and suffering adverse action in reprisal for doing so may have recourse through Section 806 for unfavorable personnel action, even though other types of attorneys would not.

ADOPTION OF CODE OF ETHICS FOR SENIOR FINANCIAL OFFICERS

Section 406 of Sarbanes-Oxley[178] directs the SEC to issue rules requiring disclosure in periodic reports of the adoption of a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions.[179] If no such code has been adopted, the reasons must be disclosed.[180] Any change in the code or waiver of its application to senior financial officers must be disclosed by

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172 17 C.F.R. § 205.3(d)(2).
173 17 C.F.R. § 205.6(a).
174 17 C.F.R. § 205.6(b).
175 17 C.F.R. § 205.6(c).
176 17 C.F.R. § 205.7(a),(b).
177 18 U.S.C. § 1514A(a)(1).
178 15 U.S.C. § 7264.
179 15 U.S.C. § 7264(a).
180 15 U.S.C. § 7264(a).

the company immediately.[181] The term "code of ethics" is defined to mean standards reasonably necessary to promote: (1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships; (2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and (3) compliance with applicable governmental rules and regulations.[182] A Final Rule adopted by the SEC amplifies the statute by applying the standard of full, fair, accurate, timely and understandable disclosure to reports and documents communicated to the public.[183] The code of ethics must be reasonably designed to deter wrongdoing, to promote the prompt internal reporting of violations of the code to an appropriate person, or persons identified in the code, and to promote accountability to adherence to the code.[184]

COMPLIANCE AUDIT

(A) PROFILE OF A WHISTLEBLOWER

(1) Individual with access to confidential information.

(a) Attorneys.

(b) Internal auditors.

(c) Financial officers.

(d) Caller to audit hotline.

(e) Others.

(2) Individual whose disclosures are protected by civil or criminal law.

(3) Participant in an internal, congressional, judicial or agency proceeding or investigation.

(B) COMPLIANCE ACTIONS

(1) Identify those responsible for compliance policies concerning corporate ethics, practices and information:

(a) Board members

(b) Executives

(c) Attorneys

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[181] 15 U.S.C. § 7264(b).
[182] 15 U.S.C. § 7264(c).
[183] 17 C.F.R. Part 274 sub-item 102P3(a)(2).
[184] 17 C.F.R. Part 274 sub-item 102P3(a)(2).

(d) Managers

(2) Identify those responsible for receiving whistleblower reports of:

(a) Corporate wrongdoing or violations of corporate standards of conduct (ethics, governance, controls)

(b) Retaliation

(3) Develop and publish concise policies concerning corporate ethics, practices and information.

(4) Communicate to employees the obligation to act lawfully with respect to corporate practices and information.

(5) Obtain written or electronic confirmation from employees that they have received a copy of corporate policies with respect to practices and information and the reporting of wrongdoing.

(6) Recognize that there is no statutory obligation for the (non-attorney) whistleblowing employee to report first to corporate officials, but establish policies and procedures to encourage reporting internally.

(7) Adopt rules of professional responsibility for attorneys conforming to the SEC Final Rule implementing Section 307.

(8) Adopt a code of ethics for senior financial officers conforming to the SEC Final Rule implementing Section 406.

(9) Publicize the whistleblower reporting procedures that have been adopted in the same manner other internal investigation procedures are reliably publicized.

(10) Publicize the protections against retaliation for protected whistleblower reporting. Analogize the protections to those available to individuals reporting other types of violations of company policy, such as reports of sexual or other forms of harassment.

(11) Adopt procedures to address employee activity that is not protected because it does not satisfy the statutory standards of a (i) "lawful act" by the employee or (ii) "reasonable belief" by the employee that the conduct about which information was provided or assistance given constitutes violation of law.

(12) Train those responsible for effectuating policies.

(13) Orient recipients of policy statements.

(14) Update policies and practices periodically as experiences or circumstances change.

(15) Establish a central control log of whistleblower complaints.

(16) Create distinct response procedures and identify distinct legal and/or management teams to address:

(a) whistleblower reports of unlawful activity, including --

(i) employee reports of mail frauds and swindles (18 U.S.C. § 1341), fraud by wire, radio or television (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344) or securities fraud (18 U.S.C. § 1348), or violations of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders (protected by the civil whistleblower provisions) and other federal offenses (protected by the criminal whistleblower provisions).

(ii) employee reports of intended participation or other assistance in a proceeding filed or about to be filed by third parties whose interests may be adverse to those of the corporation.

(b) whistleblower complaints of retaliation; and

(c) attorney reports of securities law violation or fiduciary breaches.

(17) Develop procedures for four distinct types of investigations:

(a) as a corporate matter, the investigation of wrongful activity reported by a whistleblower employee;

(b) as a personnel matter, the claimed retaliation against an employee alleging that unfavorable personnel action has resulted from protected whistleblowing;

(c) as a matter for the chief legal officer, chief executive officer, qualified legal compliance committee or board, investigation of attorney reports of securities law violation or fiduciary breach; and

(d) as a matter for the audit committee or other designees, investigation of reports regarding accounting, internal accounting controls or auditing matters or of violations of the code of ethics for senior financial officers.

(18) Develop procedures for investigation of reports by whistleblowers:

(a) Log the receipt of a whistleblower report or complaint of retaliation;

(b) Notify designated officials and/or attorneys of receipt;

(c) Restrict communications and access of others; and

(d) Follow established procedures for the investigation of whistleblower reports.

(19) Adopt procedures to ensure that those with authority to take unfavorable personnel action are aware of whistleblower protections and statutory sanctions, including corporate and personal liability.

(20) Adopt failsafe notice, review and approval procedures to be engaged before any unfavorable personnel action can be taken against any employee who has filed a whistleblower complaint.

(21) Do not minimize the significance of a Secretary of Labor retaliation investigation, and fully utilize the opportunity to defend with timely responses. Assure that those managing the corporate response are aware of deadlines and know that the Secretary of Labor is empowered to direct reinstatement upon a mere finding of "reasonable cause" prior to a hearing.

MANAGING THE INVESTIGATION

(A) INTAKE

(1) Assure the matter is logged.

(2) Assure the matter is referred to the designated individual or committee.

(3) Assure participation is restricted to those designated.

(B) PROCESSING

(1) Designate those responsible for interviews and document review.

(2) Control distribution of information received.

(C) INVESTIGATION DOCUMENTS AND COMMUNICATIONS

(1) Preserve confidentiality.

(2) Restrict electronic and print access.

(3) Establish a control list of communicators and recipients of information.

(4) Control distribution and duplication of reports.

(D) INVESTIGATION RESULTS

(1) Obtain summary of factual conclusions.

(2) Obtain report by investigator(s) of factual results to decision maker(s).

(3) Assign a number to each copy of report documents and maintain a log showing the document number given to the recipient.

(E) DECISION

(1) Result.

(2) Form.

(3) Communication:

(a) Investigators and interviewers.

(b) Board and management with need to know.

(c) Whistleblower.

(d) Witnesses.

(4) Preserve confidentiality and restrict communication and access to written materials.

(F) POST-DECISION EVENTS

(1) Control communication of report, investigation and decision events and documents.

(2) Develop operating plan and team concerning relations with the whistleblower who has continuing employee status.

(3) Develop operating plan and team concerning relations with the whistleblower whose employee status has ended.

(4) Develop operating plan and team concerning relations with witnesses and other participants in the investigation or decision.

AUDIT CHECKLIST

- Audit language of employment agreements, confidentiality agreements and settlement agreements to ensure that they cannot be construed to bar permissible whistleblowing. Consider adopting language that the individual "will not disclose the lawful information or

activities of [the employer] in a manner not authorized by [this Agreement] or applicable law . . . ."

- Audit procedures for receiving and processing complaints.
- Audit procedures for notifying legal or other designated corporate representatives of the receipt of a whistleblower complaint.
- Audit procedures for taking unfavorable personnel actions against employees who have reported information as whistleblowers.
- Audit policies, procedures and other communications distributed to employees concerning their protections and responsibilities with respect to corporate practices and information.
- Audit policies and communications issued to supervisors and managers concerning their authority and responsibilities with respect to corporate practices and information.
- Audit employee handbooks and other policy statements for provisions concerning the confidentiality of lawful corporate information and prohibitions against communications to others.
- Audit policies controlling electronic and print access to whistleblower complaints, communications, investigation materials, reports and findings.
- Audit employment agreements for the definition of "cause" for termination, and incorporate Sarbanes-Oxley Section 1105 bases for removal of officers and directors,[185] as well as Section 406 code of ethics for senior financial officers.
- Audit procedures concerning settlement agreements take account of Secretary of Labor supervision once administrative proceedings are underway.
- Audit distribution and access to confidential electronic and print communications to:
    - NOTE AS CONFIDENTIAL.
    - CONTROL DISTRIBUTION.
    - CONTROL DUPLICATION.

[185] SEC orders concerning section 10(b) violations of Section 21C(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-3(f), and section 17(a)(1) violations of Section 8A(h) of the Securities Act of 1933, 15 U.S.C. § 77h-1(f).

