



RUNNING THE GAUNTLET:

The Campaign for Credible Corporate Whistleblower Rights

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Preface

On August 14, 2008, President Bush signed into law the Consumer Product Safety Improvement Act of 2008. The law creates new whistleblower protections for an estimated 20 million employees working in the consumer product industry, allowing employees at companies like Mattel and Wal-Mart to challenge corporate product safety abuses that threaten our families. The new employee rights, championed by Senators Claire McCaskill (D-MO), Mark Pryor (D-AR), and Daniel Inouye (D-HI), constitute the most significant breakthrough in corporate free speech protections in U.S. history.

While still untested, these rights, and their congressional sponsors, provide a beacon of hope in an otherwise treacherous legal landscape for private sector employees who speak out in defense of the public. This report explains how we reached this point; why it is necessary to continue to pass sector-by-sector whistleblower laws, despite the promise of a “breakthrough” in corporate accountability in the post-Enron 2002 Sarbanes-Oxley law; and where we still need to go to solidify and streamline the gains made by the recent victory in the consumer product legislation (and analogous recently-won rights for ground transportation employees and defense contractors). The consumer product model provides an historic precedent toward establishing a uniform, coherent system of “best practices” protection for all corporate and other private sector employees. Such a reform was recently introduced by House Education and Labor Committee leaders George Miller (D-CA) and Lynn Woolsey (D-CA). However, until the “best practices” model becomes the rule, rather than the exception, employees’ so-called legal rights are a serious threat to their professional survival.

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Introduction: Whistleblowing in Corporate America

The new millennium ushered in a wave of corporate scandals that cheated ordinary shareholders and employees out of billions of dollars in lifetime savings, investments, and pensions. Over two dozen major accounting scandals followed the discovery in October 2001 of Enron's sham bookkeeping, bribery, and energy market manipulation. Exposed by whistleblowers at Enron, WorldCom, and other companies, these revelations seriously strained public confidence in the stock market and sparked sweeping congressional reforms. Legislators passed the Public Company Accounting Reform and Investor Protection Act – commonly known as the Sarbanes-Oxley Act.

Unfortunately, corporate wrongdoing is not limited to accounting scandals or to large publicly-traded corporations. Every year, thousands of employees from all kinds of business organizations witness wrongdoing on the job. These discoveries may jeopardize the physical or financial wellbeing of others and endanger our shared environment or economy. Whistleblowers may see managers at a nuclear facility violate safety codes, officers of a chemical company dump hazardous waste unlawfully, or a food processing plant executive attempt to sell contaminated meat to consumers.

Most employees remain silent. They conclude that it is not their concern or that nothing they could do would stop the problem. Often, they cannot afford to get themselves into trouble. Others choose to bear witness and speak out. They seek to make a difference by “blowing the whistle” on unethical conduct in the workplace. This may sound like an elaborate task, but even a simple note or a frank discussion with one's supervisors can sometimes suffice to bring about real change.

At the Government Accountability Project (GAP), we define whistleblowers as individuals who use free speech rights to challenge abuses of power that betray the public trust.¹ Their actions have saved the lives of employees, consumers, and the general public, as well as billions of dollars in shareholder and taxpayer funds. They have averted nuclear accidents, exposed large-scale corporate fraud, and reversed the approval of unsafe prescription drugs. But rather than receive praise for their integrity, whistleblowers are often targeted for retaliatory investigations, harassment, intimidation, demotion, or dismissal and blacklisting. Ernie Fitzgerald, a whistleblower who exposed billions of dollars of cost overruns at the Pentagon, described whistleblowing as “committing the truth,” because employers often react as if speaking the truth about wrongdoing were tantamount to committing a crime.²

GAP was created to help employees commit the truth, and thereby serve the public interest. Since 1977, we have provided legal and advocacy assistance to thousands of employees who have blown the whistle on lawlessness and threats to public health, safety, and the environment. This experience has given GAP attorneys and organizers valuable insight into the strategies and hazards of whistleblowing.

In 1977, GAP produced its first whistleblower primer, entitled *A Federal Employee's Guide to the Federal Bureaucracy*. Twenty years later, GAP distilled the knowledge it

had accumulated into a publication entitled *The Whistleblower's Survival Guide: Courage Without Martyrdom*. Then in 2002, GAP, the Project on Government Oversight (POGO), and the Public Employees for Environmental Responsibility (PEER) collaborated to write *The Art of Anonymous Activism: Serving the Public While Surviving Public Service*, which focused on public employees.

Throughout this period, at GAP we saw that a primary obstacle to helping corporate whistleblowers was the legal system, because it is chaotically dysfunctional, and a treacherous gauntlet of obstacles that sabotage any realistic chance for justice. As will be outlined below, more often than not the so called rights are a trap to rubberstamp retaliation against employees who invest time and money by taking them at face value.

Fortunately, times are changing. Significant progress is occurring, both in terms of cultural acceptance and legal rights. When GAP was founded in 1977, whistleblowers were considered traitors. It was a weathervane of change when high level corporate whistleblowers Sherron Watkins of Enron and Cynthia Cooper of MCI joined FBI attorney Colleen Rowling as TIME magazine's 2002 Persons of the Year. After the 2006 congressional elections, a Democracy Corps survey of likely voters rated strengthening whistleblowers rights as the second highest priority for the new Congress, only behind ending illegal government spending.³

Accompanying this cultural sea change have been promising but still treacherous shifts in the legal landscape. In 2002, the Sarbanes-Oxley law pioneered jury access for whistleblowers – access which has since been expanded to cover employees in the nuclear and ground transportation industries, as well as defense contractors and 20 million workers connected with manufacture or sale of some 15,000 retail products regulated by the Consumer Products Safety Commission (CPSC). In December 2007, Representatives George Miller, Chair of the House Education and Labor Committee, and Workplace Protections Subcommittee Chair Lynn Woolsey introduced the Private Sector Whistleblower Protection Streamlining Act, H.R. 4047, to standardize best practices in corporate whistleblower law.

Until genuine rights are the rule rather than the exception, however, whistleblowers will remain vulnerable and powerless. In the meantime, the goal of this report is teaching you how to run the gauntlet of your rights so you will not be attacking yourself when you exercise them. In the interim, we want to help you get the most out of the rights you do have.

This is an introductory guide to your legal options, beginning with the Sarbanes-Oxley Act (SOX) and other federal statutes with whistleblower provisions and concluding with state and common law remedies. It surveys the marketing gap for corporate free speech rights, discerning what is advertised from what you get. It contains practice tips, learned from the often painful experiences of pioneer whistleblowers before you. Let's get started.

RUNNING THE GAUNTLET:

The Campaign for Credible Corporate Whistleblower Rights

There are a number of statutory and common law provisions aimed at safeguarding private-sector whistleblowers. Unfortunately, these protections are neither comprehensive nor well-enforced by government agencies and the courts, in addition to lacking adequate remedies. What has evolved is a patchwork of specific employee legal protections covering environmental, health and safety, labor relations, and civil service issues, though recent legislative developments have consolidated whistleblower protections on the books for employees of publicly-traded companies.

SOX, OSHA AND OTHER FEDERAL WHISTLEBLOWER STATUTES: A MIRAGE OF PROTECTION

In the Sarbanes-Oxley reform law,⁴ enacted after the 2002 Enron and MCI scandals, Senators Patrick Leahy (D.-Vermont) and Charles Grassley (R.-Iowa) attempted to replace 30 years of piecemeal corporate whistleblower protection with one comprehensive law for publicly-traded companies that would protect some 42 million corporate employees. As described earlier, the goal was to ban retaliation against those like Sherron Watkins who challenge “cooking the books” and other concealed misconduct that threatens shareholder investment. The broad corporate free speech law has unprecedented bite – if the Department of Labor (DOL) administrative process does not act within six months, whistleblowers are entitled to a fresh start in federal district court before a jury of their peers. Whistleblowers and their champions celebrated the ground-breaking new rights, which were on par with those against race, sex and religious discrimination. Groups like the Government Accountability Project announced America’s arrival in the “Promised Land” of corporate free speech.

Almost six years later, entrance to the Promised Land has been barricaded by arbitrary barriers that were not in the law as passed by Congress. In the most comprehensive study of SOX whistleblower rights to date, Professor Richard Moberly identifies the many “procedural and boundary hurdles” arising from DOL’s “misapplication of Sarbanes-Oxley’s substantive protections to the significant disadvantage of employees.”⁵ Regrettably, in practice the SOX “breakthrough” has been just one more in a long line of corporate whistleblower laws that routinely approve whatever retaliation is challenged.

Regardless, even paper rights can serve an effective role in a whistleblower strategy. They ensure that employers who retaliate do not get a free ride. Instead, employers may have to spend years enduring the burdens of litigation for reprisals to stick. Filing a lawsuit provides the opportunity to negotiate and settle a case. Furthermore, some people

do win, which sends a message of uncertainty to the industry bullies about what they can continue to get away with.

Most encouragingly, the seed is taking root for a new model of jury trials to enforce corporate free speech rights. The 2002 SOX law was riddled with generalities and implied or indirect rights, because the reform commanded only a fragile congressional majority. But in 2005, Congress reaffirmed the mandate of jury trials for nuclear workers as part of the Energy Policy Act.⁶ Since the November 2006 elections, Congress has intensified the pace of change, passing new laws for corporate ground transportation workers, defense contractors, and in July 2008 for some twenty million employees connected with the manufacture or sale of 15,000 retail products. The new laws all have “best practice” whistleblower rights enforced by jury trials.⁷ A guide to global best practices is enclosed as Appendix 1.

In December 2007, House Education and Labor Committee leaders Lynn Woolsey (D.-California) and George Miller (D.-California) introduced H.R. 4047, the Private Sector Whistleblower Streamlining Act of 2007, to provide coverage for nearly any corporate employee, to create one consistent set of legal boundaries and rules, and to impose lessons that would directly correct many of the unanticipated problems in SOX’ first five years. This is an initiative that everyone concerned with corporate whistleblower rights should support. Until passage of a reform like the Miller-Woolsey bill, the law will fall woefully short of protecting your right to “commit the truth.” It is enclosed as Appendix 2.

Your Rights on Paper

For nearly 35 years, in order to strengthen enforcement Congress has included remedial, anti-retaliation witness protection clauses in 50 laws, including 40 that protect workers of corporations, government contractors or government corporations. They include*:

- Age Discrimination in Employment Act, 29 U.S.C. § 623(d)
- Americans with Disabilities Act, 42 U.S.C. § 12203
- Armed Forces civilian employee protection, 10 USC § 1587*
- Asbestos School Hazard Abatement, 20 U.S.C. § 4018
- Asbestos School Hazard Detection and Control, 20 U.S.C. § 3608
- Aviation Reform Act, 49 U.S.C. § 42121
- Banking, Credit Unions, 12 U.S.C. § 1790 (b)
- Banking, FDIC, 12 U.S.C. § 1831j
- Civil Rights Act of 1871 protection for constitutional rights of state and municipal government employees, 42 USC 1983*
- Civil Rights Act of 1871 protection against conspiracy to obstruct justice or intimidate witnesses, 42 USC 1985
- Civil Rights of Institutionalized Persons Act, 42 USC 1997d
- Civil Service Reform Act/Whistleblower Protection Act 5 U.S.C. § 2302(b)(8)*

* Denotes a law limited to government employees.

- Clean Air Act, 42 U.S.C. § 7622
- Coast Guard whistleblower protection 46 U.S.C. § 2114*
- Commercial Motor Vehicle Safety Act/Surface Transportation Assistance Act, 49 U.S.C. § 31105
- Comprehensive Environmental Response, Compensation and Liability (“CERCLA” or “Superfund”) Act, 42 U.S.C. § 9610
- Defense Contractors, 10 U.S.C. § 2409
- Employment Retirement Income Security Act (ERISA), 29 USC 1132(a), 1140
- Energy Reorganization Act, 42 U.S.C. § 5851
- Fair Labor Standards Act, 29 U.S.C. § 215(a)(3)
- False Claims Act, 31 U.S.C. § 3730 (h)
- Family and Medical Leave Act, 29 U.S.C. § 2615(a) & (b)
- FBI whistleblower protection, 5 USC 2303*
- FDIC employee protection, 12 USC 1790(b)
- Federal Rail Safety Act/National Transit Systems Security Act, 49 U.S.C. § 20109
- Federal Reserve Bank employee protection, 31 U.S.C. § 5328*
- Foreign Service Act of 1980, 22 USC 3905 *
- Government Contractors, 41 U.S.C. § 265
- Job Training and Partnership Act/Workforce Investment Act, 29 USC 2934(f)
- Lloyd-LaFollette Act, federal employee’s right to petition Congress 5 U.S.C. § 7211*
- Longshoreman’s and Harbor Workers’ Compensation Act, 33 U.S.C. § 948a
- Major Fraud Act, 18 U.S.C. § 1031(h)
- Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1854-5
- Military Whistleblower Protection Act, 10 USC 1034*
- Mine Health and Safety Act, 30 U.S.C. § 815(c)
- National Labor Relations Act, 29 U.S.C. § 158(a)(4)
- Occupational Safety and Health Act, 29 U.S.C. § 660(c)
- Pipeline Safety Act, 49 U.S.C. § 60129
- Racketeering Influenced and Corrupt Organizations Act (“RICO”), 38 USC 1961-68
- Safe Containers for International Cargo Act, 46 § U.S.C. 1506
- Safe Drinking Water Act, 42 U.S.C. § 300j-9(I)
- Sarbanes-Oxley Act, 18 U.S.C. § 1514A
- Solid Waste Disposal Act, 42 U.S.C. § 6971
- Surface Mining Act, employee protection 30 § U.S.C. 1293
- Title VII anti-retaliation, 42 U.S.C. § 2000e-3(a)
- Toxic Substances Act, 15 U.S.C. § 2622
- Uniformed Services Employment and Reemployment Rights Act of 1994, 38 USC 4311(b)*
- Water Pollution Control Act, 33 U.S.C. § 1367
- Welfare and Pensions Disclosure Act, 29 USC 1140.

These laws traditionally were concerned with environmental protection, worker safety or public safety in the transportation industry. In 1986 Congress included anti-retaliation

rights for government contractors challenging fraud in federal contracts or related payments such as Medicare.⁸ Until SOX, the whistleblower provisions found in each law were generally restricted to employees challenging specific violations laid out in that particular statute. They were implemented through a multi-stage administrative process at DOL enjoying only limited review by federal appeals courts. The table below compares the nuts and bolts of successive models for Department of Labor adjudication. To review the text of every whistleblower law administered by OSHA, and accompanying DOL Regulations, go to <http://www.osha.gov/dep/oia/whistleblower/index.html>.

	Who is Covered?	What counts as protected conduct?	Statute of Limitation	Burdens of proof⁹	Access to Court for jury trial?	Available remedies
Occupational Safety and Health 11(c) (1970)	“Any employee” who discloses an occupational health or safety violation.	Initiating an OSHA complaint or testifying in an OSHA proceeding	30 days	Mt. Healthy	No	Reinstatement and back pay.
Toxic Substances Control Act of 1976 (TSCA)	“Any employee” who discloses a violation of the TSCA.	Commencing, testifying or assisting in any proceeding under the Act.	30 days	Mt. Healthy	No	Reinstatement, back pay, attorney’s fees, compensatory, and exemplary damages.
The Clean Air Act of 1977	“Any employee” who discloses a violation of the CAA.	Commencing, testifying, or assisting in a proceeding under the act or related plan.	30 days	Mt. Healthy	No	Reinstatement, back pay, attorney’s fees, compensatory damages.
Aviation Investment and Reform Act (AIR21) (2000)	An employee of an air carrier, subcontractor or contractor.	Provide, file, or testify about any violation or any related provision or law.	90 days	WPA	No	Reinstatement, back pay, attorney’s fees, compensatory damages.
Sarbanes-Oxley Act, Sec. 806 (2002)	An employee of a publicly-traded company.	Disclose any violation of SEC rules or law relating to shareholders.	90 days	WPA	Yes, after an 180-day administrative exhaustion period.	Reinstatement, back pay, attorney’s fees, special and compensatory damages.
Energy Re-organization Act of 1974, Sec. 5851 (amended in 2005)	An employee of a licensee of the NRC, an employee of DOE and NRC, and contractors.	Disclose a violation of the ERA or Atomic Energy Act or refuse to assist in a violation.	180 days	WPA	Yes, after a 365-day administrative exhaustion period.	Reinstatement, back pay, attorney’s fees, compensatory damages.

Surface Transport. Assistance Act of 1982 (amended in 2007)	An employee of a commercial motor carrier.	Disclose any violation of safety/security standard or refuse to operate vehicle.	180 days	WPA	Yes, after a 210-day administrative exhaustion period.	Reinstatement, back pay, attorney's fees, compensatory and punitive damages.
Consumer Product Safety Improvement Act of 2008	An employee of a manufacturer, distributor, or retailer of a CPSC product.	Disclose any violation of any rule related to product safety or refuse to violate.	180 days	WPA	Yes, after a 210-day administrative exhaustion period.	Reinstatement, back pay, attorney's fees, compensatory and special damages.

With the exception of drastic inconsistencies on court access, in broad brush terms these statutes all operate in much the same manner. However, each has its own particular, and frequently arbitrary, twist. As a rule, corporate workers who challenge violations through internal or public disclosures and experience retaliation can file a complaint with the Department of Labor (DOL). DOL's Occupational Safety and Health Administration (OSHA) conducts an initial investigation and issues an order.¹⁰ The order is nonbinding if either side requests an administrative hearing before an Administrative Law Judge (ALJ). Government-wide and defense contractor laws substitute an Office of Inspector General investigation for OSHA and subsequent administrative due process rights. If they do not obtain relief through the IG investigation, defense contractor whistleblowers can go to court for a jury trial. The rest cannot.¹¹

Why are many corporate whistleblower cases investigated by an agency whose mission is occupational safety and health? One of the first whistleblower laws requiring the investigation of retaliation complaints was the Occupational Safety and Health Act of 1970, so it was logical for OSHA to take on that role, and the agency developed a body of investigators with relevant training. As other laws were enacted, DOL decided to consolidate most mandatory retaliation investigations in one place, initially its Wage and Hour Division, but the hub was moved to OSHA in order to take advantage of accumulated expertise. Unfortunately, the placement has created a mission conflict for the agency, which also has been resource starved even for its primary activities. Oddly, whistleblower rights under laws like the Employment Retirement Income Security Act (ERISA)¹² and the Fair Labor Standards Act (FLSA)¹³ do not include any judicial review, which also is the case for OSHA anti-retaliation rights.

Both parties then engage in the discovery process, which involves requesting documents, interviewing witnesses, and taking statements from the parties. According to DOL regulations, the ALJ has broad discretion to limit examination of witnesses or documents in pre-hearing discovery,¹⁴ and may issue subpoenas to force witnesses to appear. After discovery is complete, the ALJ presides over a full hearing with whatever witnesses and evidence are necessary for the ALJ to come to a decision. DOL regulations permit ALJs or the Department of Labor's final decision-making body, the Administrative Review Board (ARB), to waive any provision in "special circumstances" or if good cause is shown.¹⁵

The ALJ issues a ruling at the conclusion of the hearing, but either party can appeal that ruling to the Administrative Review Board (ARB) of the DOL within 30 days of the ALJ's decision. The ARB has authority to act on behalf of the Secretary of Labor and issue final decisions on SOX claims. If the ARB does not accept the case within 30 business days, the decision of the ALJ becomes final. If the ARB accepts the case, the ALJ's decision is set aside pending ARB review, though any preliminary restraining orders that were issued remain in effect. The ARB does not hear new evidence, but only reviews the evidence presented to the ALJ and decides whether the ruling was correct; i.e., supported by substantial evidence for findings of fact and not arbitrary or capricious for conclusions of law.¹⁶

Sarbanes-Oxley added another option. As with equal employment opportunity laws, there is now a "use it or lose it" rule for the administrative process. If DOL does not issue a final decision within 180 days and the delays are not on your account, you can move your case to federal district court *de novo* – meaning starting with a clean slate – and let a jury decide the outcome.¹⁷ A summary of SOX *on paper* follows:

Who is covered

As written SOX applies to publicly-traded companies and their officers, employees, contractors, subcontractors, or agents.¹⁸ According to the DOL's commentary on its regulations, the key criterion for liability of subsidiaries, affiliates or other subunits is whether the parent company controls the specific decision of a subordinate organization that retaliates, also known as the "integrated employer test."¹⁹ This is a qualifier not found in the law enacted by Congress. The term "employee" extends to a person presently or formerly employed, or a current applicant for employment with the company. There is no explicit restriction on extending rights to a foreign employee working for a domestic firm abroad, and coverage has been upheld in those cases if the corruption and decision to retaliate originated in the United States.²⁰ Suits can be brought against both companies and individuals who retaliate against whistleblowers.

Reasonable belief

To qualify for protection, an employee must have an actual, or genuine, believe in the truth of the allegations, and that belief must be reasonable to an objective third party. Whether your belief is reasonable depends on the knowledge available to a reasonable person in the same circumstances and with the employee's training and experience. While your conclusion can be mistaken, factually your disclosure must be specific and definite about what alleged misconduct violates the law. A general inquiry will not suffice.²¹

Protected conduct

The statute covers disclosures of alleged mail fraud, wire fraud, securities fraud, violations of SEC regulations, or of any law relating to fraud against shareholders.

Since SEC rules require disclosure of any information “material” (i.e. makes a meaningful difference) for the value of investments,²² the law should protect those revealing misconduct that creates serious legal liability, affects public confidence, or otherwise threatens stock values. As written, the law creates a broad free speech mandate, limited only when consequences are insignificant. Environmental lawlessness covered in other whistleblower statutes, product safety breakdowns, and corruption scandals are just a sampling of the wrongdoing employees should have the right to challenge.

Protected audiences

The law explicitly shields disclosures to federal law enforcement, regulatory personnel, congressional or committee offices, and supervisors or others in the corporate chain of command. Unstated, but consistent with all corporate whistleblower laws, is the premise recognized by Department of Labor precedents since 1980²³ that protecting disclosures to the government also sweeps in otherwise lawful communications with the media or public, although it may be necessary for whistleblowers to communicate that the government will be one of their audiences.²⁴

What retaliation is illegal?

The law lists traditional reprisals like termination, suspension, and demotion, but also bans actions that “threaten, harass, or in any other manner discriminate against the employee” because of lawful, protected activity.²⁵ The Supreme Court recently interpreted this to mean any act that “might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”²⁶

Legal burdens of proof

This factor decides how high the bar is for an employee to win. SOX has modern burdens of proof from federal civil service law that are more realistic for whistleblowers than traditional DOL standards. You must show by a “preponderance of the evidence” – meaning more likely than not – that your protected activity was a “contributing factor” in the unfavorable personnel action – meaning the disclosure, alone or in combination with other factors, prompted the retaliation.²⁷ If you pass that test, you have established a *prima facie* case. But the employer can still win through an affirmative defense by proving with “clear and convincing evidence” that it would have taken the same action even if the employee had not engaged in the protected activity. “ ‘Clear and convincing evidence’ is “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”²⁸ To sum up, to meet *your* legal burdens you will need to meet the following four criteria:²⁹

1. you made a protected communication;
2. the employer knew or should have known of your disclosure;

3. you suffered an unfavorable personnel action; and
4. the protected activity was a “contributing factor” in the alleged discrimination.

Remedies

The SOX section for general and compensatory damages entitles prevailing employees to “all relief necessary to make the employee whole,”³⁰ including reinstatement with the seniority the employee would have had but for the discrimination, back pay with interest, and reasonable attorney’s fees and other costs of litigation. Compensatory damages include reimbursement for emotional distress and pain and suffering, and loss of reputation.³¹

Criminal liability

SOX toughens the criminal penalties for retaliating against whistleblowers who disclose corporate violations of federal law provided the disclosure is to a law enforcement official. Corporations can be fined \$500,000 and individuals \$250,000 along with up to ten years in prison.³² The prospects of criminal enforcement, though, are dubious. A milder one-year prison penalty had been on the books for almost three decades, yet the Department of Justice never prosecuted a single case.

In sum, SOX adds court access to pioneer whistleblower protection provisions tucked into various federal environmental, securities, or public health and safety statutes passed in the 1970s and 1980s. While many follow analogous models, most have particular idiosyncrasies. There are no consistent, predictable rules for which employees are protected; how soon they must file a complaint; what disclosures are protected; where the case may be brought; what legal burden of proof must you meet; what, if any, interim relief is available; and what final relief. SOX incorporates other law by reference, specifically the procedures and legal burdens of proof in the 2001 AIR21 legislation, protecting airlines whistleblowers.³³

The Energy Policy Act of 2005 is the most commonly used of these environmental statutes with approximately two or three-dozen cases filed under it each year. Between 10 and 20 whistleblower cases are filed yearly under the Clean Air Act and the Water Pollution Control Act individually. The SWDA, SDWA, and TSCA are each the basis for fewer than 10 whistleblower suits per year typically. CERCLA (the Superfund law) is the least commonly used of these statutes, averaging fewer than one case per year since its enactment.

Your Rights in Reality

Unfortunately, there is little common ground between what is advertised and what you get. In practice, corporate whistleblower law is a patchwork of inconsistent protections. With scattered exceptions, if you file a lawsuit you are sentencing yourself to

an administrative process with unforgiving, short deadlines and a maze of bureaucratic procedures. Decisions are seldom issued in less than two to three years, and most statutes do not offer any chance for interim relief. When interim reinstatement is permitted, as under SOX, the employer may request that it be denied upon persuasive evidence that the employee would be dangerous or threatening back at work.³⁴ And at the end of the process, you will have spent years and five or six figures for results that predictably rubberstamp whatever retaliation you challenged. Below are common questions about whistleblower rights in practice that we are asked at GAP and the painful answers we must offer.

Who do the corporate whistleblower laws protect and for what kind of whistleblowing?

In any given industry, potentially any employee or almost no one. The limited forms of misconduct legally eligible for protected dissent are like a road with more potholes than pavement. Any corporation *may* violate environmental or occupational safety laws, so all employees have rights to challenge those particular types of misconduct. But for other potentially greater abuses of power, they may have none. No one can be sure; it helps to have a lawyer to navigate.

For example, an employee at a meat packing plant has free speech rights when challenging the release of fecally contaminated water flowing into a river. But the same employee has none when challenging fecally contaminated meat and poultry that shows up on our families' dinner tables. An employee of a pharmaceutical company has protection for disclosing false statements in financial reports to shareholders, but none for challenging false statements to the government and the public about potentially lethal drug safety hazards. An illustration of the stakes is the threat of unnecessary heart attacks from killer pain killers such as Vioxx, which ultimately killed some 50,000 Americans.

If I speak out, when will I become a legally-recognized whistleblower?

You may not have rights until you communicate with the government, which means you are proceeding at your own risk trying to work within the corporate system. It used to be that challenging corporate misconduct internally triggered rights because this was deemed an "essential preliminary step" for responsible disclosures to the government. Recent decisions have disqualified protection for internal disclosures, pushing employees to contact the government behind their employer's back, lest they waive their rights.

Am I protected for refusing to violate the law?

Rarely. Unlike the Whistleblower Protection Act for government workers and an increasing number of state laws, most DOL-administered laws only protect you for making noise. Again, the recent laws reverse that trend. But as a rule, if you try to walk the talk you are walking the plank.

How long do I have to act on my rights?

It ranges from 30-90 days in most DOL-administered statutes, or 180 days year in newer laws for nuclear, ground transportation, defense contractor and retail product safety whistleblowers. In theory, the law could provide flexibility through a doctrine called “equitable tolling,” which allows you to meet a deadline if you asserted your rights on time, but merely in the wrong forum. In practice, this does not always pan out. In one case, DOL extended the deadline to a year, but in the instance of Henry Immanuel the case was thrown out even though he initially asserted his rights less than two weeks after being fired.

The Right Time, but the Wrong Place

Henry Immanuel’s ordeal is illustrative of the surreal problems whistleblowers face with filing timely complaints. Immanuel, an employee of an organic market, was fired for blowing the whistle when the market threw five gallons of toxic industrial cleaner into a trash dumpster. Within 13 days he filed a reprisal complaint with the Maryland Occupational Safety and Health (MOSH) agency. After six months, MOSH informed him that they were the wrong agency to handle the dispute. He then began contacting government offices to find out where he was supposed to assert his rights. Despite a series of false leads and dead ends, he found out about OSHA and immediately filed a complaint. Seventy-three days had passed since he had been fired, 43 days over the normal 30 day deadline. According to DOL, it was too late and there were no excuses. Without explanation, the ARB disregarded a series of prior rulings extending deadlines up to one year due to similar circumstances and Immanuel was left with no legal recourse.³⁵

How long will this case take?

In theory, most statutes give the Department of Labor 90 days for a decision. In reality, expect to be twisting in the wind for at least two to three years. Six years is not uncommon. One DOE employee who was vindicated for blowing the whistle on radioactive releases at nuclear weapons facilities waited 14 years while victories on the merits kept getting sent back to perfect technicalities. Note that it took DOL 4.5 years to tell Mr. Immanuel that he was too late to keep his rights by filing 43 days after the 30 day deadline.

Can I get any interim relief while I’m waiting?

In five recent DOL-administered laws -- AIR21, the Energy Policy Act, SOX, the 9/11 law and the CPSC law, you can get a ruling for interim relief, but not the other laws.

What do I have to prove to win; what tests will I have to pass?

It all depends on which law. Most are governed by antiquated burdens of proof from 1974. An employee must prove that protected activity is the “primary, motivating factor” in order to establish a basic *prima facie* case. Then the burden of proof shifts and the employer can still prevail if it proves by a preponderance of the evidence that it would have taken the same action for independent reasons.³⁶ Under the eight most recent DOL-administered statutes, the more modern standards of the Whistleblower Protection Act³⁷ apply. The employee only has to prove protected activity was a “contributing [or relevant] factor” for a *prima facie* case, and the employer must prove its independent justification with “clear and convincing” evidence.

Will I be able to go to court for my day in court?

A few statutes, such as banking reforms passed in response to the 1990s savings and loan scandal, allow employees to go straight to court on a retaliation claim, but do not provide for jury trials. For a handful of other laws, you can take your case to a federal court if DOL misses the deadline for taking administrative action. Under SOX, this deadline is 180 days. For defense contractor employees and ground transportation workers under the 9/11 law, you can go to court if there is no final ruling within 210 days. For claims under the Energy Reorganization Act, 365 days. Under all the other DOL-administered statutes: you are a prisoner of DOL’s administrative law system until it reaches a final decision after two to three years, if you’re lucky. To appeal this decision, most DOL-administered laws provide limited review in US Courts of Appeals, but not all. In the case of mine safety, an autonomous “external” commission substitutes for court review. In occupational safety retaliation cases review is entirely within OSHA, and secret. For all practical purposes, your rights are none of your business.

If I go to court, will a jury decide whether my rights were violated?

In theory, that is possible under SOX, but no one has made it to a jury trial since the law’s 2002 passage. The same is true for nuclear whistleblowers, although their access was not established until the 2005 Energy Policy Act. Some courts have warned they may not accept jury trials despite clear congressional intent because of a technical error in drafting the law.

When it’s over, will I understand why I won or lost?

While there are exceptions, increasingly the rule is not to supply an answer or even hints about “why” any given conclusion was reached.

The bottom line: What are my chances of winning?

If there is no realistic chance of success, the law is a trap that offers legal wrongs, not rights. Unfortunately, that has been the case with DOL-administered corporate

whistleblower laws. The percentage of whistleblowers who win formal victories, compared to those who file complaints, ranges from 2.9% for nuclear workers from 2003 through 2007 under the Energy Reorganization Act, to 9.8% for airlines whistleblowers from 2000 through 2007 under the AIR 21 law.

Professor Richard Moberly has conducted the most comprehensive study to date of SOX, a law that is representative of the DOL legal system generally. Looking at over 700 administrative decisions, he analyzed its track record in its first three years. He found a 3.6% win rate at the OSHA level, 6.5% with Administrative Law Judges, and not a single case where the ARB ordered retaliation to stop.³⁸ Similarly, OSHA went from 2005 to 2007 without backing a single SOX whistleblower, despite receiving some 250 complaints of SOX retaliation annually. According to the Labor Department's own statistics, it is getting worse. Through September 2, 2008, out of 858 SOX complaints since 2002 that were not settled, there have been 17 rulings in favor of whistleblowers and 841 against – a bottom line win rate for employers of over 98%.³⁹ The silver lining is that a significant number of SOX complainants settle their cases, 11.6% at the OSHA level and 18.3% with ALJs.⁴⁰ Even then, with such a remote chance of winning whistleblowers negotiate their settlements from a position of weakness.

What went wrong?

Part of the reason is a hostile political environment at the Department of Labor. Since the turn of the millennium, DOL's corporate whistleblower system has become dysfunctional. The two Achilles' heels are at the beginning and end of the process – the Occupational Safety and Health Administration and the Administrative Review Board. To put whistleblowers' frustrations at OSHA in perspective, one of the catalysts for this report was requests from whistleblowers for help tracking down their cases when OSHA loses them. During OSHA investigations of a whistleblower claim, the agency regularly engages in double standards on the right to counsel, access to evidence and the opportunity to read the other side's arguments for an informed rebuttal. One reason for these inconsistencies is that the agency is starved for resources. To illustrate, OSHA has not received any more resources for SOX cases, although the new law created a 12% workload increase.

After an administrative hearing, the ARB holds the final word on behalf of the Secretary of Labor. Unfortunately, it is the legal system's least competent venue for appellate review. The members are political appointees selected by the Secretary of Labor for two year terms – effectively minor league patronage appointments without enough time to accumulate expertise even if they were qualified. They view their jobs as part time, sometimes living in their home states except to fly in for meetings where they frequently tell career staff how to rule without first reading the staff's memoranda analyzing the record and the law. While the Office of Administrative Law Judges is well-respected, realistically it cannot overcome the legitimacy breakdown that surrounds it.

The Administrative Review Board regularly keeps secret both the evidence and arguments supporting its conclusions. With its reasoning cloaked in secrecy, DOL throws out prior rulings and doctrines at will. As discussed above recent decisions no longer consistently protect job duties as “essential preliminary steps” to a government disclosure, reversing over two decades of case law without explanation. This means those with jobs like safety inspectors, auditors, or truck drivers risk waiving their whistleblower rights when issuing the types of reports or notices that are necessary for quality control

The ARB seems to have a blind spot for congressional language. For example, the Board functionally has erased the common catchall provision providing protection for any action to assist the government in carrying out the purposes of the relevant statute. Recent rulings on the STAA truck safety law are illustrative. In one case, the ARB disregarded a driver’s refusal to drive while impaired due to sleep deprivation – specifically protected activity in that statute. Instead, it created a loophole with the explanation that the employee should not have been hired in the first place.⁴¹ Despite unqualified statutory language banning any discrimination on the basis of legally-protected activity, discrimination no longer counts until there is a victim. For example, companies can issue retaliatory warning letters at will, even though it means the person can be fired for the next offense. While that might help to demonstrate retaliatory intentions behind the later action, the warning letter will not support a lawsuit despite serving as Strike One to set up termination.⁴²

The early fate of the SOX whistleblower law demonstrates how a clear congressional mandate can be eliminated through hostile judicial activism, generally at the administrative law level. The key problem is that whistleblowers do not have access to the law. A gauntlet of procedural roadblocks and shrunken boundaries for protection, almost none created by Congress, kicks out the cases before anti-retaliation rights can be considered upon their merits. To illustrate, while employers won 93.5% of ALJ decisions, only 24.1% of outcomes were based on whether retaliation occurred.⁴³ The rest were screened out by the procedural or boundary firewalls. If your case reaches a hearing on retaliation grounds, you have a fair chance to win. Professor Moberly’s study found that 55.6% of whistleblowers won in that context.⁴⁴

While the case law is still evolving and split in many instances, the law was drastically stunted in early test cases and regularly has been rewritten since. Rulings such as those below illustrate how the DOL, with initial complicity of the courts, largely undermined SOX’s promise to allow juries to determine justice for whistleblowers challenging significant corporate misconduct.

- Despite explicit statutory language and SEC definitions, subsidiaries have been exempted by ignoring the scope of liability in the underlying law -- securities regulations.⁴⁵ In truth, subsidiaries of publicly-traded corporations are inextricably connected to the financial make-up of their parent companies. Unless these subsidiary employees are protected under SOX provisions, large-scale fraud might go unreported and undetected, resulting in significant harm to investors.

- The Generally Accepted Accounting Principles (GAAP) is a framework of guidelines widely used for proper financial bookkeeping and relied on by the Securities and Exchange Commission (SEC). Challenging the failure to honor it is not a protected activity unless the specific GAAP standard that was violated also mirrors an SEC rule.⁴⁶
- In some instances, SOX' broad anti-fraud mandate has been narrowed only to protect disclosures of shareholder fraud, despite specific statutory language that includes wire, mail and banking fraud, violation of "any Federal law relating to fraud against the shareholders," and violation of any SEC rules, including failure to disclose misconduct that could materially threaten the shareholder's interest.⁴⁷
- It is not protected to disclose mere illegality. The government must also have caught the wrongdoing and taken action to punish the misconduct, and the government penalty must have a direct and specific impact on shareholders' stock value. There is no protection for challenging any misconduct with "speculative" punitive consequences. So much for the freedom to warn.⁴⁸
- The legislative text of SOX only requires proving discrimination, not any specific motivation. In an authoritative preview of SOX regulations, in regulations for non-SOX statutes the Department of Labor has re-written Congress' prerogative by requiring proof of "retaliation," which entails specific evidence of animus or hostility toward you because of the whistleblowing.⁴⁹
- Rather than grant a whistleblower a fresh trial when DOL fails to issue a decision within 180 days, in issuing its SOX regulations DOL suggested that courts send the case back to DOL with an order to issue a decision.⁵⁰
- Although the statute's section on relief for prevailing whistleblowers is entitled "Compensatory Damages," one court refused to consider this type of relief because these two words were not repeated again in the text of that section.⁵¹
- The same court ruled that contrary to the stated mandate of the new law, there is no right to a jury trial because of the compensatory damages linguistic confusion.⁵²

These examples illustrate the loopholes carved into the law. While there are conflicting rulings, these lowest common denominators make your rights tenuous at best. To be sure, SOX remains a pioneering statute in its legislative mandate. It creates a back door into federal court for when the politicized administrative law system becomes a "black hole." And the possibility of settlement cannot be discounted. After a rare preliminary victory in a 2008 case, a UPS employee won a \$254,000 settlement under the trucking whistleblower law.⁵³ While a different context than SOX, it demonstrates the potential from OSHA support. Yet in tangible results, SOX remains a paper tiger. It may

be useful as part of a legal campaign, but you are doomed if you come to depend solely on these legal rights.

The Pyrrhic Victories of David Welch

In 1999, David Welch became Chief Financial Officer for the Bank of Floyd. Floyd is a small agricultural town in central Virginia. Less than 500 people call it home. The Bank of Floyd runs a handful of branches in the state, and, at the time Welch began working there, local residents owned almost all of the bank's stock and its board of directors consisted of local farmers. This fact did not distract Welch from his responsibilities as CFO. He approached his new position with tenacity, and soon noticed a trend that suggested insider trading.

According to Welch, the bank's president Leon Moore and other officers frequently purchased bank stock shortly before making public announcements that would send the stock price up. In addition to suspicions of insider trading, Welch discovered that the bank's accounting books were being prepared to make profits seem larger than they truly were. In one instance, the bank gave out loans equaling \$195,000 then wrote them off purportedly because they did not expect them to be repaid. When the loans ended up being repaid, however, Moore instructed the payments be recorded as income. At other times, Moore's travel and entertainment costs were recorded in one quarter and then shifted to another quarter.

In October 2001, Welch approached Moore about suspicions of insider trading going on at the bank. When Welch did not get answers, he notified the Securities and Exchange Commission. Three months later, Welch wrote a memo to Moore comparing the fraudulent activities within the Bank of Floyd to those which went on at Enron. When SOX went into effect later that year, Welch expressed to Moore and others at the bank that he would not sign any financial documents he believed to be deliberately misleading. Bank officials requested a meeting with Welch to discuss his allegations, but Welch refused when he was told he could not bring his own lawyer. The board of directors fired him for insubordination.

Welch filed a SOX claim with the Occupational Safety and Health Administration (OSHA). After losing with OSHA, the Administrative Law Judge (ALJ) ruled in his favor, making Welch the first employee to win under the new law. The ALJ ordered Welch's reinstatement with back pay, however the bank refused to comply and appealed the decision to the Administrative Review Board (ARB). It argued that SOX "was never intended to protect employees from a dispute with management. We know what it was intended to do. It was really intended to root out corruption in big companies that employ a lot of people." A four year string of appeals ensued.

In July 2007 the ARB abruptly reinterpreted the law and held that Welch was not a whistleblower. In a blockbuster decision, the ARB ruled that 1) despite statutory language there was no protection for disclosures of wire fraud; 2) despite statutory language only requiring a reasonable belief of a material threat to shareholders, an

employee must disclose an actual violation resulting in actual harm to qualify as a whistleblower; and 3) despite contrary statutory language, what the SEC characterizes as violations of its rules on Generally Accepted Accounting Principles and internal controls do not qualify for protected whistleblowing.

On August 5, 2008 the Fourth Circuit issued a ruling that made a caricature of Welch's rights, while restoring some rationality to interpretations of SOX. On the positive side, the court rejected DOL holdings that a whistleblower must cite specific violations of a law for a protected disclosure, or even be right. Mistaken allegations that are factually specific deserve protection if reasonably believed. Further, it restored the rights of juries to rule on whether an employee qualifies for protection through having a genuine, actual belief, the subjective dimension of the reasonable belief test. It held that Mr. Welch's disclosure of misclassifying assets deserved protection, even if the false statements did not affect the company's bottom line income.⁵⁴

Amazingly, the court ruled against Mr. Welch anyway. Its rationale? His lawyers hadn't filed legal briefs early enough in the lawsuit demonstrating the link between misconduct and relevant SEC laws, so the Department of Labor could ignore whether there was one, and render Mr. Welch's rights irrelevant.⁵⁵

Even while he was "winning," Welch struggled to find employment. He sold his family farm, moved to Ohio, and eventually secured a position on the accounting faculty of Franklin University in 2007. His insight after exercising his rights? "When you're in deep trouble, keep your mouth shut and your eyes straight ahead."⁵⁶

Practice Tips

While the statute and interpretations impose significant barriers, the likelihood of unhappy endings in SOX cases would be minimized if whistleblowers knew how to navigate their legal maze of rights. Few lawyers have mastered the process. By sharing lessons learned below, we hope to prevent avoidable frustration. This section draws from the more comprehensive nuts and bolts guide found in Appendix 3, which summarizes the investigative manual used by the OSHA Office of Whistleblower Protection and interviews with the office's staff.

Getting started

Get a lawyer as quickly as possible. This applies even for the initial informal stage of an OSHA investigation. The terrain is saturated with legal traps and a mistake at the OSHA stage cannot always be cured in the later due process phase. Further, the initial OSHA stage may be the best chance for a settlement, which will benefit from a skilled professional to negotiate the best terms.

Beware of the time limits in your statute and give yourself ample margin for error. Keep in mind that they run from the date you learn of the alleged discrimination, not

when it takes effect.⁵⁷ Settlement negotiations will not toll or suspend the time limits even if the employer waives them.⁵⁸ It is irrelevant if you raised your reprisal allegations in another forum or even if government officials misled you.⁵⁹ In Professor Moberly's study, 33.8% of employee losses were due to missing the statute of limitations.⁶⁰

Understanding OSHA

File your complaint with the regional office. OSHA's national Office of Whistleblower Protection (OWP) sets policy and reviews outcomes, but the cases are investigated and decided by regional OSHA offices. Learn the procedures of the region where you file and seek to learn how it interprets the law, such as its interpretations for protected conduct. There are enormous variations in how they conduct business.

Be sensitive that OSHA's whistleblower program is hopelessly understaffed. The regional offices have a staff of 80, including ten managers and no administrative support, to conduct the first stage processing for 17 whistleblower statutes. Many SOX investigators do not have laptop computers. Some have only been trained in antiquated, hostile legal standards, although they must interpret laws with modernized burdens of proof more favorable to employees. No additional resources were granted for handling the new flood of SOX complaints, around 250 per year or 13% of the agency's expanded caseload. A headquarters staff of four reviews 1,800-1,900 cases annually and handles a steady stream of inquiries.

Take the informal stage seriously. While OSHA's findings are inadmissible as evidence in later administrative or court proceedings, ALJ's and judges regularly refer to them. Their "first impression" is significant.

Packaging your rights

In your initial complaint, you must allege all the legal elements to prevail. Otherwise, OSHA will not investigate. In some contexts, it is a good strategy to hold back, but here that would be fatal. By statute you must present a referenced script for victory, otherwise OSHA will rule against you without further investigation.⁶¹ Even if all the elements are covered, also list all the possible acts of alleged discrimination in your initial complaint. Otherwise the investigator may not consider them if submitted subsequently. First impressions on paper are all important in this setting.

If you work for a subsidiary, include the parent corporation as a defendant. That may preserve your rights when the parent company is a publicly-traded corporation but the subsidiary isn't.⁶²

List all of the individual defendants in your lawsuit before the OSHA investigation is over. It may be too late to add them later when you seek a hearing.⁶³ Further, the

specter of broader personal liability creates a greater incentive within the employer's ranks to settle the case.

In your complaint, if relevant, specifically allege retaliation for disclosing violations of the SOX requirements for independent auditors and adequate internal controls for financial records. These are in SOX sections 202 and 404, respectively. Citing these specific provisions helps avoid your case being limited solely to shareholder fraud.

In your complaint and any relevant legal arguments, explain why you believe the specific alleged misconduct in your disclosure proves how each particular law is violated. It does not matter how obvious the connection seems. Mr. Welch ultimately lost his case for failing to spell it out in the early stages of his case.

For the same reason, whenever relevant also charge retaliation for disclosing wire fraud if a telephone or fax has been used. This again helps prevent your case from being restricted to shareholder fraud issues.

If relevant, reinforce your complaint by attacking the company's failure to construct a professionally credible hotline. This is its own SOX requirement, and can help demonstrate disregard for your anti-retaliation rights as well.

Making the case to OSHA

Develop a relationship with the investigator. At the informal stage, your rights will be handled in a more personal and idiosyncratic manner than later before an Administrative Law Judge. Respect what the OSHA investigators are coping with. It is not realistic to expect that they will dig beneath the surface or take initiatives beyond reviewing what is submitted. You must be sensitive to the investigator's workload, know and meticulously respect the region's procedures, and spell out your evidence.

Press hard to have an initial interview. Although not a formal entitlement, it is hard for OSHA to refuse because the employer has an explicit right to meet with the investigator in your case.⁶⁴ This may be your only chance to establish credibility and earn the investigator's trust.

Persistently build the record in a responsible way. Get the investigator's email, and immediately and steadily update the record of evidence. Transfer it in well-organized files, limited to significant factual material. Skip the background. Do not bombard the investigator with a stream of updates. Instead, supplement the record every other week to show trends in evidence unless there is a major development.

Insist on your right to know and rebut the employer's defense. Until last year, you did not have the right to know the employer's response to your complaint. Now you are entitled to know the substance, but only in summary form – not necessarily the actual response. And you may not get that if you are not assertive. Make sure the

investigator confirms there are no opposing arguments you have not had an opportunity to read and rebut.

Do not expect the OSHA investigator to negotiate a settlement. For decades the Department of Labor played a significant role mediating settlements during the informal stages of whistleblower complaints. However, that is no longer the case. OSHA personnel for SOX and other recent laws are investigators whose primary role is fact finding. Although they will cooperate with settlement efforts, that is not their responsibility.

Pursue victory on at least one or two elements of the retaliation claim. Even if you lose at the OSHA level, this will put you on higher ground in negotiating a settlement before seeking a hearing.

SOX Eligibility Criteria

All of the following must have occurred for a federal court to have jurisdiction over a SOX claim:

- The employee filed a complaint with OSHA within 90 days of the alleged employer misconduct
- If OSHA's preliminary order was in favor of the employer, the employee appealed that order
- At least 180 days elapsed since the filing of the complaint
- The Secretary of Labor, as represented by the ARB, did not issue a final decision on that complaint
- The lack of a final decision within 180 days was not due to bad faith on the employee's part
- The employee gave 15 days notice to the ALJ or the ARB and the other party before filing in Federal District Court

Getting to court

Notify the official presiding over your DOL case 15 days before moving it to district court. This is necessary to prevent the transfer from being rejected on procedural grounds.⁶⁵

Be prepared to argue that Congress intended your right to a jury trial. There is conflict within the courts on this issue because it is only granted indirectly by reference in the statute.⁶⁶ Until the issue is resolved, you must be prepared to argue it directly. The Senate floor speech by the provision's chief sponsor, Senator Leahy, reflects an unequivocal congressional mandate to provide jury trials for whistleblowers.⁶⁷ The former is more significant authority than the latter.

In your initial complaint, state that in order to be "made whole" you must receive specific "damages" for all the losses caused by whistleblower discrimination. These

legal magic words are extremely important to preserving your right to a jury trial because only a claim for damages beyond reinstatement and back pay is what is called “an action at law” and only actions at law permit jury trials. Specifically list and seek monetary compensation for items like loss of reputation, emotional distress, lowered credit rating, medical bills, and any other direct or indirect impact of the unlawful reprisal.

When you go to court on a SOX case, add a “public policy exception state tort claim” to your lawsuit. Public policy exception cases are common law wrongful discharge tort lawsuits available in most states and discussed more below. Their common feature is a right to a jury trial because they are by definition “actions at law” seeking money damages. By including a companion state claim, you will guarantee that a jury will hear all the evidence and make factual determinations on misconduct and associated retaliation in the trial, at least for relevant fact finding on the tort claim. That almost certainly will overlap with your SOX case. Further, punitive damages generally are available, increasing the value of statutory whistleblower cases commonly limited to “make whole” remedies.

Beware that the Labor Department may try to block court access if you persist in seeking normal pre-trial discovery at the administrative level. In its 2007 regulations on analogous statutes, the, DOL warned that not consenting to expedited discovery proceedings could constitute bad faith and disqualify your access.⁶⁸

On balance, complete as much discovery as possible at the administrative level before moving a case to court. Although an ALJ is much less sympathetic than a jury, the administrative level is much less expensive than the same procedures in federal court. Finish as much of that work as possible before going to court. What you learn also may help spark a settlement that obviates the need for a trial.

Finally, if you do win at any level, be prepared to accept reinstatement, even if only for a brief transition period before you find another job or resign. Refusing to go back can cause you to lose back pay.⁶⁹

THE FALSE CLAIMS ACT

The federal False Claims Act, originally passed in 1863 and amended to include whistleblower protection in 1986, is another potential source of relief for an employee who blows the whistle on illegal activities by a government contractor or grantee who engages in civil fraud.⁷⁰ The Act targets attempts at defrauding the government in contracts, grants or other reimbursement programs like Medicare. Employees who disclose the fraud may engage in protected conduct “in furtherance of an action under this section.”⁷¹ All who file a *qui tam* lawsuit seeking recovery of fraudulent profits are protected. Because the False Claims Act only applies when an employer defrauds the government, its scope is more limited than SOX. The False Claims Act *qui tam* and anti-retaliation provisions may be modified under legislation that has passed the House of Representatives, and the Senate Judiciary Committee.⁷² The only significant change

currently contemplated for the anti-retaliation provision is expanding the statute of limitations to six years, corresponding to the time frame for associated anti-fraud lawsuits – and the longest on the books for whistleblowers challenging fraud in government contracts.

Unlike the 90-day statute of limitations under SOX, early False Claims Act judicial precedents allow lawsuits to be filed up to six years after the adverse employment action was taken⁷³ – the same as to file a *qui tam* lawsuit challenging the fraud. That time frame would be codified by the pending legislation,⁷⁴ because a 2005 Supreme Court decision pegged the statute of limitation to varying time limits for analogous state public policy tort claims.⁷⁵ Under the 7th Amendment, since the law provides damages whistleblowers who file under the False Claims Act are entitled to a jury trial in federal district court.⁷⁶ Early on in the False Claims Act's history whistleblowers did not have much success, but recent history has been more satisfactory. As of September 2005, the Taxpayers Against Fraud website reported that FCA claimants had settled or won over retaliation 1,000 cases, and lost over 2,750.⁷⁷

There are signs of increasing judicial hostility in administering the False Claims Act. One disturbing trend has been the courts' rejection of employees' warnings of illegality as protected activity. The employee must make an explicit accusation of defrauding the government, identifying specific legal violations in order to qualify for protection.⁷⁸ An even more sweeping loophole predated for corporate employees of government contractors the Supreme Court's *Garcetti v. Ceballos* ruling⁷⁹ that government employees lose their free speech rights when they are performed as part of their official job duties.⁸⁰

Section 4 of the 1986 amendments provides that “Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against... by his or her employer because of lawful acts done by the employee... in furtherance of an action under this section” is entitled to “all relief necessary to make the employee whole.”⁸¹ This “make whole” relief provision is similar to that of SOX and can include reinstatement with the seniority status the employee would have had but for the discrimination, *double* back pay plus interest, and compensation for any “special damages,” including litigation costs and reasonable attorneys' fees.⁸² An employee may bring an action in US federal district court in order to obtain this relief. The availability of federal district court as a venue and the possibility of double back pay as a remedy can make this Act attractive for employees to whom it applies.

STATE STATUTORY PROTECTIONS

The common law rule is that at-will employees, meaning all employees who do not work under contract for a definite term, may be fired at any time for any reason or no reason. However, recognizing that punishing employees who identify illegal public health and safety hazards is often contrary to the public interest, 18 states have enacted whistleblower protection laws that provide an exception to this employment-at-will

doctrine.⁸³ With exceptions, state whistleblower statutes are the legal system's lowest common denominator for whistleblower rights.

State law may include or exclude particular classes of employees. Statutes may also cover only disclosures of particular kinds of wrongdoing. The law may vary greatly from state to state, and even where statutory language is very similar, it is the way the courts apply these laws that makes some jurisdictions preferable to others. Consulting a seasoned practitioner is a useful supplement to your own statutory research.

California, New Jersey, and Florida have particularly strong state whistleblower protection statutes that cover private as well as public employees.⁸⁴ These laws do not overlap completely as they have somewhat different statutory protections and procedures. Although it is unlikely that an individual will have a choice as to which of these laws, if any, to seek protection under, we briefly present them here to demonstrate some of the stronger whistleblower provisions available under state law.

California's corporate whistleblower protection law provides that employers may not make or enforce any rule or policy that would discourage employees from disclosing information to a government or law enforcement agency where that information discloses a violation of law or noncompliance with a state or federal rule or regulation.⁸⁵ The employee must show only that his or her protected conduct was a factor that contributed to the retaliatory action.⁸⁶ The employer then must prove by "clear and convincing evidence" that it would have taken the adverse action irrespective of the protected activity.⁸⁷ This law provides not only for the same remedies as most whistleblower laws, but also for up to \$10,000 in punitive damages per violation.⁸⁸ The state Attorney General's office also maintains a hotline for whistleblowers, and refers callers to the most appropriate government authority.⁸⁹ California also has a law that protects government employees who expose fraud, waste, or other illegal behavior.⁹⁰

New Jersey's Conscientious Employee Protection Act (CEPA) prohibits "retaliatory actions" against any employee who has a "reasonable basis for objecting to a co-employee's activity, policy, or practice."⁹¹ A retaliatory action is defined as the discharge, suspension, or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.⁹² An employee need only prove by a preponderance of the evidence that he engaged in protected conduct, was subject to subsequent retaliation, and that there was a causal connection between the conduct and the retaliation.⁹³ On the downside, New Jersey whistleblower law does not provide for jury trials.⁹⁴

Florida has separate whistleblower acts for public and private employees. Under the latter, private employers are prohibited from retaliating against an employee who has engaged in any of three activities.⁹⁵ First, employers cannot retaliate against an employee who, under oath and in writing, discloses or threatens to disclose an employment activity, policy or practice that is in violation of a law, rule, or regulation.⁹⁶ This prohibition on retaliatory action only applies, however, if the employee has first notified his employer in writing about the illegal conduct and given the employer a reasonable time to correct the

situation.⁹⁷ Second, employers cannot retaliate against an employee who provided information to, or testified before, any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of law, rule, or regulation by the employer.⁹⁸ And third, employers cannot retaliate against employees who refuse to participate in any activity, policy, or practice that is in violation of a law, rule, or regulation.⁹⁹

COMMON LAW PROTECTIONS

Even in the absence of state statutory protections, many common law, or judicially-created, remedies exist. In 44 states and the District of Columbia, courts recognize that disclosing a wide variety of violations falls within the public policy exception to the employment-at-will doctrine.¹⁰⁰ Various courts have found that reporting improper accounting, mismanagement of property, or fraud; actions that violate public welfare, consumer, or employee protection laws; activities that violate commercial, trade restraint, or environmental protection laws; and misconduct relating to transactions with governmental entities fall under the public policy exception.¹⁰¹ Although the specifics vary by jurisdiction, employees filing common law actions must prove that they were fired in retaliation for engaging in a protected activity, and that their discharge was in violation of a clear public policy.¹⁰² This is usually the case when an employee is fired for reporting a violation of state or federal law.¹⁰³ It is important to note that it is the discharge, and not the reported misconduct, that must be contrary to public policy, but that a retaliatory discharge is usually against the public policy when the alleged misconduct is itself of serious concern to the public.¹⁰⁴

Not all employees who are fired after disclosing misconduct by their employers have a case at common law, and those boundaries vary arbitrarily. Generally, the misconduct must be a violation of the Constitution or a specific state or federal law.¹⁰⁵ Violating a code of ethics or a set of guidelines is often insufficient.¹⁰⁶ The reason for this is that enforcing a professional or private code of conduct is not necessarily as strongly in the public interest as enforcing state and federal laws.

In some cases, even an employee who reports illegal activity and is discharged as a result cannot bring a common law suit. This occurs mainly when the employee was neither asked to participate in or to keep silent about illegal activities, nor had any affirmative obligation to discover wrongdoing. In essence, an employee who is not obliged to go looking for illegality but does so anyway may or may not be eligible to file a suit at common law, depending on the jurisdiction.¹⁰⁷

An employee must also disclose illegal conduct in a “reasonable” way and to an appropriate person. “Reasonable” disclosures must have at least a substantial chance of bringing the misconduct to light in such a way that it can be corrected.¹⁰⁸ In some jurisdictions, filing a claim under a state whistleblower statute precludes pursuing a common law action such as a tort or contract lawsuit, but in others the two claims can be made simultaneously.¹⁰⁹ However, it is always possible to file both federal and state claims.¹¹⁰

RECOMMENDATIONS AND CONCLUSIONS

In passing SOX, the Senate Judiciary Committee found that the necessity to reform corporate whistleblower rights stemmed from the “patchwork and vagaries” of a diverse set of state and federal laws.¹¹¹ These include a dozen federal environmental and regulatory statutes, the False Claims Act, state legislation, and common law of varying strength and scope. SOX is a pioneering reform because it systematically extends corporate freedom of speech in principle, solidifies modern legal burdens of proof, and creates the right to seek justice from a jury. But to date it has helped few whistleblowers actually achieve justice. In practice its scope has been drastically shrunk until it no longer is relevant to consolidate corporate whistleblower rights. Access to jury trials has proved elusive, and other institutions from OSHA to courts have engaged in systematic, hostile activism against the congressional mandate. It is a sobering reminder of the limitations that even the most ambitious whistleblower laws have in practice. Remember that your legal rights are a resource, not a solution. Use them as part of your survival strategy, but do not depend on them.

Most important, do not be passive about settling for your rights as they currently exist. There are many major steps before corporate freedom of speech becomes a reality, starting with leadership by corporate executives. But a milestone would be a system of legal rights that are a resource for corporate whistleblowers, rather than a threat.

The central recommendation from this survival guide is enactment of legislation that institutionalizes a coherent, uniform system of best practices legal rights. H.R. 4047, the Private Sector Whistleblower Protection Streamlining Act (Appendix 2), literally reflects that standard for all federal laws affecting public health or safety. While its scope should be expanded to cover all federal law, it is the broadest legislation pending that would create consistent, best practices rights. It is not a pioneer statute in the sense of expanding the current standards for legal rights. Congress has passed truncated versions of H.R. 4047 three times since November 2006, for ground transportation, defense contractor, and some 20 million workers connected with manufacture or sales of 15,000 retail products regulated by the Consumer Products Safety Commission. The legislation is a good housekeeping measure to replace hit and miss chaos with systematic rights reflecting modern standards.

This reform also is a win-win from every perspective. Currently neither management nor employees can be sure what the boundaries of free speech rights are without a lawyer to guide them through the maze of some three dozen different, overlapping laws that have different ground rules. That is a lose-lose for the status quo. All will benefit if they know where they stand. That means replacing the current legal anarchy with clear, comprehensive rules of the game.

H.R. 4047 is a win-win in tangible terms as well. It will help companies take advantage of whistleblowers as a resource against internal fraud, which is a significant drain on corporate resources. Even more significant, it will provide corporate leaders with

the knowledge necessary for effective leadership, if they choose to listen to the messengers. Beyond mere protection for government disclosures, H.R. 4047 creates a safe channel for whistleblowers to serve as an organization's best early warning signal to minimize or prevent avoidable disasters.

For whistleblowers, one tangible benefit will be more immediate: You will have a fair chance to defend yourself when asserting your rights against retaliation. More intrinsically, you will have the legal right to freedom of speech when you choose to act as a public citizen on the job.

All those who benefit from responsible whistleblowing should send a message to our elected leaders demanding their commitment to this reform, by co-sponsoring it in the House or introducing it in the Senate. To date it is in its infancy, with only a handful of Democratic House co-sponsors, and no Republicans. Companion legislation has not yet been introduced in the Senate. That could and should change quickly, if all those who benefit from whistleblowing make their voices heard. Three times in the last two years, Congress has adopted the same principles to help enforce broader laws. Your active participation can make a difference. It is time for us all to blow the whistle on America's corporate whistleblower laws.

ENDNOTES

¹ Under the Whistleblower Protection Act (WPA), the legal definition of whistleblowing applied to government workers is disclosing information that an employee reasonably believes is evidence of illegality, gross waste, gross mismanagement, abuse of power, or substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8)

² Joanna Gualtieri, *When the Whistle Blows*, CA MAGAZINE (August 2004), http://www.camagazine.com/index.cfm/ci_id/22181/la_id/1.htm.

³ Democracy Corps Frequency Questionnaire, Greenberg Quinlan Rosner (February 2007) at 14-15.

⁴ The Public Company Accounting Reform and Investor Protection Act of 2002, US Public Law No. 107-204, 116 Stat. 745 (July 30, 2002), also known as the Sarbanes-Oxley Act of 2002.

⁵ Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WILLIAM & MARY LAW REVIEW 65-6 (Fall 2007).

⁶ P.L. 109-058 (August 8, 2005), 42 U.S.C. § 5851.

⁷ 41 U.S.C. § 31105 (surface transportation employees), 49 U.S.C. § 20109 (public transportation and railroad employees), 10 U.S.C. § 2409 (defense contractor employees), H.R. 4040 (Consumer Product Safety Improvement Act of 2008, became Public Law 110-314 on August 14, 2008).

⁸ 31 U.S.C. § 3730(h).

⁹ Most of the DOL-administered whistleblower statutes passed prior to 1989 do not specify the burdens of proof necessary to demonstrate unlawful retaliation. In these situations, the burdens default to those specified by the Supreme Court in *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 286-87 (1977), which require the employee to demonstrate that protected conduct was a primary or predominate motivating factor in the employer's decision to take an employment action. Once demonstrated, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that it would have taken the action in the absence of the protected conduct. In 1989, the Whistleblower Protection Act (WPA) lowered the employee's burden to demonstrate that protected conduct was a "contributing" factor, and the employer must then meet its burden by clear and convincing evidence. 5 U.S.C. § 1221(e). Nearly every corporate law passed since 1989 reflects the WPA burdens.

¹⁰ There is no ALJ appeal or opportunity for a hearing when employees blow the whistle on occupational safety violations of the OSHA law itself. 29 USC 660(c).

¹¹ 41 U.S.C. § 265; 10 U.S.C. § 2409.

¹² 29 USC 1140

¹³ 29 U.S.C. § 215(a)(3)

¹⁴ 29 C.F.R. § 24.107(b). Use or misuse of this discretionary power has been a source of deep frustration. If administrative law judges limit otherwise relevant discovery, complainants may be denied their due process right to study information necessary to assert their rights, and may never get the opportunity to have their cases fully heard. A full and fair presentation of the case is critical to serving the Sarbanes-Oxley Act's purpose of protecting whistleblowers from retaliation. *See generally English v. General Electric Co.*, 496 U.S. 72 (1990).

¹⁵ 29 C.F.R. §§1980.115, 24.115. The statutory basis for this provision is uncertain. Of particular concern is the suggestion that an ALJ may waive a rule even without good cause, in “special circumstances.”

¹⁶ 29 C.F.R. § 1980.109(c) and 110(a), and 29 C.F.R. § 24.109(e) and 110(a).

¹⁷ 18 U.S.C. § 1514A(b)(1)(B).

¹⁸ 18 U.S.C. § 1514A(a).

¹⁹ 69 Fed. Reg. 52107 (1999)

²⁰ *O’Mahony v. Accenture, Ltd*, 537 F.Supp.2d 506, 513-15 (S.D.N.Y. 2008); *Neuer v. Bessellieu*, 2006-SOX-132 (ALJ Dec. 5, 2006); *Penesso v. LLC International, Inc.*, 2005-SOX-16 (ALJ Mar. 4, 2005)

²¹ *Welch v. Chao*, No. 07-1684 (4th Cir. Aug. 5, 2008), slip op., at 9-12 (“*Welch 4th Cir.*”); *Van Arsdale v. International Game Technology*, 498 F.Supp.2d 1321 (D.Nev. 2007); *Allen v. Stewart Enterprises, Inc.*, ARB 06-081 at 10, 2004-SOX-60 (ARB July 27, 2006).

²² Robert Vaughn, *America’s First Comprehensive Statute Protecting Corporate Whistleblowers*, 57 Admin. L. Rev. 1, 9-19 (2005).

²³ *Wedderspoon v. Milligan*, 80-WPCA-1, slip op. of ALJ, at 10-11 (July 11, 1980), adopted by SOL (July 28, 1980); *Donovan v. R.D. Andersen Constr. Co.*, 552 F. Supp. 249 (D. Kan. 1982); *Dobreuenaski v. Associated Universities, Inc.*, 96 ERA-44, D&O of ARB, at 9 (June 18, 1998); *Simon v. Simmons Industries, Inc.*, 87-TSC-2, D&O of SOL, at 4 (Apr. 4, 1994), citing *Legutko v. Local 16, International Brotherhood of Teamsters*, 606 F. Supp. 352, 358-59 (E.D.N.Y. 1985, *aff’d*, (2d Cir. 1988); *Nunn v. Duke Power Co.*, 84-ERA-27, D&O of Remand by Deputy SOL, at 13 (July 30, 1987).

²⁴ *Donovan v. R.D. Andersen Const. Co.*, 552 F.Supp. 249, 253 (D. Kan.1982); *Dobreuenbraski v. Associated Universities, Inc.*, 96-ERA-44, D&O of ARB, at 9 (June 18, 1998); *Simon v. Simmons Industries, Inc.*, 87-TSC-2, D&O of SOL, at 6 (April 4, 1994), *aff’d on other grounds* 49 F.3d 86, 88 (8th Cir. 1995).

²⁵ 18 USC 1514A(a)

²⁶ *Burlington Northern and Santa Fe Railway Company v. White*, 548 U.S. 53, 68 (2006).

²⁷ See 49 U.S.C. § 42121(b)(2)(B)(iii) (2006).

²⁸ *Peck v. Safe Air International, Inc.*, ARB 02-028 at 6, 2001-AIR-3 (ARB Jan. 30, 2004) (citing BLACK’S LAW DICTIONARY 1201 at 577 (7th ed. 1999).

²⁹ *Welch 4th Circ.*, *supra* at 8; *Klopfenstein v. PCC Flow Techs. Holdings Inc.*, ARB 04-149, 2004-SOX-00011 (ARB May 31, 2006).

³⁰ 18 U.S.C. § 1514A(c).

³¹ *Bohac v. Dept. of Agriculture*, 239 F.3d 1334, 1341 (Fed.Cir.2001) (citing *Restatement (Second) of Torts* §§ 905, 906); *cf. Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057, 1064 (5th Cir.1981); *Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1332, 1334(S.D. Fla. 2004).

³² 18 U.S.C. § 1513(e).

³³ 49 U.S.C. § 42121.

³⁴ The DOL made clear that the security risk exception to the preliminary reinstatement remedy applies only when an employee's reinstatement "might pose a significant safety risk to the public" in terms of physical violence. In the event of such circumstances, the DOL may still require "economic reinstatement," meaning that DOL may require the employer to provide the employee who suffered the reprisal with their normal compensation and benefits. 29 C.F.R. § 1980.105(a)(1) and supplemental commentary, 69 *Fed. Reg.* 52103 (2004).

³⁵ *Immanuel v. The Railway Market*, ARB 04-462, 2002-CAA-20 (ARB Dec. 5, 2005); testimony of Henry Immanuel, before the House Education and Labor Subcommittee on Workforce Protection (May 15, 2007)

³⁶ The burdens of proof are drawn from a 1977 Supreme Court decision, *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977).

³⁷ 5 U.S.C. § 1221(e).

³⁸ Moberly, *supra* at 90.

³⁹ Jennifer Levitz, "Whistleblowers are Left Dangling," *The Wall Street Journal* (Sept.4, 2008), at 3.

⁴⁰ Moberly, *supra* at 96.

⁴¹ *Blackann v. Roadway Express, Inc.*, ARB 02-115, 2000-STA-38 (ARB June 30, 2004).

⁴² *West v. Kasbar, Inc.*, ARB 04-155, 2004-STA-34 (ARB Nov. 30, 2005); *Agee v. ABF Freight System, Inc.*, ARB 04-182, 2004-STA-40 (ARB Dec. 29, 2005)

⁴³ Moberly, *supra* at 90, 103-05.

⁴⁴ Moberly, *supra* at 121.

⁴⁵ 1 *Bothwell v. American Income Life*, 2005-SOX-57 (ALJ Sept 19, 2005). *But see* 18 U.S.C. § 1514A(a); "Company" means a corporation, a partnership, an association, a joint-stock company, a trust, a fund, or any organized group of persons whether incorporated or not; or any receiver, trustee in a case under title 11 of the United States Code or similar official or any liquidating agent for any of the foregoing, in his capacity as such. 15 U.S.C. § 78c(a)(19) and 15 U.S.C. § 80a-2(a)(8).

⁴⁶ *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15, (ARB May 31, 2007), slip op. at 12 ("Welch ARB").

⁴⁷ *Livingston v. Wyeth*, 520 F.3d 344, 353 (4th Cir. 2008); *Bishop v. PCS Admin. (USA), Inc.*, 2006 WL 1460032, *9 (N.D. Ill. May 23, 2006); *Wengender v. Robert Half International, Inc.*, 2005-SOX-59 (ALJ Mar. 30, 2006).

⁴⁸ Livingston, *supra*, at 352-53.

⁴⁹ 29 C.F.R. § 24.102(a).

⁵⁰ 69 *Fed. Reg.* 52111 (Aug. 24, 2004).

⁵¹ Murray, *supra*.

⁵² *Murray v. TXU Corp.*, 2005 WL 1356444, slip op. at 1-3 (N.D. Tex. 2005).

⁵³ “UPS Pays \$254,000 to Mechanic Following Whistleblower Investigation,” OH&S, www.ohsonline.com (Mar. 20, 2008).

⁵⁴ *Welch 4th Circ.*, *supra* at 8-13.

⁵⁵ *Id.* at 14.

⁵⁶ Adam Geller, *The whistleblower’s unending story*, ASSOCIATED PRESS (April 26, 2008).

⁵⁷ Moberly, *supra* at 107; 29 C.F.R. § 1980.103(d).

⁵⁸ *Id.* at 107-08; *Szymonik v. TyMetrix, Inc.*, 2006-SOX-50 (ALJ Mar. 8, 2006).

⁵⁹ *Hoff v. Mid-States Express, Inc.*, ARB 03-051, 2002-STA-6 (May 27, 2004); *Immanuel, supra*.

⁶⁰ Moberly, *supra* at 107.

⁶¹ 49 U.S.C. § 42121(b)(2)(B)(i); 18 U.S.C. § 1514A(b)(2)(A).

⁶² *Bothwell v. American Income Life*, 2005-SOX-57 (ALJ Sept 19, 2005); *Klopfenstien v. PPC Flow Technologies Holdings, Inc.*, 2004-SOX-11 (ALJ July 6, 2004).

⁶³ *Bozeman v. Per-Se Technologies, Inc.*, 456 F.Supp.2d 1282 (N.D.Ga. 2006); *Hanna v. WCI Communities, Inc.*, 348 F. Supp. 2d 1322 (S.D. Fla. Dec. 2, 2004).

⁶⁴ 29 C.F.R. § 1980.104(e); Moberly, *supra* at 126.

⁶⁵ 29 C.F.R. § 1980.114(b).

⁶⁶ Compare *Murray, supra*, with *Hanna v. WCI Communities, Inc.*, 348 F. Supp.1322 (S.D. Fla. Nov. 18, 2004).

⁶⁷ As Senator Leahy reaffirmed on the Senate floor, “... [I]f there is not final agency decision within 180 days of the complaint (and such delay is not shown to be due to the bad faith of the claimant) may he or she may bring a de novo case in federal court with a jury trial available.” See United States Constitution, Amendment VII, 42 USC 1983, 148 *Cong. Rec.* at S7420.

⁶⁸ 69 *Fed. Reg.* 52110 Supplementary information on 29 C.F.R. § 1980.107.

⁶⁹ *Kalkunte v. DVI Fin. Servs.*, 2004-SOX-56 (ALJ July 18, 2005).

⁷⁰ 31 U.S.C. § 3729 (2006).

⁷¹ *Id.* at § 3730(h). Those challenging criminal fraud have identical protection under the Major Fraud Act. 18 USC 1031(h).

⁷² False Claims Correction Act of 2007, H.R. 4854, 110th Cong., §3(h) (2007). For further information, see the website of Taxpayers Against Fraud, www.taf.org.

⁷³ *Neal v. Honeywell, Inc.*, 33 F. 3d 860, 865 (7th Cir. 1994).

⁷⁴ False Claims Correction Act of 2007, H.R. 4854, 110th Cong., §4(b)(1) (2007).

⁷⁵ *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005); *United States ex rel. Lujan Aircraft Co.*, 162 F.3d 1027, 1034-35 (9th Cir. 1998) (upholding one year

California statute of limitations); *United States e. rel. Ackley v. IBM*, 110 F. Supp. 2d 395, 404-05 (D. Md. 2000) (upholding three year Maryland statute of limitations)

⁷⁶ *Murray, supra*.

⁷⁷ Taxpayers Against Fraud, www.taf.org/statistics.htm.

⁷⁸ *U.S. ex rel. Scott v. Metropolitan Health Corp.*, 375 F.Supp.2d 626 (W.D. Mich. 2005), affirmed 234 Fed.Appx. 341, 2007 WL 1028853, *cert. denied* 128 S.Ct. 1225; *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948 (5th Cir. 1994), *cert. denied*, 513 US 1154.

⁷⁹ 547 U.S. 410 (2006)

⁸⁰ *Maturi v. McLaughlin Research Corp.*, 326 F. Supp. 313 (D.R.I. 2004), *affirmed* 413 F.3d 166.

⁸¹ False Claims Amendment Act, PL 99-562, 100 Stat. 3157 (1986) (Amendment to 31 U.S.C. § 3729(h)).

⁸² *Id.*

⁸³ Devine, *Courage Without Martyrdom: The Whistleblower Survival Guide*, Government Accountability Project (1997) at 135. *See generally* Stephen Kohn, *Concepts and Procedures in Whistleblower Law*, SM027 ALI-ABA 1169 (Dec. 2006), <http://www.whistleblowers.org/private.htm> Robert Vaughn, *State Whistleblower Statutes and the Future of Whistleblower Protection*, 51 ADMINISTRATIVE LAW REVIEW 581 (1999).

⁸⁴ *E.g.* N.J. Stat. Ann. § 34:19-8, Cal Lab Code § 1102.5, Fla. Stat. § 448.102 (2006).

⁸⁵ Cal. Lab. Code § 1102.5 (2006).

⁸⁶ *Id.*

⁸⁷ 2003 Cal. Legis. Serv. Ch. 484 (West).

⁸⁸ Cal. Lab. Section 1102.5(f).

⁸⁹ *Id.* at § 1102.7 (2006).

⁹⁰ Cal. Gov't Code § 5847.

⁹¹ N.J. Stat. Ann. § 34:19-1 (2006).

⁹² *Beasley v. Passaic County*, 873 A.2d 673 (N.J. Super. Ct. App. Div. 2005).

⁹³ *Schlichtig v. Inacom Corp.*, 271 F. Supp. 2d 597 (D.N.J. 2003).

⁹⁴ *Abbamont v. Piscataway Township Bd. Of Ed.*, 570 A.2d 479 (N.J. Super. Ct. App. Div. 1990).

⁹⁵ Fla. Stat. § 448.102 (2006).

⁹⁶ *Id.* at § 448.102(1).

⁹⁷ *Id.*

⁹⁸ *Id.* at § 448.102(2).

⁹⁹ *Id.* at § 448.102(3).

¹⁰⁰ Kohn, *supra*.

¹⁰¹ 105 A.L.R.5th 351 (2003).

¹⁰² *Acuff v. IBP Inc.*, 65 F.Supp.2d 866 (C.D. Ill. 1999).

¹⁰³ *Northport Health Servs, Inc. v. Owens*, 158 S.W.3d 164 (Ark. 2004).

¹⁰⁴ 105 A.L.R.5th 351 (2003).

¹⁰⁵ Kohn, *supra*.

¹⁰⁶ *Emerick v. Kuhn*, No. CV 94-0460869S, 1995 WL 405678 (Conn. Super. Ct. June 14, 1995).

¹⁰⁷ *See, e.g., Darnall v. AN Homecare, Inc.* No. 01-A-01-9807-CV-0034, 1999 WL 346225 (Tenn. Ct. App. 1999); *Jie v. Liang Tai Knitwear Co.*, 107 Cal. Rptr.2d 682 (Cal.Ct. App. 2001).

¹⁰⁸ *Altig v. GS Roofing Products Co. Inc.* 182 F.3d 924 (9th Cir. 1999).

¹⁰⁹ 14 Temp. Envtl. L. & Tech. J. 1 at 30-31.

¹¹⁰ *English v. General Electric*, 496 U.S. 72 (1990)

¹¹¹ Congressional Record p. S7412; S. Rep. No. 107-146, 107th Cong., 2d Session 19 (2002).

INTERNATIONAL BEST PRACTICES FOR WHISTLEBLOWER POLICIES AT INTERGOVERNMENTAL ORGANIZATIONS

by Tom Devine
Legal Director

The Government Accountability Project (GAP) is a non-profit, nonpartisan public interest law firm that specializes in protection for genuine whistleblowers, employees who exercise free speech rights to challenge institutional illegality, abuse of power or other betrayals of the public trust they learn of or witness on the job. GAP has led the public campaigns for passage of nearly all United States national whistleblower laws; and has played partnership roles in drafting and obtaining approval for the Organization of American States (OAS) model law to implement its Inter-American Convention Against Corruption; and the United Nations whistleblower policy, among other initiatives.

While whistleblower protection laws are increasingly popular, in many cases the rights have been largely symbolic and therefore counterproductive. Employees have risked retaliation thinking they had genuine protection, when in reality there was no realistic chance they could maintain their careers. In those instances, acting on rights contained in whistleblower laws has meant the near-certainty that a legal forum would formally endorse the retaliation, leaving the careers of reprisal victims far more prejudiced than if no whistleblower protection law had been in place at all. Review of the track records for these and prior laws over the last 29 years has revealed numerous lessons learned, which have steadily been solved on the federal level through amendments to correct mistakes and close loopholes.

GAP labels token laws as “cardboard shields,” because anyone relying on them is sure to die professionally. We view genuine whistleblower laws as “metal shields,” behind which a employee’s career has a fighting chance to survive. The checklist of 21 requirements below reflects GAP’s 29 years of lessons learned on the difference. All the minimum concepts exist in various employee protection statutes currently on the books.

I. SCOPE OF COVERAGE

The first cornerstone for any reform is that it is available. Loopholes that deny coverage when it is needed most, either for the public or the harassment victim, compromise whistleblower protection rules. Seamless coverage is essential so that accessible free expression rights extend to any relevant witness, regardless of audience, misconduct or context to protect them against any harassment that could have a chilling effect.

1. Context for Free Expression Rights with “No Loopholes”. Protected whistleblowing should cover “any” disclosure that would be accepted in a legal forum as evidence of significant misconduct or would assist in carrying out legitimate compliance functions. There can be no loopholes for form, context or audience, unless release of the information is specifically prohibited by statute or would incur organizational liability for breach of legally enforceable confidentiality commitments. In that circumstance, disclosures should still be protected if made to representatives of organizational leadership or to designated law enforcement or legislative offices.

United Nations whistleblower policy, section 4; OAS Model Law (approved November 2000) to implement Inter-American Convention Against Corruption (“OAS Model Law”), sections 2(d)-(f); Asian Development Bank Audit Manual, section 810.200; Public Interest Disclosure Act of 1998 (“PIDA”), c. 23 (U.K.), amending the Employment Rights Act of 1996, c.18), section 43(G); Protected Disclosures Act of 2000 (“PDA”); Act No. 26, GG21453 of 7 Aug. 2000 (S. Afr.), section 7-8; Anti-Corruption Act of 2001 (“ACA”) (Korea – statute has no requirement for internal reporting); Ghana Whistleblower Act of 2005 (“Ghana WPA), section 4; Japan Whistleblower Protection Act, Article 3; Whistleblower Protection Act of 1989 (“WPA”) (U.S. federal government), 5 USC 2302(b)(8); Sarbanes Oxley Reform Act (“SOX”) (U.S. publicly-traded corporations) 18 USC 1514(a); Protected Disclosures Act, No. 92, section 19, N.S.W. Acts, (1994)(Austl.).

2. Subject Matter for Free Speech Rights with “No Loopholes”. Whistleblower systems should cover disclosures of any illegality, gross waste, mismanagement, abuse of authority, substantial and specific danger to public health or safety and any other activity which undermines the institutional mission to its stakeholders, as well as any other information that assists in honoring those duties.

United Nations policy, section 2.1(a); OAS Model Law, Article 2(c); Inter-American Development Bank (“IDB”) Staff Rule 328, section 104; PIDA, (U.K.); PDA, section 1(i)(S. Afr.); ACA (Korea), Article 2; Public Service Act (“PSA”), Antigua and Barbuda Freedom of Information Act, section 47; R.S.O., ch. 47, section 28.13 (1990) (Can.); WPA)(U.S. federal government), 5 USC 2302(b)(8); SOX (U.S. publicly traded corporations), 18 USC 1514(a); Ghana WPA, section 1.

3. Right to Refuse Violating the Law. This provision is fundamental to stop *faits accomplis* and in some cases prevent the need for whistleblowing. As a practical reality, however, in many organizations an individual who refuses to obey an order on the grounds that it is illegal must proceed at his or her own risk, assuming vulnerability to discipline if a court or other authority subsequently determines the order would not have required illegality. Thus what is needed is a fair and expeditious means of reaching such a determination while protecting the individual who reasonably believes that she or he is being asked to violate the law from having to proceed with the action or from suffering retaliation while a determination is sought.

OAS Model Law, Articles 2(c), (5); WPA (U.S. federal government) 5 USC 2302(b)(9); Inter-American Development Whistleblower Policy, Section 28.

4. Protection Against Spillover Retaliation. The law should cover all common scenarios that could have a chilling effect on responsible exercise of free expression rights. Representative scenarios include individuals who are perceived as whistleblowers (even if mistaken), or as “assisting whistleblowers,” (to guard against guilt by association), and individuals who are “about to” make a disclosure (to preclude preemptive strikes to circumvent statutory protection, and to cover the essential preliminary steps to have a “reasonable belief” and qualify for protection as a responsible whistleblowing disclosure). These indirect contexts often can have the most significant potential for a chilling effect that locks in secrecy by keeping people silent and isolating those who do speak out. The most fundamental illustration is reprisal for exercise of anti-retaliation rights.

OAS Model Law, Articles 2(g), 5; World Bank Group Policy on Eradicating Harassment, Guidelines for Implementation (“World Bank Harassment Guidelines”), section 9.0 (Mar. 1, 2000); European Bank for Reconstruction and Development (“EBRD”), Grievance and Appeals Procedure (“Employee Grievance Procedures”), section 10.02 (2002). Asian Development Bank (“ADB”) Administrative Order No. 2.06: Administrative Review and Appeal” (“Administrative Review”), section 10.1 (July 9, 1998), ADB Personnel Policy section 2.12; ACA (Korea), Art. 31; WPA (U.S.), 5 USC sections 2302(b)(8) (case law) and 2302(b)(9); Energy Policy Act of 2005 (U.S. Nuclear Regular Commission, Department of Energy and regulated corporations), 42 USC 5851.

5. “No Loopholes” Protection for All Citizens With Disclosures Relevant to the Public Service Mission. Coverage for employment-related discrimination should extend to all relevant applicants or personnel who challenge betrayals of the organizational mission or public trust, regardless of formal status. In addition to conventional salaried employees, IGO whistleblower systems should protect all who are applicants for funding or are paid with IGO resources to carry out activities relevant to its mission. It should not matter whether they are full time, part-time, temporary, permanent, expert consultants, contractors or employees seconded from another organization. If harassment could create a chilling effect that undermines an organization’s mission as defined by the Charter and implementing rules, the reprisal victim should have rights. This means the mandate also must cover those who apply for jobs, contracts or other funding, since blacklisting is a common tactic.

Most significant, whistleblower protection should extend to those who participate in or are affected by the organization’s activities. Other multilateral development banks have inspection panels organized entirely to provide redress for citizen victims of organizational activities. Overarching U.S. whistleblower laws, particularly criminal statutes, protect all witnesses from harassment, because it obstructs government proceedings.

U.N. policy, section 8; OAS Model Law, Section 2(b); Anti-Corruption Initiative for Asia-Pacific (Organization for Economic Cooperation and Development [OECD]), Pillar 3; Asian Development Bank Audit Manual, section 810.750; PIDA (U.K.), sections 43 (K)(1)(b-d); ACA (Korea), Art. 25; Foreign Operations Appropriations Act of 2005 (“Foreign Operations Act”)(U.S. MDB policy) section 1505(a)(11)(signed November 14, 2005); False Claims Act (U.S. government contractors), 31 USC 3730(h); Anti-Corruption Commission Act of 1988, W. Austl. Repr. Acts (1988)(Austl), section 16(1); Whistleblowers Protection Act of 1997 (Queensland, Austl.) No. 83, Queensl. Publ Acts (1997), sections 8-9. Ghana WPA, sec. 2.

6. Reliable Anonymity Protection. To maximize the flow of information necessary for accountability, reliable protected channels must be available for those who choose to make confidential disclosures. As sponsors of whistleblower rights laws have recognized repeatedly, denying this option creates a severe chilling effect.

U.N. policy, section 5.2; OAS Model Law, Articles 10(5), 20-22; Asian Development Bank, Audit Manual, sections 810.175, 820.915, 830.400, 830.500, 830.530; 2003 Office of Auditor General Anticorruption (“OAGA”) Annual Report, at 3, explained in letter from Peter Pedersen, ADB Auditor General to GAP (Nov. 12, 2003) (“Pedersen letter”)(available at Government Accountability Project); PSA (Can.), sections 28.17(1-3), 28.20(4), 28.24(2), 28.24(4); ACA (Korea), Articles 15 and 33(1); WPA (U.S.) 5 USC sections 1212(g), 1213(h).

7. Protection Against Unconventional Harassment. The forms of harassment are limited only by the imagination. As a result, it is necessary to ban any discrimination taken because of protected activity, whether active such as termination, or passive such as refusal to promote or provide training. Recommended, threatened and attempted actions can have the same chilling effect as actual retaliation. The prohibition must cover recommendations as well as the official act of discrimination, to guard against managers who “don’t want to know” why subordinates have targeted employees for an action. In non-employment contexts it could include protection against harassment ranging from discipline to litigation.

OAS Model Law, Article 2(g); World Bank, Harassment Guidelines, section 1; ADB Audit Manual sections 810.750 and 830.530, Pedersen letter; EBRD Employee Grievance Procedures, sections 4.01 and 6.01(a); IDB, Staff Rule 323, section 102, 301, 2101-02; Staff Rule 328, section 105; Code of Ethics, section 413.4.; ACA (Korea), Article 33; WPA (U.S. federal government), 5 USC 2302(b)(8) and associated case law precedents; SOX (U.S. publicly traded corporations) 18 USC 1514(a).

8. Shielding Whistleblower Rights From Gag Orders. Any whistleblower law or policy must include a ban on “gag orders” through an organization’s rules, policies or nondisclosure agreements that would otherwise override free expression rights and impose prior restraint on speech.

OAS Model Law, Article 6; PIDA (U.K.), section 43(J); PDA (South Africa), section 2(3)(a, b); Ghana WPA, sec. 31; WPA (U.S.), 5 USC 2302(b)(8); Transportation, Treasury, Independent Agencies and General Government Appropriations Act of 2005 (U.S.), section 620 (anti-gag statute)(passed annually since 1988).

9. Providing Essential Support Services for Paper Rights. Whistleblowers are not protected by any law if they do not know it exists. Whistleblower rights, along with the duty to disclose illegality, must be posted prominently in any workplace. Similarly, legal indigence can leave a whistleblower's rights beyond reach. Access to legal assistance or services and legal defense funding can make free expression rights meaningful for those who are unemployed and blacklisted. An ombudsman with sufficient access to documents and institutional officials can neutralize resource handicaps and cut through draining conflicts to provide expeditious corrective action. Informal resources should be risk free for the whistleblower, without any discretion by relevant staff to act against the interests of individuals seeking help.

OAS Model Law, Articles 9(11); 10(1)(5-8), 13, 29-30; World Bank, Harassment Guidelines, section 3.0; WPA (U.S.), 5 USC 1212; Korean Independent Commission Against Corruption (Korea), First Annual Report (2002), at 139; Whistleblowers Protection Act of 1997, No. 83, section 46, Queensl. Pub. Acts (1997)(Austl.).

II. FORUM

The setting to adjudicate a whistleblower's rights must be free from institutionalized conflict of interest and operate under due process rules that provide a fair day in court. The histories of administrative boards have been so unfavorable that so-called hearings in these settings have often been traps, both in perception and reality.

10. Right to Genuine Day in Court. This criterion requires normal judicial due process rights, the same rights available for citizens generally who are aggrieved by illegality or abuse of power. The elements include timely decisions, a day in court with witnesses and the right to confront the accusers, objective and balanced rules of procedure and reasonable deadlines. At a minimum, internal IGO systems must be structured to provide autonomy and freedom from institutional conflicts of interest. That is particularly significant for preliminary stages of informal or internal review that inherently are compromised by conflict of interest, such as Office of Human Resources Management (OHRM) reviews of actions. Otherwise, instead of being remedial those activities are vulnerable to becoming investigations of the whistleblower and the evidentiary base to attack the individual's case for any eventual day in a due process forum.

UN Policy. Section 6.3; OAS Model Law, Articles 11, 14; Foreign Operations Act (U.S. policy for MDB's), section 1505(11); PIDA (U.K.) Articles 3, 5; PDA (S. Afr.), section 4(1); ACA (Kor.), Article 33; WPA (U.S.), 5 USC 1221, 7701-02; SOX (U.S. publicly traded corporations) 18 USC 1514(b); Energy Policy Act (U.S. government and corporate

nuclear workers), 42 USC 5851; Whistleblowers Protection Act, No. 21, section 9(2), S. Austl. Acts and Ordinances (Austl.) (1993).

11. Option for Alternative Dispute Resolution with an Independent Party of Mutual Consent. Third party dispute resolution can be an expedited, less costly forum for whistleblowers. For example, labor-management arbitrations have been highly effective when the parties share costs and select the decision-maker by mutual consent through a “strike” process. It can provide an independent, fair resolution of whistleblower disputes, while circumventing the issue whether IGOs waive their immunity from national legal systems. It is contemplated as a normal option to resolve retaliation cases in the model whistleblower law to implement the Organization of American States Inter-American Convention Against Corruption, as well as the U.S. Whistleblower Protection Act.

OAS Model Law, Article 10(14); Foreign Operations Act, (U.S. MDB policy) section 1505(a)(11); WPA (U.S. federal government labor management provisions), 5 USC 7121.

12. Waiving Immunity from National Courts. Some institutions may not usually be subject to the jurisdiction of national courts in whistleblower cases. Most IGOs claim immunity from lawsuits filed in the U.S. and other courts, particularly over personnel matters.. They could do so more uniformly, or immunity could be limited by the member nations. If immunity were waived, whistleblowers would be judged by a jury of peers or other third party not subject to potential retaliation from the institution. If an IGO does not offer aggrieved individuals independent, third party dispute resolution, waiver of sovereign immunity is unavoidable to overcome the inherent, structural conflict of interest that occurs when an organization is both the defendant and the judge. So far, American and French courts have imposed this reform involuntarily in some cases, usually breach of contract scenarios.

III. RULES TO PREVAIL

The rules to prevail control the bottom line. They are the tests a whistleblower must pass to prove that illegal retaliation violated his or her rights, and win.

13. Realistic Standards to Prove Violation of Rights. The U.S. Whistleblower Protection Act of 1989 overhauled antiquated, unreasonable burdens of proof that had made it hopelessly unrealistic for whistleblowers to prevail when defending their rights. The test has been adopted within international law, within generic professional standards such as the OAS Model Law and individual organizations such as the World Bank.

This emerging global standard is that a whistleblower establishes a *prima facie* case of violation by establishing through a preponderance of the evidence that protected conduct was a “contributing factor” in challenged discrimination. The discrimination does not have to involve retaliation, but only need occur “because of” the whistleblowing. Once a *prima facie* case is made, the burden of proof shifts to the organization to demonstrate by

clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of protected activity.

Since the U.S. government changed the burden of proof in its whistleblower laws, the rate of success on the merits has increased from between 1-5 percent annually to between 25-33 percent, which gives whistleblowers a fighting chance to successfully defend themselves. Many nations that adjudicate whistleblower disputes under labor laws have analogous presumptions and track records. There is no alternative, however, for the IGO to commit to one of these proven formulas to determine the bottom line – tests the whistleblower must pass to win a ruling that their rights were violated.

OAS Model Law, Articles 2(h), 7; World Bank, Department of Institutional Integrity Investigations Manual, section 7.4; Foreign Operations Act, Section 1505(11); Whistleblower Protection Act (U.S. federal government) 5 USC 1214(b)(2)(4) and 1221(e); SOX (U.S. publicly-traded corporations), 18 USC 1514(b)(2)(c); Energy Policy Act of 2005 (U.S. government and corporate nuclear workers), 42 USC 5851(b)(3).

14. Realistic Time Frame to Act on Rights. Although some laws require employees to act within 30-60 days or waive their rights, most whistleblowers are not even aware of their rights within that time frame. Three months is the minimum functional statute of limitations. One-year statutes of limitations are consistent with common law rights and are preferable.

World Bank, Appeals Committee Procedures, section 5, Administrative Tribunal Statute, Art.II.2; EBRD, Employee Grievance Procedures, sections 2.03 and 5.02; PIDA (U.K.), section 48.3; PDA (S. Afr.), section 4(1); WPA (U.S. federal employment) 5 USC 1214; SOX (U.S. publicly-traded corporations), 18 USC 1514(b)(2); False Claims Act (U.S. government contractors), 42 USC 3730(h) and associated case law precedents.

IV. RELIEF FOR WHISTLEBLOWERS WHO WIN

The twin bottom lines for a remedial statute's effectiveness are whether it achieves justice by adequately helping the victim obtain a net benefit, and by holding the wrongdoer accountable.

15. Compensation with “No Loopholes”. If a whistleblower prevails, the relief must be comprehensive to cover all the direct, indirect and future consequences of the reprisal. In some instances this means relocation or payment of medical bills for consequences of physical and mental harassment. In non-employment contexts, it could require relocation, identity protection, or withdrawal of litigation against the individual.

OAS Model Law, Articles 10(10), 16-17; Foreign Operations Act (U.S. policy for MDB's), Section 1505(11); ACA (Korea), Article 33; PIDA (U.K.), section 4; WPA (U.S. federal government employment), 5 USC 1221(g)(1); SOX (publicly traded U.S. corporations), 18 USC 1514(c); False Claims Act (U.S. government contractors), 31 USC

3730(h); Public Interest Disclosure Act, No. 108, section 32, Austr. Cap. Terr. Laws (1994)(Austl.), (amended 2001).

16. Interim Relief. Relief should be awarded during the interim for employees who prevail. Anti-reprisal systems that appear streamlined on paper commonly drag out for years in practice. Ultimate victory may be merely an academic vindication for unemployed, blacklisted whistleblowers who go bankrupt while they are waiting to win. Injunctive or interim relief must occur after a preliminary determination. Even after winning a hearing or trial, an unemployed whistleblower could go bankrupt waiting for completion of an appeals process that frequently drags out for years.

UN Whistleblower Policy, Section 5.6; OAS Model Law, Articles 9(12), 10(1) and 24; PIDA (“U.K.”), section 9; WPA (U.S. federal government), 5 USC sections 1214(b)(1), 1221(c); SOX (U.S. publicly-traded corporations), 5 USC 1214(b)(1); Public Interest Disclosure Act, No. 108, section 32, Austr. Cap. Terr. Laws (1994)(Austl.), (amended 2001).

17. Coverage for Attorney Fees. Attorney fees and associated litigation costs should be available for all who substantially prevail. Whistleblowers otherwise couldn’t afford to assert their rights. The fees should be awarded if the whistleblower obtains the relief sought, regardless of whether it is directly from the legal order issued in the litigation. Otherwise, organizations can and have unilaterally surrendered outside the scope of the forum and avoided fees by declaring that the whistleblower’s lawsuit was irrelevant to the result. Affected individuals can be ruined by that type of victory, since attorney fees often reach sums more than an annual salary.

OAS Model Law, Article 16; EBRD Employee Grievance Procedures, section 9.06; WPA (U.S. federal government), 5 USC 1221(g)(2-3); SOX (U.S. publicly-traded corporations), 18 USC 1514(c)(2)(C); False Claims Act (U.S. government contractors), 31 USC 3730(h); Energy Policy Act (U.S. government and corporate nuclear workers), 42 USC 5851(b)(2)(B)(ii).

18. Transfer Option. It is unrealistic to expect a whistleblower to go back to work for a boss whom he or she has just defeated in a lawsuit. Those who prevail must have the ability to transfer for any realistic chance at a fresh start. This option prevents repetitive reprisals that cancel the impact of newly created institutional rights.

UN Whistleblower Policy, Section 6.1; OAS Model Law, Article 10(7); EBRD Employee Grievance Procedures, section 9.04; ADB Audit Manual, section 810.750; PDA (S. Afr.), section 4(3); ACA (Korea), Article 33; WPA (U.S. federal government), 5 USC 3352; Public Interest Disclosure Act, No. 108, section 27, Austr. Cap. Terr. Laws (1994)(Austl.), (amended 2001).

19. Personal Accountability for Reprisals. To deter repetitive violations, it is indispensable to hold accountable those responsible for whistleblower reprisal. Otherwise, managers have nothing to lose by doing the dirty work of harassment. The

worst that will happen is they won't get away with it, and they may well be rewarded for trying. The most effective option to prevent retaliation is personal liability for punitive damages by those found responsible for violations. Another option is to allow whistleblowers to counterclaim for disciplinary action, including termination. Some nations, such as Hungary or the U.S. in selective scenarios such as obstruction of justice, impose potential criminal liability for whistleblower retaliation.

UN Whistleblower Policy, Section 7; OAS Model Law, section 18; EBRD, Procedures for Reporting and Investigating Suspect Misconduct, section 6.01(a); Staff Handbook, Chapter 8.5.6; ACA (Korea), Article 32(8); Article 32(8); Hungary, Criminal code Article 257, "Persecution of a conveyor of an Announcement of Public Concern"; WPA (U.S. federal government), 5 USC 1215; Public Interest Disclosure Act, No. 108, section 32, Austr. Cap. Terr. Laws (1994)(Austl.), (amended 2001); SOX (U.S. publicly-traded corporations), 18 USC 1513(e).

V. MAKING A DIFFERENCE

Whistleblowers will risk retaliation if they think that challenging abuse of power or any other misconduct that betrays the public trust will make a difference. Numerous studies have confirmed this motivation. This is also the bottom line for affected institutions or the public—positive results. Otherwise, the point of a reprisal dispute is limited to whether injustice occurred on a personal level. Legislatures unanimously pass whistleblower laws to make a difference for society.

20. Credible Corrective Action Process. Whether through hotlines, ombudsmen, compliance officers or other mechanisms, the point of whistleblowing through an internal system is to give managers an opportunity to clean house, before matters deteriorate into a public scandal or law enforcement action. In addition to a good faith investigation, two additional elements are necessary for legitimacy.

First, the whistleblower who raised the issues should be enfranchised to review and comment on the charges that merited an investigation and report, to assess whether there has been a good faith resolution. While the whistleblower reporting parties rather than investigators or finders of fact, as a rule they are the most knowledgeable, concerned witnesses in the process. In the U.S. Whistleblower Protection Act, their evaluation comments have led to significant improvements and changed conclusions. They should not be silenced in the final stage of official resolution for the alleged misconduct they risk their careers to challenge.

Second, transparency should be mandatory. Secret reforms are an oxymoron. As a result, unless the whistleblower elects to maintain anonymity, both the final report and whistleblower's comments should be a matter of public record, posted on the Bank's website.

The most significant reform is to enfranchise whistleblowers and citizens to "walk the talk" by filing formal actions against illegality exposed by their disclosures. In government statutes, these types of suits are known as private attorney general, or "*qui*

tam" actions in a reference to the Latin phrase for "he who sues on behalf of himself as well as the king." These statutes can provide both litigation costs (including attorney and expert witness fees) and a portion of money recovered for the government to the citizen whistleblowers who file them, a premise that merges "doing well" with "doing good."

This approach has been tested in the U.S. False Claims Act for whistleblower suits challenging fraud in government contracts. It is the most effective whistleblower law in the U.S. Civil fraud recoveries in government contracts have increased from \$27 million annually in 1985 to over a billion dollars for the last three years, and \$15 billion since 1985.

Another tool that is vital in cases where there are continuing violations is the power to obtain from a court or objective body an order that will halt the violations or require specific corrective actions. The obvious analogy for IGO's is the ability to file for proceedings at Independent Review Mechanisms or Inspection Panels, the same as an outside citizen personally aggrieved by institutional misconduct.

OAS Model Law, Articles 10(13), 27-28; ACA (Korea), Articles 30, 36; PSA (Can.), section 28.14(1) (1990); WPA (U.S. federal government), 5 USC 1213; Inspector General Act of 1978 (U.S. federal government), 5 USC app.; False Claims Act, 31 USC 3729 (government contractors)

110TH CONGRESS
1ST SESSION

H. R. 4047

To streamline the administration of whistleblower protections for private sector employees.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 1, 2007

Ms. WOOLSEY (for herself, Mr. GEORGE MILLER of California, Mr. KILDEE, Mr. PAYNE, Mr. ANDREWS, Mrs. MCCARTHY of New York, Mr. KUCINICH, Mr. BISHOP of New York, Mr. HARE, Ms. SHEA-PORTER, Mr. GRIJALVA, Mr. MARKEY, Mr. TIERNEY, and Ms. LINDA T. SÁNCHEZ of California) introduced the following bill; which was referred to the Committee on Education and Labor

A BILL

To streamline the administration of whistleblower protections for private sector employees.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Private Sector Whistle-
5 blower Protection Streamlining Act of 2007”.

1 **TITLE I—PRIVATE SECTOR EM-**
2 **PLOYMENT WHISTLEBLOWER**
3 **PROTECTIONS**

4 **SEC. 101. DEFINITIONS.**

5 As used in this title, the following definitions apply:

6 (1) **APPLICABLE LAW.**—The term “applicable
7 law” means any Federal law, rule, or regulation, or
8 a law, rule or regulation of a State or political sub-
9 division of a State implementing any Federal law,
10 rule or regulation, relating to—

11 (A) health and health care;

12 (B) environmental protection;

13 (C) food and drug safety;

14 (D) transportation safety;

15 (E) working conditions and benefits;

16 (F) building and construction-related re-
17 quirements, including safety requirements and
18 structural and engineering standards;

19 (G) energy, homeland, and community se-
20 curity, including facility safety;

21 (H) financial transactions or reporting re-
22 quirements, including banking, insurance, and
23 securities laws; and

24 (I) consumer protection.

1 (2) CLEAR AND CONVINCING EVIDENCE.—The
2 term “clear and convincing evidence” means evi-
3 dence indicating that the matter to be proved is
4 highly probable or reasonably certain.

5 (3) CONTRIBUTING FACTOR.—The term “con-
6 tributing factor” means any factor which, alone or
7 in combination with other factors, affects in any way
8 the outcome of the decision.

9 (4) EMPLOYEE.—The term “employee” means
10 any person receiving compensation from or acting on
11 behalf of an employer, being considered for employ-
12 ment by the employer, or previously employed by an
13 employer, including any working as an associate,
14 person employed on a temporary or part-time basis,
15 or employed by a contractor or subcontractor of an
16 employer.

17 (5) EMPLOYER.—The term “employer” means
18 any person (including one or more individuals, part-
19 nerships, associations, corporations, legal representa-
20 tives, mutual companies, joint-stock companies,
21 trusts, unincorporated organizations, nongovern-
22 mental organizations, or trustees) engaged in profit
23 or nonprofit business affecting commerce, including
24 any subsidiaries, affiliates, or the foreign operations
25 of any business that are subject to applicable law,

1 any entity of a State government or political subdivi-
2 sion of a State, or any nongovernmental organiza-
3 tion, and any contractor or subcontractor of another
4 employer.

5 (6) MANAGER.—The term “manager” means
6 any person who has direct, implied, or apparent au-
7 thority over the work performance of a whistle-
8 blower, directly or indirectly through subordinates,
9 or a person who has the direct, implied, or apparent
10 authority to recommend or to take corrective action
11 regarding the activities or policies of the employer or
12 to remedy a violation of an applicable law.

13 (7) MEDIA.—The term “media” includes a
14 member of the print, radio, television, or internet
15 media.

16 (8) PROTECTED INFORMATION.—The term
17 “protected information” means any information that
18 a whistleblower reasonably believes evidences—

19 (A) a violation or the intent to commit a
20 violation, by the employer or a subsidiary or
21 business affiliate of the employer, of an applica-
22 ble law;

23 (B) a hazard or potential danger to the
24 health or safety of any employee or to the pub-
25 lic, including any injury or illness; or

1 (C) fraud on the part of the employer or
2 a business affiliate or subsidiary of the em-
3 ployer in connection with the implementation of
4 or compliance with an applicable law or a
5 standard of practice established by a profes-
6 sional standards setting body.

7 (9) PUBLIC BODY.—The term “public body”
8 means Congress, any State legislature or popularly
9 elected local government body, any Federal, State or
10 local regulatory, administrative, or public agency,
11 authority, or instrumentality or combination thereof,
12 any Federal, State, or local law enforcement agency,
13 prosecutorial office, or police or peace officer, any
14 Federal, State or local court or other adjudicative
15 body, or any division, board, bureau, office, com-
16 mittee, or commission of any such public bodies, or
17 any organization or credentialing body that estab-
18 lishes or enforces standards of professional conduct.

19 (10) RESPONSIBLE PARTY.—The term “respon-
20 sible party” means any employer, any professional
21 membership organization, including a certification,
22 disciplinary, or other professional body, and any
23 agency or licensee of the Federal government, and
24 includes a person acting directly or indirectly in the
25 interest of another responsible party.

1 (11) REASONABLY BELIEVES.—The term “rea-
2 sonably believes”, with respect to information that
3 may be protected information, means that a disin-
4 terested observer with a similar level of education,
5 skill and experience and with knowledge of the es-
6 sential facts known to or readily ascertained by the
7 whistleblower could conclude that such information
8 is protected information, and the determination of
9 reasonable belief in this context is a subjective
10 standard which is a question of fact.

11 (12) SECRETARY.—The term “Secretary”
12 means the Secretary of Labor.

13 (13) UNFAVORABLE PERSONNEL ACTION.—The
14 term “unfavorable personnel action” means any ac-
15 tion or inaction, whether taken, recommended, or
16 threatened, directly or indirectly unfavorable to the
17 whistleblower, or family member of the whistle-
18 blower, by any responsible party, including current
19 employer of the whistleblower, including termination,
20 performance appraisal or action, discipline, reduction
21 in pay or benefits, transfer, reassignment, demotion,
22 withholding of training or other advancement oppor-
23 tunities, removal of resources, the denial, suspen-
24 sion, or revocation of a security clearance, investiga-
25 tion, peer review, law enforcement referral, or pros-

1 ecution, filing criminal or civil charges, change in se-
2 niority rights, denial of advancement, denial of con-
3 tract, revocation of security credentials, blacklisting,
4 listing on a practitioner databank, violence or other
5 physical action, any other discrimination or other ac-
6 tion that negatively affects the terms or conditions,
7 or privileges of employment of such whistleblower, or
8 any other conduct that would dissuade a reasonable
9 person from engaging in activities protected by this
10 title.

11 (14) WHISTLEBLOWER.—The term “whistle-
12 blower” includes an employee, independent con-
13 tractor, or any member or staff of a professional
14 membership organization or other professional body,
15 including professionals with institutional privileges
16 or appointments to an organization, who engages in
17 the protected activity described in section 102(a).

18 **SEC. 102. PROTECTION AGAINST RETALIATION OR DIS-**
19 **CRIMINATION AGAINST WHISTLEBLOWERS.**

20 (a) IN GENERAL.—Notwithstanding the require-
21 ments of any other law, no responsible party shall take
22 any unfavorable personnel action against a whistleblower
23 if such action is due, in whole or in part, to any lawful
24 act done, perceived to have been done, or intended to be
25 done by the whistleblower to—

1 (1) communicate or disclose, without restriction
2 as to place, form, motive, context, forum, or prior
3 disclosure, including disclosure in the ordinary
4 course of the whistleblower's duties, to a manager,
5 public body, or the media, or to the public, any pro-
6 tected information, where disclosure is not prohib-
7 ited by law or because such information is classified,
8 in which case the information may be disclosed to an
9 official eligible by law to receive such information
10 and designated by the employer, or to a relevant reg-
11 ulatory authority, law enforcement agency or Inspec-
12 tor General;

13 (2) take action to initiate, testify, cooperate, or
14 otherwise assist or participate in an investigation or
15 proceeding by a public body, or any proceeding au-
16 thorized by applicable law, or take action indicating
17 that the whistleblower is about to testify, cooperate,
18 or otherwise assist such an investigation or pro-
19 ceeding;

20 (3) object to or refuse to participate in any ac-
21 tivity, policy, practice, or assigned task which the
22 whistleblower reasonably believes is in violation of an
23 applicable law or endangers the safety or health or
24 the whistleblower or others;

1 (4) inform or discuss with co-workers of the
2 whistleblower, experts or corroborating witnesses, a
3 representative of the whistleblower, a safety and
4 health or similar workplace committee, or a family
5 member of the whistleblower, any protected informa-
6 tion, where disclosure is not prohibited by law or be-
7 cause it is classified; or

8 (5) otherwise avail himself or herself of the
9 rights set forth in this title or other applicable law,
10 or assist another whistleblower in asserting the
11 rights available under this title.

12 (b) BROAD CONSTRUCTION.—It is the sense of Con-
13 gress that the provisions of this section and section 101
14 shall be construed broadly to maximize the Act’s remedial
15 objectives and for the benefit of the public.

16 **SEC. 103. ENFORCEMENT.**

17 (a) COMPLAINT; RIGHT OF ACTION.—

18 (1) IN GENERAL.—A whistleblower who believes
19 that he or she has been discharged or otherwise dis-
20 criminated against by any responsible party in viola-
21 tion of section 102(a) may seek the relief described
22 in this section, either by—

23 (A) filing a complaint with the Secretary
24 as described in subsection (b); or

1 (B) bringing an action at law or equity in
2 the appropriate district court of the United
3 States as described in subsection (c).

4 Except as provided in subsection (b)(11), a whistle-
5 blower, having filed a complaint under subparagraph
6 (A), may not bring an action under subparagraph
7 (B).

8 (2) STATUTE OF LIMITATIONS.—A whistle-
9 blower may take either action permitted by the pre-
10 ceding paragraph not later than 1 year after the
11 later of—

12 (A) the date on which such violation oc-
13 curs; or

14 (B) the date on which the whistleblower
15 knows or should reasonably have known that
16 such violation occurred.

17 For purposes of this paragraph, a violation shall be
18 considered to have occurred on the last date on
19 which such violation continues.

20 (b) DEPARTMENT OF LABOR COMPLAINT PROCE-
21 DURE.—

22 (1) NOTIFICATION OF PUBLIC BODY.—Upon re-
23 ceipt of a complaint under this section, the Secretary
24 shall provide prompt notice to the appropriate public
25 body of any protected information referenced in the

1 complaint of a violation of section 102(a). The pub-
2 lic body's determination on whether or not a viola-
3 tion has occurred, nor its action or inaction, shall
4 not be considered by the Secretary.

5 (2) ELECTION OF PROCEDURE; EXCLUSION.—

6 (A) ELECTION OF PROCEDURE.—Upon re-
7 ceipt of a complaint under this section, the Sec-
8 retary shall inform the complainant (or any
9 legal counsel retained by complainant) of any
10 program for administering whistleblower com-
11 plaints described in section 202 that may be ap-
12 plicable to the complainant's situation, and ob-
13 tain the complainant's consent as to the pro-
14 gram under which the complainant wishes to
15 proceed. No action may proceed unless a com-
16 plainant with such an election makes it, and
17 such an election is binding. If the complaint is
18 to be processed under this title, the Secretary
19 shall provide written notice to the responsible
20 party named in the complaint of the filing of
21 the complaint, the substance of the evidence
22 supporting the complaint, and of the opportuni-
23 ties that will be afforded to such responsible
24 party under this subsection.

1 (B) EXCLUSION.—No complaint by a gov-
2 ernment employee that is within the scope of
3 the Whistleblower Protection Act (5 U.S.C.
4 1201 note) shall be considered under the provi-
5 sions of this title, provided, however, that this
6 exclusion does not diminish any rights a whis-
7 tleblower may have under any program for ad-
8 ministering whistleblower complaints described
9 in section 202.

10 (3) DECISION TO INVESTIGATE OR DISMISS
11 COMPLAINT.—The Secretary shall, based on the cri-
12 teria set forth in paragraph (d)(1), either—

13 (A) make a decision to investigate the com-
14 plaint under paragraph (5); or

15 (B) make a final decision to dismiss the
16 complaint.

17 (4) TEMPORARY RELIEF DURING INVESTIGA-
18 TION.—If the complaint is not dismissed under para-
19 graph (3), the Secretary shall, upon request, issue a
20 preliminary order providing for temporary reinstate-
21 ment of the complainant while the Secretary is con-
22 ducting an investigation pursuant to paragraph (5).
23 If a hearing is not requested as provided for in para-
24 graph (7), such preliminary order shall be deemed a
25 final order that is not subject to judicial review.

1 (5) INVESTIGATION.—The Secretary shall inves-
2 tigate any complaint not dismissed under paragraph
3 (3). The Secretary shall afford the responsible party
4 named in the complaint an opportunity to submit to
5 the Secretary a written response to the complaint
6 and to meet with a representative of the Secretary
7 to present statements from witnesses. The complain-
8 ant shall be provided an opportunity to meet with a
9 representative of the Secretary and rebut any state-
10 ments provided to the Secretary by the responsible
11 party named in the complaint. In conducting such
12 investigation, the Secretary may issue subpoenas re-
13 quiring the deposition of or the attendance and testi-
14 mony of witnesses and the production of any evi-
15 dence, including any books, papers, or documents,
16 relating to the matter under investigation. The Sec-
17 retary shall complete the investigation and issue a
18 decision in accordance with the criteria set forth in
19 subsection (d)(2) not later than 30 days after the
20 date of receipt of a complaint. The Secretary shall
21 notify, in writing, the complainant and the respon-
22 sible party named in the complaint of the Sec-
23 retary’s findings.

24 (6) PRELIMINARY ORDER FOLLOWING INVES-
25 TIGATION.—If the Secretary finds that a violation of

1 section 102(a) has occurred, the Secretary shall
2 issue a preliminary order providing the relief pre-
3 scribed by paragraph (10). If a hearing is not timely
4 requested as provided for in paragraph (7), such
5 preliminary order shall be deemed a final order of
6 the Secretary that is not subject to judicial review.

7 (7) HEARING.—

8 (A) REQUEST FOR HEARING.—The com-
9 plainant or responsible party alleged to have
10 committed a violation of section 102(a) may re-
11 quest a hearing on the record before an admin-
12 istrative law judge—

13 (i) if the complainant or the respon-
14 sible party alleged to have committed a
15 violation of section 102(a) objects to a pre-
16 liminary order of temporary reinstatement
17 or preliminary order for relief and files
18 such objections and request for a hearing
19 not later than 30 days after receiving noti-
20 fication of such preliminary order; or

21 (ii) if the Secretary has not issued a
22 decision under paragraph (5) within 30
23 days of the receipt of the complaint.

24 The filing of objections under clause (i) shall
25 not operate to stay any reinstatement remedy

1 contained in a preliminary order issued pursu-
2 ant to either paragraph (4) or paragraph (6).

3 (B) PROCEDURES.—Such hearing request
4 shall be granted, and shall be conducted expedi-
5 tiously and in accordance with the Federal
6 Rules of Civil Procedure. In conducting such
7 proceeding, the Secretary may issue subpoenas
8 requiring the deposition of or the attendance
9 and testimony of witnesses and the production
10 of any evidence, including any books, papers, or
11 documents, relating to the matter under consid-
12 eration. A decision issued in accordance with
13 the criteria set forth in subsection (d)(2), shall
14 be issued not later than 90 days after the date
15 on which a hearing was requested under this
16 paragraph. The parties and the Secretary shall
17 promptly be notified of the decision. If the ad-
18 ministrative law judge find that a violation of
19 section 102(a) has occurred, the judge shall
20 issue a preliminary order providing the relief
21 prescribed by paragraph (10). If review under
22 paragraph (8) is not timely requested, such pre-
23 liminary order shall be deemed a final order of
24 the Secretary that is not subject to judicial re-
25 view.

1 (8) FURTHER ADMINISTRATIVE REVIEW.—Not
2 later than 10 days after the date of notification of
3 a decision by an administrative law judge under
4 paragraph (7), the complainant or the responsible
5 party alleged to have committed a violation of sec-
6 tion 102(a) may file objections to specified portions
7 thereof and request a further review by the Sec-
8 retary. The Secretary shall have discretion as to
9 whether to grant such a review and shall be limited
10 to determining whether the decision of the adminis-
11 trative law judge was based upon substantial evi-
12 dence. If review is granted, the decision of the ad-
13 ministrative law judge shall be stayed pending the
14 completion of further review, except for any order of
15 reinstatement which shall be stayed only upon mo-
16 tion. The final decision and order of the Secretary
17 shall be issued not later than 30 days after the ad-
18 ministrative law judge issues a decision. If judicial
19 review under paragraph (11) is not timely requested,
20 such preliminary order shall be deemed a final order
21 of the Secretary that is not subject to judicial re-
22 view.

23 (9) SETTLEMENT.—At any time before issuance
24 of a final order, a proceeding under this subsection
25 may be terminated on the basis of a settlement

1 agreement entered into by the Secretary, or adminis-
2 trative law judge conducting a hearing, the com-
3 plainant, and the responsible party alleged to have
4 committed the violation. The Secretary or adminis-
5 trative law judge conducting a hearing may not ac-
6 cept any settlement that contains conditions that are
7 contrary to the public policy of this title, including
8 any restrictions or activity protected by this Act, and
9 the right to seek future employment without dis-
10 crimination prohibited by this Act.

11 (10) REMEDY.—If, in response to a complaint
12 filed under subsection (a)(1), the Secretary of Labor
13 determines that a violation of section 102(a) has oc-
14 curred, the Secretary shall order the responsible
15 party who committed such violation to—

16 (A) take affirmative action to abate the
17 violation;

18 (B) reinstate the complainant to his or her
19 former position and with the same seniority sta-
20 tus together with the compensation (including
21 back pay and interest) and restore the terms,
22 rights, conditions, and privileges associated with
23 his or her employment, and provide preference
24 to the complainant to transfer to any available
25 position that provides equivalent or better com-

1 pensation, terms, conditions and privileges of
2 employment for which the complainant is quali-
3 fied;

4 (C) provide compensatory damages and
5 consequential damages to the complainant, in-
6 cluding relief for emotional distress and harm
7 to reputation, and may include punitive dam-
8 ages;

9 (D) expunge all warnings, reprimands or
10 derogatory references that have been placed in
11 paper or electronic records or databases of any
12 type relating to the actions by the complainant
13 that gave rise to the unfavorable personnel ac-
14 tion, and, at the complainant's direction, send
15 a copy of the decision on the complaint to any
16 person whom the complainant reasonably be-
17 lieves may have received such unfavorable infor-
18 mation; and

19 (E) post appropriate public notice of the
20 violation.

21 If such an order is issued under this paragraph, the
22 Secretary, at the request of the complainant, shall
23 assess against the responsible party against whom
24 the order is issued a sum equal to the aggregate
25 amount of all costs and expenses (including attor-

1 neys' and expert witness fees) reasonably incurred,
2 as determined by the Secretary, by the complainant
3 for, or in connection with, the bringing the com-
4 plaint upon which the order was issued.

5 (11) INACTION BY THE SECRETARY.—Notwith-
6 standing subsection (a), if the Secretary has not
7 issued a final decision within 180 days of the filing
8 of the complaint, the complainant may bring an ac-
9 tion at law or equity for de novo review in the ap-
10 propriate district court of the United States, as de-
11 scribed in subsection (c), which shall have jurisdic-
12 tion over such an action without regard to the
13 amount in controversy, and which action shall, at
14 the request of either party to such action, be tried
15 by the court with a jury.

16 (12) JUDICIAL REVIEW.—

17 (A) APPEAL TO COURT OF APPEALS.—Any
18 complainant or responsible party adversely af-
19 fected or aggrieved by a final order issued
20 under this subsection for which review is avail-
21 able, may obtain review of the order in the
22 United States Court of Appeals for the circuit
23 in which the violation, with respect to which the
24 order was issued, allegedly occurred or the cir-
25 cuit in which the complainant resided on the

1 date of such violation. The petition for review
2 must be filed not later than 60 days after the
3 date the final order of the Secretary was re-
4 ceived. Review shall conform to chapter 7 of
5 title 5, United States Code. The commencement
6 of proceedings under this subparagraph shall
7 not, unless ordered by the court, operate as a
8 stay of the order.

9 (B) LIMITATION ON COLLATERAL AT-
10 TACK.—An order of the Secretary with respect
11 to which review could have been obtained under
12 subparagraph (A) shall not be subject to judi-
13 cial review in any criminal or other civil pro-
14 ceeding.

15 (13) ENFORCEMENT OF ORDER.—Whenever
16 any responsible party has failed to comply with a
17 final order issued under this subsection, including a
18 final order for temporary relief, the Secretary or the
19 complainant on whose behalf the order was issued
20 may file a civil action in the United States district
21 court for the district in which the violation was
22 found to occur to enforce such order. If both the
23 Secretary and the person on whose behalf the order
24 was issued file such an action for enforcement, the
25 action of the Secretary shall take precedence. In ac-

1 tions brought under this paragraph, the district
2 courts shall have jurisdiction to grant all appropriate
3 relief including, injunctive relief, compensatory dam-
4 ages, and reasonable attorneys and expert witness
5 fees. In addition to enforcing the order, the court
6 shall assess a penalty of not greater than \$10,000
7 a month against any person who fails to comply with
8 a final order issued under this subsection, which
9 shall be awarded to the party seeking enforcement.

10 (c) DISTRICT COURT PROCEDURE.—

11 (1) NOTIFICATION.—Upon receipt of a com-
12 plaint brought under subsection (a)(1)(B) or
13 (b)(11), the court shall provide prompt notice to the
14 appropriate public body of any protected information
15 referenced in the complaint of a violation of section
16 102(a), but the public body shall have no standing
17 to participate in any way in the proceeding nor shall
18 its failure to take action be considered by the court.

19 (2) SUMMARY JUDGMENT.—The Court shall
20 summarily dismiss a complaint filed under this title
21 based upon the criteria set forth in paragraph
22 (d)(1).

23 (3) TEMPORARY RELIEF.—If the complaint is
24 not dismissed by summary judgment, the court shall,

1 upon request, issue a preliminary order providing for
2 temporary reinstatement of the complainant.

3 (4) DECISION.—The complainant in a case
4 brought under subsection (a)(1)(B) or (b)(11) shall
5 be entitled to a trial by jury. The jury or the court
6 shall determine whether a violation of section 102(a)
7 has occurred based upon the criteria set forth in
8 paragraph (d)(2).

9 (5) RELIEF.—The Court shall have jurisdiction
10 to grant all appropriate relief to a whistleblower
11 available by law or equity, including, injunctive re-
12 lief, compensatory and consequential damages, puni-
13 tive damages, reasonable attorneys and expert wit-
14 ness fees, and court costs.

15 (d) CRITERIA FOR DISMISSAL AND FOR DECISION.—

16 (1) DISMISSAL.—The Secretary, administrative
17 law judge, or the court shall dismiss a complaint
18 filed under this section unless the complainant
19 makes a prima facie showing that any behavior de-
20 scribed in paragraphs (1) through (5) of section
21 102(a) was a contributing factor in the unfavorable
22 personnel action alleged in the complaint. The com-
23 plainant will be considered to have made such a
24 showing if the complaint, on its face, supplemented
25 as appropriate through interviews, depositions, or af-

1 fidavit of the complainant, alleges the existence of
2 facts and either direct or circumstantial evidence to
3 meet the required showing.

4 (2) DECISION.—The Secretary, administrative
5 law judge, or a court may determine that a violation
6 of section 102(a) has occurred only if the complain-
7 ant demonstrates that any behavior described in
8 paragraphs (1) through (5) of section 102(a) was a
9 contributing factor in the unfavorable personnel ac-
10 tion alleged in the complaint. Relief may not be or-
11 dered if the responsible party demonstrates by clear
12 and convincing evidence that the responsible party
13 would have taken the same unfavorable personnel
14 action in the absence of the behavior described in
15 paragraphs (1) through (5) of section 102(a).

16 **SEC. 104. RESTRICTIONS ON WHISTLEBLOWING PROHIB-**
17 **ITED; CONFIDENTIALITY OF WHISTLE-**
18 **BLOWER.**

19 (a) RESTRICTIONS ON REPORTING PROHIBITED; IN-
20 VALID CONTRACT CLAUSES.—No responsible party shall
21 by contract, policy, or procedure prohibit or restrict any
22 person from engaging in any action for which a protection
23 against discrimination or retaliation is provided under sec-
24 tion 102. Any clause or provision of any contract for em-
25 ployment or contract with an independent contractor for

1 the provision of services which purports to limit or restrain
2 an individual from engaging in any of the actions de-
3 scribed in paragraphs (1) through (5) of section 3(a) as
4 a condition of employment or a condition of the contract,
5 whether in force before, on, or after the date of enactment
6 of this title, shall be invalid and void as violative of public
7 policy as established by this title.

8 (b) RESTRICTIONS ON RELIEF PROVIDED UNDER
9 THIS ACT PROHIBITED; INVALID ARBITRATION
10 CLAUSES.—

11 (1) PROTECTION OF PROCEDURAL RIGHTS.—
12 Notwithstanding any other provision of law, any
13 clause of any agreement between an responsible
14 party and a whistleblower that requires arbitration
15 of a claim arising under this title, whether in force
16 before, on or after the date of enactment of this Act,
17 shall not be enforceable.

18 (2) EXCEPTIONS.—

19 (A) WAIVER OR CONSENT AFTER CLAIM
20 ARISES.—Paragraph (1) shall not apply with
21 respect to any claim if, after such claim arises,
22 the parties involved voluntarily consent to sub-
23 mit such claim to arbitration.

24 (B) COLLECTIVE BARGAINING AGREE-
25 MENTS.—Paragraph (1) shall not preclude the

1 enforcement of any of the rights or terms of a
2 valid collective bargaining agreement.

3 (c) CONFIDENTIALITY.—The identity or identifying
4 information of a whistleblower who complains or discloses
5 information as described in section 102(a) to a public body
6 shall remain confidential and shall not be disclosed by any
7 person except—

8 (1) upon the knowing written consent of the
9 whistleblower;

10 (2) in the case in which there is imminent dan-
11 ger to health or public safety or an imminent viola-
12 tion of criminal law; or

13 (3) as otherwise required by law.

14 An employee of a public body shall provide reasonable ad-
15 vance notice to the affected employee if disclosure of that
16 person's identity or identifying information is to occur. An
17 employee of a public body who discloses the identity of
18 a whistleblower in violation of this subsection shall be con-
19 sidered to be acting outside such employee's official duties.

20 **SEC. 105. NONPREEMPTION.**

21 (a) EFFECT ON OTHER LAWS.—Nothing in this title
22 shall be construed to preempt any law, rule, or regulation
23 of a State or political subdivision of a State and nothing
24 in this title shall be construed or interpreted to impair
25 or diminish in any way the authority of any State to enact

1 and enforce any law which provides equivalent or greater
2 protections for whistleblowers covered under this title.

3 (b) RIGHTS RETAINED BY WHISTLEBLOWERS.—Ex-
4 cept as provided in section 103(b)(2)(A), nothing in this
5 title shall be construed to diminish the rights, privileges,
6 or remedies of any whistleblower under any Federal or
7 State law, or under any collective bargaining agreement.

8 **SEC. 106. EFFECTIVE DATE AND RULES.**

9 This title shall take effect on the date of enactment
10 of this Act, and the procedures described in section 103
11 shall apply to complaints and actions filed under this title
12 after such date of enactment. The Secretary shall establish
13 interim final rules to implement this title within 60 days
14 of such date of enactment. The time periods for processing
15 complaints shall start once such interim rules are in effect.

16 **TITLE II—WHISTLEBLOWER**
17 **PROTECTION OFFICE**

18 **SEC. 201. ESTABLISHMENT.**

19 (a) ESTABLISHMENT AND PURPOSE.—There is es-
20 tablished within the Employment Standards Administra-
21 tion of the Department of Labor the Whistleblower Pro-
22 tection Office, in the title referred to as “the Office”, to
23 administer the duties of the Secretary under title I and
24 any duties assigned to the Secretary under the provisions
25 of law referred to by section 202, other than duties involv-

1 ing hearings and subsequent review and legal representa-
2 tion which may be assigned to other offices and agencies
3 within the Department of Labor.

4 (b) ADMINISTRATOR.—The Whistleblower Protection
5 Office shall be under the direction of an Administrator of
6 Whistleblower Protection, referred to in this title as “the
7 Administrator”, who shall be appointed by the President
8 with the advice and consent of the Senate.

9 (c) APPOINTMENT OF PERSONNEL.—

10 (1) APPOINTMENT AND COMPENSATION.—The
11 Administrator may, subject to the civil service laws,
12 appoint such employees as the Administrator con-
13 siders necessary to carry out the functions and du-
14 ties of the Office, and shall fix their compensation
15 in accordance with the provisions of chapter 51 and
16 subchapter III of chapter 53 of title 5, United
17 States Code.

18 (d) TRANSFER OF PERSONNEL; BUDGET.—

19 (1) IN GENERAL.—Beginning not later than the
20 effective date of this title, the functions of the Sec-
21 retary under any of the provisions of law referred to
22 in section 202 shall be carried out by the Adminis-
23 trator.

24 (2) BUDGETS, PERSONNEL, ETC.—All unex-
25 pended balances of appropriations, personnel, prop-

1 erty, records, obligations, and commitments which
2 are used primarily with respect to any functions
3 transferred under the provisions of paragraph (1) to
4 the Administrator shall be transferred to the Office,
5 as appropriate. The transfer of personnel pursuant
6 to this paragraph shall be without reduction in clas-
7 sification or compensation for 1 year after such
8 transfer, except that the Administrator shall have
9 full authority to assign personnel during such 1-year
10 period in order to efficiently carry out functions
11 transferred to the Administrator under this title.

12 (3) CONTINUATION.—All orders, decisions, de-
13 terminations, rules, and regulations, (A) which have
14 been issued, made, granted, or allowed to become ef-
15 fective in the exercise of functions which are trans-
16 ferred under this subsection; and (B) which are in
17 effect at the time this section takes effect, shall con-
18 tinue in effect according to their terms until modi-
19 fied, terminated, superseded, set aside, revoked, or
20 repealed by the Secretary, the Administrator, or
21 other authorized officials, by any court of competent
22 jurisdiction, or by operation of law. The provisions
23 of this subsection shall not affect any proceedings
24 pending at the time this title takes effect. The provi-
25 sions of this section shall not affect suits commenced

1 prior to the date this section takes effect and in all
2 such suits proceedings shall be had, appeals taken,
3 and judgments rendered, in the same manner and
4 effect as if this section had not been enacted.

5 (e) **PRINCIPAL OFFICE.**—The principal location of
6 the Office shall be in the District of Columbia, but the
7 Administrator or a duly authorized representative may ex-
8 ercise any or all of the Administrator’s powers in any
9 place.

10 **SEC. 202. OTHER PRIVATE SECTOR WHISTLEBLOWER PRO-**
11 **TECTIONS.**

12 Notwithstanding any other provision of law, the fol-
13 lowing provisions of law shall, after the effective date of
14 this title, be administered in accordance with this title:

15 (1) Sections 20209, 31105, 42121, and 60129
16 of title 49, United States Code.

17 (2) Section 211 of the Asbestos Hazard Emer-
18 gency Response Act of 1986 (15 U.S.C. 2651).

19 (3) Section 7 of the International Safe Con-
20 tainer Act (46 App. U.S.C. 1506).

21 (4) Section 1450 of the Safety Drinking Water
22 Act of 1974 (42 U.S.C. 300j–9i).

23 (5) Section 507 of the Federal Water Pollution
24 Control Act, Amendments of 1972 (33 U.S.C.
25 1367).

1 (6) Section 23(a)(1) through (3) of the Toxic
2 Substances Control Act (15 U.S.C. 2622).

3 (7) Section 7001 of the Solid Waste Disposal
4 Act of 1976 (42 U.S.C. 6971).

5 (8) Section 322 of the Clean Air Act, amend-
6 ments of 1977 (42 U.S.C. 7622).

7 (9) Section 10 of the Comprehensive Environ-
8 mental Response, Compensation, and Liability Act
9 of 1980 (42 U.S.C. 9610).

10 (10) Section 211 of the Energy Reorganization
11 Act of 1978 (42 U.S.C. 5851).

12 (11) Section 806 of the Sarbanes-Oxley Act of
13 2002 (18 U.S.C. 1514A).

14 (12) Section 1413 of the Implementing Rec-
15 ommendations of the 9/11 Commission Act of 2007
16 (P.L. 110–53).

17 **SEC. 203. DUTIES, POWERS AND FUNCTIONS.**

18 (a) SUBPOENAS, EVIDENCE, AND TESTIMONY.—In
19 carrying out its duties under title I of this Act or under
20 any of the provisions of law referred to by section 202,
21 the Administrator may issue subpoenas requiring the dep-
22 osition of or the attendance and testimony of witnesses
23 and the production of any evidence, including any books,
24 papers, or documents, relating to any matter under inves-

1 tigation by the Commission, or required in connection with
2 a hearing.

3 (b) RULES.—The Secretary is authorized to prescribe
4 such rules as are necessary for the orderly transaction of
5 the proceedings of the Office and for the implementation
6 of the programs of the Office.

7 (c) EFFECTIVE DATE.—The Administrator shall
8 begin to carry out the duties and exercise the powers set
9 forth in this title on the date that is 1 year after the date
10 of enactment of this Act, or such earlier date as the Sec-
11 retary may determine that the Office is sufficiently estab-
12 lished, staffed, and funded.

13 (d) ANNUAL REPORTS.—The Administrator shall an-
14 nually transmit a report to Congress detailing the activi-
15 ties of the Office during the previous year, including infor-
16 mation relating to the number and nature of complaints
17 filed, the number of merit and non-merit cases, the num-
18 ber of such complaints disposed of without investigation
19 due to specific procedural issues, investigations conducted,
20 orders issued, and statistics related to settlements . In ad-
21 dition, the Administrator shall annually make available the
22 full text of all settlements approved by the Office, fol-
23 lowing the elimination of all personal identifying informa-
24 tion about the claimant, the employer, and any other

1 party, and no settlement approved by the Office may pro-
2 hibit disclosure in such a manner.

3 (e) STUDY ON INTIMIDATION OF WHISTLE-
4 BLOWERS.—Not later than 6 months after the effective
5 date of this title, the Administrator shall request the Na-
6 tional Academies to conduct a study of intimidation faced
7 by those in the private sector who blow the whistle on vio-
8 lations of law or accepted standards of practice established
9 by public bodies. The study shall consider the role played
10 by a belief that whistleblowing will not make any dif-
11 ference, fear of retaliation, cultural factors, distrust of the
12 government, lack of information or misinformation about
13 employee rights, deficiencies in such rights or in the prac-
14 tical ability to seek relief for violation thereof, and such
15 other factors as may be relevant. The study shall include
16 recommendations for addressing such issues. The Admin-
17 istrator shall transmit the study, including any further
18 recommendations of the Administrator, to Congress not
19 later than 90 days after the receipt of the study.

20 **TITLE III—CONFORMING**
21 **AMENDMENTS**

22 **SEC. 301. OCCUPATIONAL SAFETY AND HEALTH ACT.**

23 Section 11(c) of the Occupational Safety and Health
24 Act (29 U.S.C. 660(c)) is amended—

1 (1) by striking the period at the end of para-
2 graph (1) and inserting the following: “, including
3 reporting any injury, illness, or unsafe condition to
4 the employer, agent of the employer, safety and
5 health committee involved, or employee safety and
6 health representative involved. No person shall dis-
7 charge or in any manner discriminate against an
8 employee for refusing to perform the employee’s du-
9 ties if the employee has a reasonable apprehension
10 that performing such duties would result in serious
11 injury to, or serious impairment of the health of, the
12 employee or other employees. The circumstances
13 causing the employee’s apprehension of serious in-
14 jury or serious impairment of health shall be of such
15 a nature that a reasonable person, under the cir-
16 cumstances confronting the employee, would con-
17 clude that there is a bona fide danger of a serious
18 injury, or serious impairment of health, resulting
19 from the circumstances. In order to qualify for pro-
20 tection under this paragraph, the employee, when
21 practicable, shall have sought from the employee’s
22 employer, and have been unable to obtain, a correc-
23 tion of the circumstances causing the refusal to per-
24 form the employee’s duties.”; and

1 (2) by striking paragraphs (2) and (3), and in-
2 serting the following:

3 “(2) Any employee who believes that he or she
4 has been discharged or otherwise discriminated
5 against by any person in violation of this subsection
6 may file a complaint with the Secretary of Labor, or
7 bring a civil action at law or equity in Federal court.
8 The Secretary shall receive, process, investigate, and
9 attempt to resolve and remedy complaints of viola-
10 tions of paragraph (1) in the same manner that the
11 Secretary receives, processes, investigates, and at-
12 tempts to resolve and remedy complaints of viola-
13 tions of section 102(a) of the Whistleblower Protec-
14 tion Streamlining Act of 2007. A civil action
15 brought under this subsection shall be governed
16 under the rules and procedures set forth in section
17 103 of such Act.”.

18 **SEC. 302. FEDERAL MINE SAFETY AND HEALTH ACT.**

19 Section 105(c) of the Federal Mine Safety and
20 Health Act of 1977 (30 U.S.C. 815(c)) is amended—

21 (1) in paragraph (1)—

22 (A) by inserting “or an injury or illness in
23 a coal or other mine or that may be associated
24 with mine employment,” after “of an alleged

1 danger or safety or health violation in a coal or
2 other mine,”; and

3 (B) by adding at the end the following:

4 “No miner shall be required to work under con-
5 ditions he has reasonable grounds to believe to
6 be abnormally and immediately dangerous to
7 himself beyond the normal hazards inherent in
8 the operation which could reasonably be ex-
9 pected to cause death of serious physical harm
10 before such condition or practice can be
11 abated.”;

12 (2) in paragraph (2), by inserting after the fifth
13 sentence the following: “No investigation or hearing
14 authorized by this paragraph may be stayed to await
15 resolution of a related grievance proceeding.”; and

16 (3) by adding at the end the following:

17 “(4) In lieu of initiating an action pursuant to para-
18 graph (2), or if a complaint under paragraph (2) is not
19 decided within 180 days, any miner or applicant for em-
20 ployment or representative of miners who believes that he
21 has been discharged, interfered with, or otherwise dis-
22 criminated against by any person in violation of this sub-
23 section may bring an action at law or equity in the appro-
24 priate district court of the United States. Such civil action
25 shall be governed under the rules and procedures set forth

1 in section 103 of the Whistleblower Protection Stream-
2 lining Act of 2007.”.

○

The Sarbanes-Oxley Act (“SOX”)
Whistleblower Protection in Plain English
A Step-by-Step Guide to Filing a SOX Complaint

by Shelia Thorpe

A Step-by-Step Guide to Filing a SOX Complaint

Introduction

The Sarbanes-Oxley Act resulting from the Congressional response to problems highlighted in the corporate failures of Enron and WorldCom.¹ Trust and confidence in financial markets were eroded by the daily news of accounting irregularities and possible fraudulent acts occurring at major corporations around the country.² The legislation sought to establish a framework to deal with conflicts of interests that undermined the integrity of the capital markets. The Act is applicable to public companies only.³

In order to secure the integrity of the capital markets it was determined that meaningful protections must be provided for whistleblowers.⁴ Congress attempted to “protect the ‘corporate whistleblower’ from being punished for having the moral courage to break the corporate code of silence.”⁵ As Senator Leahy acknowledged during the debate regarding the Act, “When sophisticated corporations set up complex fraud schemes, corporate insiders are often the only ones who can disclose what happened and why.”⁶

Whistleblowers from publicly traded companies may access the protections provided in the statute in the event that they suffer retaliation or discrimination for reporting violations of the Act.

Overview

SOX provides whistleblower protection for employees of publicly traded companies. No officer, employee, contractor, subcontractor or other agent of a publicly traded company may fire, demote, suspend, threaten, harass or in any other way discriminate against an employee with respect to their job, job duties, or benefits because the employee has lawfully provided information either directly, indirectly or assisted in an investigation regarding any conduct which the employee believes to constitute mail, wire, bank, or securities fraud; any violation of rules or regulations of the Securities and Exchange Commission (“SEC”); or any federal law concerning fraud against shareholders to a federal regulatory or law enforcement agency; a member of Congress or a Congressional Committee; or a person with supervisory authority over the employee or another person with authority within the organization. The law further protects those who file, testify, participate or assist in a proceeding that will be filed or has been filed regarding any of the previously mentioned violations with the knowledge of the employer.⁷ (This is not to imply that the employee must seek consent of the employer, but the employer must be aware that the employee has raised concerns.)

Anyone who feels they have been either discharged or discriminated against by anyone in violation of the above may file a complaint with the Secretary of Labor. One must file a claim no later than 90 days after the date on which the violation occurs.⁸ If the Secretary has not issued a final decision on the individual’s complaint within 180 days of the filing of a complaint, absent any bad faith of the complaining party, the

complainant may file an action for de novo⁹ review in federal court in the appropriate district regardless of the amount in controversy.¹⁰

A complainant who prevails is entitled to all the relief necessary to adequately compensate the individual. The individual may be entitled to: compensatory damages or reinstatement with the same seniority they would have had absent the retaliation; back pay with interest; and compensation for damages that occurred because of the retaliation such as litigation costs, expert witness fees, as well as reasonable attorney fees. A complainant seeking protection under this law should be mindful that they may have additional rights, privileges, or remedies under other laws, both state and federal, as well as rights under a collective bargaining agreement where applicable, which they may wish to exercise.¹¹

Step 1. The Complaint Process

The complaint

Where an employee feels they have been discharged or suffered other discrimination as a result of their participation in activities covered under SOX they may file a complaint with Occupational Safety and Health Administration (“OSHA”) **within 90 days** after an alleged violation of the Act occurs.¹² The statutory time period for filing a complaint begins when the adverse action takes place. It is important to take note that the date of the adverse action is the date that one receives notice of the action not the date the action is implemented. For example, if one receives notice that they will be terminated on July 1, but is given 90 days to resign instead the date of the adverse action is July 1. If the action is a continuing one then the time period begins with the last act. If the last day of the time period falls on a weekend, federal holiday, or a date that the Department of Labor Offices are closed the next business day will count as the final day. Some circumstances may extend the time eligible for filing. For example if the employer has actively concealed or misled the employee about the adverse action or the grounds for the action; the employee suffered a debilitating illness or injury and was unable to file; a natural disaster caused conditions that would make it impossible for a reasonable person to communicate with the appropriate agency in a timely manner; or the employee filed a timely complaint with another agency that cannot grant relief. However one should be aware that such circumstances are rare and the DOL will conduct a thorough investigation to determine if a circumstance provides for the time period to be extended.¹³

The complaint should be filed with the OSHA Area Director responsible for enforcement in the geographical area where the employee resides or was employed. It can also be filed with any OSHA officer or employee. (Although the Act does not specify how the writing may be delivered, one should make sure to have a receipt of the actual date of filing. It is recommended that one retain certified mail receipts or facsimile transmittal sheets proving the date the complaint was filed. On occasion complaints may be misplaced or lost and it will be necessary to prove that the filing was timely or risk dismissal because the statute of limitation has expired. The date of the postmark, facsimile transmittal, or e-mail communication will be considered the date of filing. If

filed by any other means the complaint is considered filed when the complaint is received.)¹⁴ SOX complaints are generally received by the area office but may be received at the Regional or National Office. Complaints are sometimes received by referral from other government agencies or Congress.¹⁵

Although no particular form is required, the complaint must be filed in writing. It should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.¹⁶ The complaint should include the full name, address, and phone number of the person filing the complaint as well as the name, address and phone number of the employer.¹⁷ In addition one should furnish copies of all relevant documents that are relevant to the claim. Some examples are notices of adverse employment actions, performance appraisals, compensation information, grievances that may have been filed, job specifications or descriptions, employee handbooks, and collective bargaining agreements. Also one should keep careful records of the medical costs related to the claim and other costs that result from the claim. One should be mindful that if they have been terminated or laid off they are obligated to continue to seek work and keep records of their earnings during this period. They may be used where appropriate to compute back pay owed. Back pay liability may also be affected by the party's refusal of a bona fide offer of reinstatement.¹⁸

One should not only detail the adverse action but the dates of such adverse action with a summary of their experience. The summary should address the factors necessary to prove a prima facie case. Namely that the party has engaged in some protected activity. The employer was aware of the party's activity and took adverse action against the employee in response to their protected activity.¹⁹

If at all possible the complaint should address the statute that is applicable (e.g. Corporate and Criminal Fraud Accountability Act, "Sarbanes-Oxley"). Should one state an incorrect statute or mistakenly identify the statute the receiving office will classify the complaint type. In addition one should note if they have filed a complaint with another enforcement agency such as the Securities and Exchange Commission ("SEC").²⁰

The complaint and any additional supplemental documentation must demonstrate a prima facie showing that the protected behavior or conduct of the employee was a contributing factor in the unfavorable personnel action alleged in the complaint. While there may be an opportunity to supplement the initial filings to demonstrate a prima facie case the complainant should make every effort to satisfy this burden in the initial filing. A prima facie case is had when the complainant can show: the complainant engaged in protected activity or conduct; the named person or employer knew or suspected that the complainant engaged in the protected activity; the employee suffered an unfavorable personnel action; and the circumstances are sufficient to infer that the protected activity was a contributing factor to the unfavorable action. If the complaint and supplemental information do not demonstrate a prima facie case the complainant will be advised and no further investigation will be done.²¹

Although a party may be able to demonstrate a prima facie showing an

investigation will not be conducted if the respondent can show by clear and convincing evidence²² that they would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.²³

The decisions of the Assistant Secretary to dismiss a complaint without completing an investigation or the Assistant Secretary's determination to proceed with an investigation are not subject to review of the ALJ. Nor may the ALJ remand a complaint for completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error.²⁴

Pre-Investigative Stage

When a complaint is received basic information and the filing date is recorded by the receiving officer and sent to a Supervisor immediately. If the complaint is received at the national office or from other government agencies is usually forward to the Regional Administrator for documentation.²⁵

Upon receipt of the complaint it will be reviewed for jurisdictional requirements, timeliness, and whether a prima facie case is demonstrated. The office may contact you to get additional information.²⁶ At times the DOL may send a questionnaire to get supplemental data.²⁷

If the office finds that the case cannot proceed to the investigation phase they will explain the reason. A SOX complaint that is untimely or does not meet a prima facie analysis cannot be closed administratively. The officer will explain to the party that an impediment exists and allow the party to decide if they wish to withdraw the complaint.²⁸ At anytime before the filing of objections to findings or a preliminary order, a complainant may withdraw their complaint by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether to approve the withdrawal. If the withdrawal is approved the respondent will be notified.²⁹ If the party does not withdraw the complaint the case will be docketed and a written determination issued.³⁰

After the initial screening phase is complete the complaint will be docketed. At that time the office will formally notify both the employee and the named party in writing of receipt of the complaint and its intention to investigate.³¹ The Assistant Secretary, usually in the person of the supervisor, will notify the named person(s) or the employer ("respondent") of the filing, the allegations, and the substance of evidence supporting the complaint. (Every effort is made to protect the identity of confidential informants.) The respondent is notified of their rights.³² Simultaneously the supervisor will request that the respondent submit a written statement. The respondent is also advised that they may designate an attorney or other representative.³³ Additionally the party will be advised that any evidence they may wish to submit to rebut the allegations in the complaint must be received within 20 days from receipt of the letter. The respondent is also told that they may request a meeting during that 20 day period.³⁴ Another copy of the notice is mailed to the Securities and Exchange Commission.³⁵

In addition case number is assigned.³⁶ The case number identifies the region the case originates in (from 0-10); the area office city number (according to the World-wide Geographic Code Manual); the fiscal year it was filed in; the serial number of the complaint for the area office and fiscal year.³⁷

The office supervisor will send a letter to the complainant notifying them that the complaint has been reviewed, assigned a case number and investigator, including the name and contact information for the investigator.³⁸

Investigative Stage

An OSHA supervisor will assign the case to an investigator; however, investigating cases that involve complex issues or unusual circumstances may be conducted by the supervisor or a team of investigators. Investigators will schedule investigations within the statutory time frames in mind. A SOX complaint has a time frame of 60 days.³⁹ Every effort is made to make a determination within 60 days; nevertheless, there may be instances in which it is not possible to complete the determinations within the 60 day period.⁴⁰

Generally investigators will make initial contact with a party by phone. If the investigator finds that a prima facie case exists they will proceed to a field investigation. During a field investigation personal interviews and evidentiary document collection is conducted. Site visits may be scheduled to interview witnesses. Some testimony and evidence may be obtained by telephone, mail or electronically.⁴¹ If the investigators find that the complainant has filed a whistleblower charge with another government agency at the same time, the investigator may contact the other agency to get additional information and avoid duplicative investigative efforts.⁴²

The investigator will, of course, wish to interview the complainant and respondent in person and obtain a signed statement. It is to the party's advantage to identify as many witnesses as possible who may be able to support their allegations. The identification should include complete contact information and details of what they may have witnessed.⁴³

Witnesses are allowed to have a personal representative or an attorney present during any interview.⁴⁴ If there is a collective bargaining agreement appropriate union officials may be interviewed. Witnesses may request confidentiality.⁴⁵ Investigations will be conducted in a manner that protects those who provide information on a confidential basis.⁴⁶ Nevertheless, their identity will only be kept in confidence as allowed by law, if they testify in a proceeding their statement may be required to be disclosed. Also their identity may be disclosed to another federal agency where appropriate; the investigator will request that the information be kept confidential by the other agency.⁴⁷ Confidentiality cannot be extended to the complainant.⁴⁸

After the investigator has spoken with the respondent and taken their evidence,

the complainant and where appropriate witnesses, will be contacted to resolve any discrepancies. Upon completion of collection of all evidence the investigator will evaluate the evidence and make conclusions as to whether or not reasonable cause exists to believe that the respondent has discriminated against the complainant. After completing the field investigation and discussing the claim with the supervisor and Solicitor of Labor, the investigator will conduct a closing conference with the complainant either in person or by phone. The discussion will allow the complainant to ask questions as necessary. At this time the investigator will give his recommended determinations and how the determination was reached as well as what actions may be taken. During the conference the investigator must instruct the complainant of their rights to appeal or objection and the time limitation for filing. It should also be noted that the determination is subject to review by management and the Solicitor of Labor.⁴⁹

The investigator will write a Final Investigation Report (“FIR”). The FIR contains contact information for both the complainant and respondent as well as contact information for their representatives if designated. It also gives a brief account of the complainant’s allegations and the defense(s) offered by the respondent. There will be a statement regarding the basis of coverage by the statute, a list of witnesses interviewed, and potential witnesses not interviewed, complete with contact information and occupation. A narrative of the investigative findings must be included with exhibit references to evidentiary documentation. The investigator will also give an analysis of the facts as they relate to the elements of a prima facie case. In cases in which the investigator will recommend litigation, the investigator will examine the strengths and weaknesses of the case. Information regarding the closing conference, reasons for findings, description of the complainant’s reaction to the findings and whether the party offered any new evidence or witnesses at the conference will also be included. If a recommendation of dismissal was given, notation is made that the party was advised of appeal rights and objection procedures. If the case was settled the FIR will contain an account of the settlement. Lastly the FIR will have the investigator’s recommendations.⁵⁰

After the investigator completes the investigation the supervisor will review the file. If the recommendation is to approve a withdrawal the supervisor will approve by signing the withdrawal form. (One may verbally request a withdrawal of the complaint but is suggested that the request be made in writing.) If the recommendation is for dismissal the supervisor will prepare letters of dismissal to all parties with information of the parties’ right to objection or appeal as required by law.⁵¹

If the supervisor decides that the claim warrants further investigation is warranted the case will be returned for follow up. The supervisor will forward the file to the Regional Administrator (“RA”) or a delegate to review the recommendations and the file and for their signature on the appropriate letter of determination. Copies of the determination and complaint will be distributed to the Securities and Exchange Commission (“SEC”) and the Office of Administrative Law Judge (“OALJ”).⁵²

Findings and Preliminary Orders

If a conclusion is made that there is a reasonable cause to believe that a violation has occurred the Assistant Secretary may issue a preliminary order providing relief to the complainant. The preliminary order shall include that relief necessary to make the employee whole, including: reinstatement with the seniority status the party would enjoy had the violation not taken place; back pay with interest; and compensation for special damages resulting from the violation such as litigation costs, expert witness fees, and reasonable attorney's fees. If the respondent can demonstrate that the complainant is a security risk reinstatement may not be appropriate.⁵³ Under such circumstances front pay⁵⁴ may be available.

When it is determined that preliminary immediate reinstatement should be ordered the supervisor will again contact the respondent and provide them with the relevant evidence supporting the finding in favor of the complainant. To ensure due process rights the notification will describe the evidence relied upon to determine the violation and copies of the relevant documents will be provided including witness statements. Efforts will be made to keep the confidence of witnesses who have requested confidentiality but summaries of the contents of witness statements must be provided with as much detail as possible. The respondent is allowed to submit a written response, meet the investigator, and present rebuttal witnesses within ten business days of OSHA's letter or at a later agreed date.⁵⁵

The findings and preliminary order will be effective 30 days after receipt by the respondent unless an objection and a request for hearing has been filed.⁵⁶ The Assistant Secretary may withdraw their findings or a preliminary order at any time before the expiration of the 30 day objection period, provided no objection has been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or order begins a new 30 day objection period.⁵⁷

Anytime before the findings or order becomes final, a party may withdraw their objections to the findings or order by filing a written withdrawal with the ALJ. The ALJ will decide whether to approve the withdrawal.⁵⁸

Whether an objection is filed by a party to the preliminary reinstatement, any portion of a Preliminary Order requiring reinstatement is effective immediately upon receipt of the Finding and Preliminary Order. Enforcement may be had in the U.S. District Court in the appropriate jurisdiction.⁵⁹ Reinstatement is not stayed by the filing of an objection or request for a hearing.⁶⁰

If no objection is filed regarding the findings or the preliminary order, the findings or preliminary order will become the final decision of the Secretary, and is not subject to judicial review.⁶¹

Settlement

If the parties express that they wish to explore settlement the investigator will facilitate such.⁶² Parties may also use private alternative dispute resolution to aid them in settlement.⁶³ At any time after the filing of a complaint but before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the respondent agree to a settlement.⁶⁴

Where possible 100% relief should be sought in settlement negotiations, however, the parties are free to make concessions. An agreement may include provisions for reinstatement to the same or an equivalent job and restoration of seniority and benefits. Employers may offer front pay in lieu of reinstatement if the complainant agrees. The agreement may include lost wages; deletion of warnings, reprimands, or negative references; posting notices to employees about the settlement, other compensatory damages, and/or pain and suffering damages.⁶⁵ Monetary damages may receive interest at the rate charged by the IRS for underpaid taxes. (This rate is computed by using the Federal short-term rate established in the first month of each calendar quarter, plus three percentage points.)⁶⁶ Punitive damages may also be in order where conduct was egregious.⁶⁷

Any settlement agreement must be in writing. The employer must agree to comply with the statute and address the alleged retaliation. The agreement must specify the relief owed. Additionally the employer must make a constructive effort to lessen any chilling effect. In order to ensure such the employer may be asked to post the agreement or notice thereof. To avoid such the employer may demonstrate why notice to other employees is not necessary.⁶⁸

Settlement agreements made during the investigative stage must be reviewed by the Secretary of Labor. Under SOX any settlement made before the issuance of a final order may be terminated as a result of a settlement agreement. However, the settlement must be submitted to an Administrative Law Judge (“ALJ”) for approval even though the case has not been submitted to the Office of Administrative Law Judges (“OALJ”).⁶⁹

If the employer does not comply with the settlement agreement the noncompliance may be treated as a new instance of retaliation and precipitate a new case.⁷⁰

Objections and Request for Review

Any party may be represented by a personal representative other than an attorney, or represent themselves in a hearing, or private counsel.⁷¹ The OALJ does not have the authority to appoint counsel or refer the parties to attorneys.⁷² Witnesses may also choose self-representation, personal representation or counsel. If the party chooses a personal representative, the personal representative must submit an application to the ALJ with the applicant’s qualification. The ALJ may after a hearing on the matter, deny the privilege of appearing to any person who is deemed to not possess the requisite qualifications to represent others; is lacking in character; has engaged in unethical or improper professional conduct; or has engaged in an act involving moral turpitude.⁷³

Parties may waive their right to appear for argument or present evidence. Such a waiver should be made in writing and filed with the Chief Administrative Law Judge or the ALJ hearing the case. Where all parties waive appearance the ALJ will make a record of the written documents submitted by the parties and pleadings and will make a decision accordingly.⁷⁴

Step 2. The Office of Administrative Law Judges

The Chief Administrative Law Judge will, upon receipt of a timely objection, will notify the parties of the date, time, and place of hearing.⁷⁵ SOX requires that an expedited hearing be held. Hearings must be scheduled within 60 days from receipt of a request for hearing or order of reference. Decisions of the ALJ should be issued within 20 days after receipt of the transcript of any oral hearing or within 20 days after the filing of all documentary evidence if no oral hearing was conducted.⁷⁶

While the adjudication process is somewhat less formal than a court proceeding, the ALJ has all the powers necessary to conduct fair and impartial hearings. The ALJ may conduct formal hearings; administer oaths and examine witnesses. Where necessary the ALJ may compel production of documents and the appearance of witnesses in control of the parties as well as issue decisions and orders.⁷⁷ The ALJ may issue a default decision against any party, who without good cause, fails to appear at a hearing.⁷⁸

Persons participating in proceedings before the ALJ who disobey or resist any lawful order or process; misbehaves during a hearing or obstructs a hearing; neglects to produce documents after an order; or refuses to appear, take the oath, or refuses examination may where the statute allows have such facts of their conduct certified to the Federal District Court having jurisdiction in the place where he is sitting to request appropriate remedies.⁷⁹ The ALJ may issue a default decision against any party failing without good cause to appear at a hearing.⁸⁰

The ALJ has the authority to sanction parties just as any other judge. SOX provides that upon the determination by the Secretary of Labor (“Secretary”) that a complaint was filed frivolously or in bad faith the respondent may be awarded reasonable attorney’s fees not to exceed \$1,000 to be paid by the complainant. The ALJ may award such at the request of the respondent.⁸¹

Parties

Generally the parties to the proceedings will be the complainant and the respondent. However, other persons or organizations may participate as parties if the ALJ determines that the final decision could directly or adversely affect them or the class they represent; they will contribute materially to the disposition of the proceedings; and their interest is not adequately represented by the parties in the suit. Such additional persons or organizations must submit a petition to the ALJ within 15 days after they learn of or should have known of the proceedings. The petition must explain: their interest in

the proceedings; how their participation as a party will contribute materially to the disposition of the proceeding; who will appear for the petitioner; the issues the petitioner wish to participate on; and whether the petitioner will present witnesses. They must also serve a copy on all parties. Other parties in the suit may object to the petitioner. The ALJ will determine if the petitioner may participate in the proceedings. If the ALJ denies the petitioner the ALJ may treat the petition as a request to participate as amicus curiae.⁸²

An amicus curiae brief can only be filed with the written consent of all the parties, by leave of the ALJ, or at the request of the ALJ. Neither consent nor leave is required when the brief is from an officer or agency of the United States, a state, territory or commonwealth. The amicus curiae cannot participate in the hearing.⁸³

Document filing

Any documents that are filed with the ALJ must be served on all parties. In other words you must send a copy of the document to all the named parties in the suit. One should include on the document the case caption (e.g. John Doe v. ABC Corporation) the docket number, and a short title of the motion, i.e. Motion for Continuance. The signed documents should be mailed to the Chief Docket Clerk or to the Regional Office to which the proceeding may have been transferred for a hearing. Remember that each document requires a proof of service stating when and how they were served to the other litigant(s).

When explicitly authorized one may also fax documents to the OALJ. Of course the fax should contain a coversheet that identifies the sender, the number of pages sent, and the caption and docket number of the case. Documents faxed should not exceed 12 pages inclusive of the cover sheet, the proof of service, and any and all accompanying exhibits, etc. If prior permission has not been granted one may file by fax and attach a statement of the circumstances that precipitated that the document be filed by fax. Such does not ensure that the filing will be accepted.

It is extremely important that one be cognizant of the time requirements. Time lines begin the day following the act or event.⁸⁴ Parties have ten days after service of a motion or request in which to respond unless ordered otherwise by the ALJ.⁸⁵ If the last day of the time period is a Saturday, Sunday, or legal holiday observed by the federal government the time period concludes on the next business day. When documents are filed by mail, five days are added to the time period.⁸⁶

Adjudication Process

The ALJ may require that one or more of the parties file a prehearing statement explaining their position. A prehearing statement identifies the name of the party who is presenting it and generally: issues involved in the proceeding; stipulations;⁸⁷ disputed facts; witnesses and exhibits (other than those that are privileged); a brief statement of applicable law; conclusions to be drawn; suggested time and location of hearing as well as an estimate of the time required for the party to present their case; and other such appropriate information that complies with the ALJ's request.⁸⁸

The ALJ may order a prehearing conference at their discretion or upon a motion from a party. These conferences may be conducted by telephone unless otherwise required. Generally prehearing conferences are used to discuss simplification of issues; the necessity of amendments to pleadings; evidentiary matters; limitation of witnesses; settlement issues; identification of documents or matters of which official notice may be requested; or to expedite disposition of the proceedings. Such conferences are reported stenographically unless the ALJ directs otherwise. Usually a written order is generated following the conference unless the ALJ decides the stenographer's report is sufficient or the conference happens within seven days of the hearing.⁸⁹

After the conclusion of a hearing the record shall be closed unless the ALJ directs otherwise. (If the hearing was waived the record closes at a date set by the ALJ.) Once the record is closed no additional evidence may be accepted into the record unless one can demonstrate new material evidence that was unavailable prior to closing.⁹⁰

After the case has been heard the ALJ will issue a Recommended Decision and Order. Within a reasonable time after the filing of the proposed findings of fact, conclusions of law, and order, or within 30 days of receipt of consent findings the ALJ will make a decision. The decision will include findings of fact and conclusions of law with reasons regarding each material issue of fact or law presented.⁹¹ The ALJ will order the order the appropriate remedy.⁹²

A determination that a violation has occurred will be had when the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. If the respondent demonstrates through clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior then relief will not be ordered for the complainant.⁹³

An employee who prevails on their claim shall be entitled to all relief necessary to make the employee whole. This includes compensatory damages; reinstatement with the same seniority status the employee enjoyed prior to the discrimination; the amount of back pay, with interest where appropriate, and compensation for any special damages sustained as a result of the discrimination. Special damages may be the cost of litigation, expert witness fees, and reasonable attorney fees.⁹⁴

The decision of the ALJ will become a final order unless the Administrative Review Board ("ARB") issues an order notifying the parties that the case has been accepted for review within 30 days of the filing of a petition. If a petition for review is accepted the decision of the ALJ will be inoperative unless the Board issues an order adopting the decision. However, a preliminary order of reinstatement will be effective while the ARB considers the case unless the ARB grants a motion to stay the order. The ARB will review the case under a substantial evidence⁹⁵ standard.⁹⁶

The ARB will issue a final decision within 120 days of the conclusion of a hearing, which is the conclusion of all proceedings before the ALJ (which is ten business days after the date of the ALJ's decision unless a motion for reconsideration was filed

with the ALJ in the interim). If the ARB concludes that the respondent has violated the law, the final order will provide for all the relief necessary to make the complainant whole, including reinstatement to their former position with the seniority status the complainant would have enjoyed had there been no discrimination; backpay with interest; and compensation for any special damages sustained as a result of the discrimination. Special damages include litigation costs, expert witness fees, and reasonable attorney's fees. If the ARB finds that there has been no violation of the law, the complaint will be denied. The respondent who prevails on an allegation that the complaint is frivolous or in bad faith may be awarded reasonable attorney's fees. However, the fees may not exceed \$1,000.⁹⁷

Enforcement of Reinstatement Order

When a party fails to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the opposing party may file a civil action seeking enforcement of the order in the US district court for the district in which the violation occurred.⁹⁸

Appeal

Within 60 days after the final order of the ARB has been issued any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit that the complainant resided in on the day of the violation.⁹⁹

Summary Decision

A party may file for a summary decision twenty or more days before the date of a hearing. The ALJ may set the matter for argument or ask the parties to submit briefs. A summary decision will be issued when the ALJ has determined that there is no genuine issue as to any material fact.¹⁰⁰

Settlement Program

At any time the parties may ask to defer the hearing for a reasonable time to permit negotiation of a settlement. The parties may use a settlement judge¹⁰¹ to mediate.¹⁰² There is no charge for the services of the settlement judge.¹⁰³ Settlement discussions are confidential and no evidence of statements or conduct in the proceedings is admissible in the proceedings or subsequent administrative proceedings before the Department of Labor ("DOL"), unless agreed to by the parties. Any documents disclosed in the settlement process may not be used in litigation unless obtained through the discovery process. The settlement judge will not discuss the case with the ALJ or be called as a witness in the proceeding or subsequent proceedings before the DOL.¹⁰⁴

Settlement negotiations shall not exceed thirty days from the appointment of the settlement judge. Nevertheless, the settlement judge may request an extension of time

from the ALJ. Upon a communication from either party that the party no longer wishes to participate, the negotiations will end.¹⁰⁵

At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the ALJ. An approved settlement is a final order and may be enforced as such.¹⁰⁶

Step 3. The Administrative Review Board

Review

Either party may seek judicial review. To seek judicial review of a decision of the ALJ or in the case of a respondent alleging that the complaint was frivolous or in bad faith, a written petition for review with the ARB must be made. The petition should specifically identify the findings, conclusions or orders to which exception is taken. Any exception not raised will be deemed to be waived. One has ten business days from the date of the ALJ's decision in which to file a petition. A party seeking review must serve a petition on all parties in the litigation, the Chief ALJ, the Assistant Secretary of OSHA, and the Assistant Secretary of the Division of Fair Labor Standards. The date of the postmark is considered to be the date of filing.¹⁰⁷ If the parties fail to do so then the decision of the ALJ becomes final and is not reviewable.

Stays

Parties may request a stay of an order pending an appeal. However, one should be mindful that the burden to receive a stay is rather high. To receive a stay a party must show that they are likely to prevail on appeal; that irreparable injury will result if the stay is not granted; the stay will not cause substantial harm to the other litigant(s); and that the stay will not interfere with the public interest. If the request for stay is denied the party may appeal with the U.S. Court of Appeals for the circuit in which the violation happened.

Withdrawal

Anytime before the findings or order becomes final, a party may withdraw their objections to the findings or order by filing a written withdrawal with the ARB. The ARB will decide whether to approve the withdrawal.¹⁰⁸

Settlement

At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ARB if the case is before the ARB. An approved settlement is a final order and may be enforced as such.¹⁰⁹

Appeal

An ARB decision may be appealed by any person adversely affected or an aggrieved party within 60 days of a final decision to the U.S. Court of Appeals for the circuit in which the violation occurred. Final orders of the ARB are not subject to judicial review in any criminal or other civil proceeding.¹¹⁰

Step. 4. Federal Court

If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and the delay has not been caused by the employee, the employee may wait for the decision of the Secretary of Labor or they may file suit in the United States District Court with jurisdiction over the matter. (The amount in controversy is not an issue in such cases as they are with traditional civil suits in federal courts.)¹¹¹ To do so the complainant must file a notice of their intention to file such a complaint fifteen days in advance of filing the complaint in federal court. The Assistant Secretary, OSHA and the Associate Solicitor, Division of Fair Labor Standards should also be served with a copy of the notice.¹¹²

Frequently Asked Questions

1. *When should I file my complaint?*
A complaint must be filed within 90 days.
2. *Where should I file my complaint?*
A complaint can be filed at the area OSHA office. In states that do not have area offices one should contact the regional OSHA office.
3. *Can I keep my identity confidential?*
No. The identity of the complainant will be revealed to the respondent. However, under some circumstances witnesses may keep their identity confidential.
4. *Do I need an attorney to file a complaint?*
No. You can represent yourself in all proceedings or you may choose to have a personal representative who is not an attorney represent you. Although an attorney is not required, one must be mindful that they may be at a disadvantage in more complex proceedings.
5. *If I change my mind and can I withdraw my complaint?*
Yes. Anytime before the findings or an order becomes final a complaint may be withdrawn.
6. *Is there a fee for the use of a settlement judge?*
There is no fee for the settlement judge.
7. *Can I return to work once I have a reinstatement order?*

Reinstatement orders are applicable immediately upon receipt of the order. However, additional steps may need to be taken to enforce the order.

8. *How is front pay determined?*

Numerous factors will be considered when making a determination of a front pay award. Some of these factors are: the discharged employee's duty to mitigate their damages; the availability of employment opportunities; the period within which one by reasonable efforts may be re-employed; the employee's work and life expectancy; and the utilization of discount tables to determine the present value of future damages.

9. *What if my case does not meet the minimum amount required in federal court?*

SOX cases may proceed to federal court regardless of the amount in controversy.

Glossary

Adjudicatory proceeding – A judicial type proceeding leading to the formulation of a final order.¹¹³

Clear and convincing – Evidence that a thing to be proved is highly probable or reasonably certain. Clear and convincing evidence requires a greater burden than preponderance of the evidence.¹¹⁴

Complainant – A person who is seeking relief as a result of an act or omission that is a violation of a statute, executive order or regulation.¹¹⁵

Complaint – Any document that initiates an adjudicatory proceeding.¹¹⁶

De novo – Anew.¹¹⁷

Front pay – An award for future earnings. Front pay is monetary relief for any future loss of earnings resulting from past discrimination. Generally front pay is awarded when reinstatement is not possible.¹¹⁸

Hearing – The part of a proceeding which involves the submission of evidence, either by oral presentation or written submission.¹¹⁹

Order – The whole or any part of a final procedural or substantive disposition of a matter by the administrative law judge in a matter.¹²⁰

Petition – A written request to a court.¹²¹

Pleading – A formal document, in which a party to a legal proceeding sets forth or responds to allegations, claims, denials, or defenses.¹²²

Prejudice – Damage or detriment to one's legal rights or claims.¹²³

Prima facie case - A party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.¹²⁴

Respondent – A party to an adjudicatory proceeding against whom findings may be made or who may be required to provide relief or take remedial action.¹²⁵

Settlement judge – An active or retired administrative law judge who convenes and presides over settlement conferences and negotiations. The judge may confer with the parties individually or jointly. The settlement judge does not make a formal judgment or decision on the matter. The judge facilitates resolution and may provide an assessment of the relative merits of the parties' positions.¹²⁶

Stipulation – A voluntary agreement between opposing parties concerning some relevant point.¹²⁷

Substantial evidence – Evidence of a reasonable mind would accept as adequate to support a conclusion.¹²⁸

Overview of OSHA Personnel in Whistleblower Claims

Regional Administrator (“RA”) – The RA has the overall responsibility for all whistleblower investigation and outreach activities. The RA may issue determinations and approve settlement of complaints filed under various whistleblower statutes. However, SOX complaints have an added procedure before settlement.¹²⁹

Supervisor – The supervisor serves under the direction of the RA and is responsible for supervising field whistleblower investigations. The supervisor receives whistleblower complaints and assigns investigative cases to individual investigators. In cases that are unusual or complex, the supervisor may conduct investigations and/or settlement negotiations themselves. The supervisor reviews investigation reports for comprehensiveness and technical accuracy. In addition the supervisor, at the direction of the RA, is responsible for coordinating and acting as a liaison with the Office of the Solicitor and other governmental agencies regarding matters within their geographical area.¹³⁰

Investigator - The investigator screens incoming complaints to determine if they warrant field investigation. An investigator interviews parties and witnesses and reviews pertinent records, as well as obtains written statements and supporting documentary evidence where appropriate. After applying legal elements and evaluating the evidence the investigator will write an investigation report discussing the facts, analyzing evidence, and provide recommendations for appropriate action. In addition to investigation the investigator may negotiate with the parties to facilitate a settlement agreement; monitor the implementation of agreements or court orders and where necessary recommends further legal proceedings to obtain compliance. When assigned by the RA or the supervisor the investigator will interact with other agencies and OSHA

Area Offices. The investigator assists in the litigation process and may testify in trial proceedings.¹³¹

Office of Investigative Assistance (“OIA”) - The OIA is responsible for developing policies and procedures for the Whistleblower Program. The office also provides technical assistance and legal interpretations to the field investigative staff and distributes significant legal developments to the field staff. OIA assists in developing legislation on whistleblower matters and often is involved in the investigation of complex cases or provides their assistance as requested. In addition to conducting regional audits of case files to ensure national consistency the office maintains a statistical database on whistleblower investigations.¹³²

Area Director (“AD”) – The AD receives whistleblower complaints and transmits them to the supervisor.¹³³

National Solicitor of Labor (“NSOL”) – The NSOL provides assistance to the regional solicitors and gives advice to the OIA as well as litigating on OSHA’s behalf before the ARB and court of appeals. The Division of Fair Labor Standards within NSOL provides legal services for SOX cases.¹³⁴

A final note on investigative materials and confidentiality

About Investigative Information

Investigation materials (i.e. notes, memos, work papers, records, and recordings received or prepared by the investigator) are included in the case file to support investigative findings. Information and statements obtained from investigations are confidential except those which may be released under the Freedom of Information Act (“FOIA”), the Privacy Act, or those which must be released for the purpose of due process. The region’s document custodian will process any request for release of information in compliance with requisite laws and agency policy.¹³⁵

After a case has been closed much of the information in the file is available upon receipt of a FOIA request, request from a federal agency, the ALJ, or through discovery procedures. A SOX case is closed once OSHA has completed its investigation and issued its determination letter unless OSHA is participating in the proceeding before the ALJ or has recommended that OSHA participate as a party in the proceeding.¹³⁶

Upon a FOIA request the entire narrative report minus analysis and recommendation is generally disclosed. Included may be interviews of officials representing respondent as well as interviews of the complainant and others who have not requested confidentiality after the redaction of passages that might be considered an invasion of privacy to a third party.¹³⁷

Confidentiality

During the investigation the employer may identify materials it deems a trade secret or confidential or financial information. If the investigator finds no reason to question such identification and the disclosure officer agrees, the information will be labeled Confidential Information and will not be released except in accordance with OSHA or similar statutory requirements.¹³⁸

References

- ¹ See 148 Cong. Rec. S 7350, 7355 (daily ed. July 25, 2002).
- ² See 148 Cong. Rec. S 7350, 7360 (daily ed. July 25, 2002).
- ³ See 148 Cong. Rec. S 7350, 7351 (daily ed. July 25, 2002).
- ⁴ See 148 Cong. Rec. S 7350, 7358 (daily ed. July 25, 2002).
- ⁵ See 148 Cong. Rec. S 6524, 6528 (daily ed. July 10, 2002).
- ⁶ See 148 Cong. Rec. S 6436, 6438 (daily ed. July 9, 2002).
- ⁷ See 18 U.S.C. § 1514 A (a) (2005).
- ⁸ See 18 U.S.C. § 1514 A (b).
- ⁹ See Glossary for definition.
- ¹⁰ See 18 U.S.C. § 1514 A (b).
- ¹¹ See 18 U.S.C. § 1514 A (c).
- ¹² See Filing of discrimination complaint, 29 C.F.R. § 1980.103 (2006).
- ¹³ See OSHA, DEPARTMENT OF LABOR, OSHA: INVESTIGATIONS MANUAL (2-3)-(2-4) (2003) [hereinafter OSHA, INVESTIGATIONS MANUAL]. [The manual describes the functions of OSHA personnel and the procedure for processing complaints under the various whistleblower statutes.]
- ¹⁴ See Filing of discrimination complaint, 29 C.F.R. § 1980.103 (2006).
- ¹⁵ See *id.*
- ¹⁶ See *id.*
- ¹⁷ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-1.
- ¹⁸ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at (3-5)-(3-6).
- ¹⁹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-1.
- ²⁰ See *id.*
- ²¹ See Investigation, 29 C.F.R. § 1980.104 (2006).
- ²² See Glossary for definition.
- ²³ See 29 C.F.R. § 1980.104.
- ²⁴ See Decision and orders of the administrative law judge, 29 C.F.R. § 1980.109 (2006).
- ²⁵ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-2.
- ²⁶ See *id.*
- ²⁷ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-3.
- ²⁸ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-2.
- ²⁹ See Withdrawal of complaints, objections, and findings; settlement, 29 C.F.R. § 1980.111 (2006).
- ³⁰ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-2.
- ³¹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 1-8.
- ³² See 29 C.F.R. § 1980.104 (2006).
- ³³ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-3.
- ³⁴ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 14-2.
- ³⁵ See 29 C.F.R. § 1980.104 (2006).
- ³⁶ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 1-8.
- ³⁷ See *id.*
- ³⁸ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-3.
- ³⁹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 2-5.
- ⁴⁰ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 14-4.
- ⁴¹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at (3-4)-(3-5).
- ⁴² See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 3-2.
- ⁴³ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 3-5.
- ⁴⁴ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 3-7.
- ⁴⁵ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 3-9.
- ⁴⁶ See 29 C.F.R. § 1980.104.
- ⁴⁷ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 3-9.
- ⁴⁸ See 29 C.F.R. § 1980.104.
- ⁴⁹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at (3-9)-(3-10).
- ⁵⁰ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at (5-3)-(5-4).
- ⁵¹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at (4-1)-(4-2).

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- ⁵² See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at (4-2)-(4-3).
- ⁵³ See Issuance of findings and preliminary orders, 29 C.F.R. § 1980.105 (2006).
- ⁵⁴ See Glossary for definition.
- ⁵⁵ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 14-3.
- ⁵⁶ See 29 C.F.R. § 1980.105.
- ⁵⁷ See 29 C.F.R. § 1980.111.
- ⁵⁸ See *id.*
- ⁵⁹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 14-4.
- ⁶⁰ See Objections to the findings and the preliminary order and request for hearing, 29 C.F.R. § 1980.106 (2006).
- ⁶¹ See *id.*
- ⁶² See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 3-7.
- ⁶³ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 6-1.
- ⁶⁴ See 29 C.F.R. § 1980.111 (2006).
- ⁶⁵ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at (6-3)-(6-4).
- ⁶⁶ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 6-5.
- ⁶⁷ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 6-4.
- ⁶⁸ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 6-2.
- ⁶⁹ See *Settlement Reached Prior to Investigatory Finding and Appeal to ALJ*, Department of Labor, at <http://www.osha.dol.gov> (visited April 20, 2006).
- ⁷⁰ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 6-5.
- ⁷¹ See Representation, 29 C.F.R. § 18.34 (2006).
- ⁷² See Legal Assistance, 29 C.F.R. § 18.35 (2006).
- ⁷³ See Representation, 29 C.F.R. § 18.34 (2006).
- ⁷⁴ See Waiver of right to appear and failure to participate or to appear, 29 C.F.R. § 18.39 (2006).
- ⁷⁵ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 14-4.
- ⁷⁶ See Expedited proceedings, 29 C.F.R. § 18.42 (2006).
- ⁷⁷ See Authority of administrative law judge, 29 C.F.R. § 18.29 (2006).
- ⁷⁸ See 29 C.F.R. § 18.39.
- ⁷⁹ See 29 C.F.R. § 18.29.
- ⁸⁰ See 29 C.F.R. § 18.39.
- ⁸¹ See OSHA, INVESTIGATIONS MANUAL, *supra* note 13, at 14-4.
- ⁸² See Parties, how designated, 29 C.F.R. § 18.10 (2006).
- ⁸³ See Amicus Curiae, 29 C.F.R. § 18.12 (2006).
- ⁸⁴ See Time computations, 29 C.F.R. § 18.4 (2006).
- ⁸⁵ See Motions and requests, 29 C.F.R. § 18.6 (2006).
- ⁸⁶ See Time computations, 29 C.F.R. § 18.4 (2006).
- ⁸⁷ See Glossary for definition.
- ⁸⁸ See Prehearing statements, 29 C.F.R. § 18.7 (2006).
- ⁸⁹ See Prehearing conferences, 29 C.F.R. § 18.8 (2006).
- ⁹⁰ See Closing the record, 29 C.F.R. § 18.54 (2006).
- ⁹¹ See Decision of the administrative law judge, 29 C.F.R. § 18.57 (2006).
- ⁹² See 29 C.F.R. § 1980.109.
- ⁹³ See *id.*
- ⁹⁴ See 18 U.S.C. § 1514 A (c).
- ⁹⁵ See Glossary for definition.
- ⁹⁶ See Decisions and orders of the Administrative Review Board, 29 C.F.R. § 1980.110 (2006).
- ⁹⁷ See *id.*
- ⁹⁸ See Judicial Enforcement, 29 C.F.R. § 1980.113 (2006).
- ⁹⁹ See Judicial review, 29 C.F.R. § 1980.112 (2006).
- ¹⁰⁰ See Motion for summary decision, 29 C.F.R. § 18.40 (2006).
- ¹⁰¹ See Glossary for definition.
- ¹⁰² See Consent order or settlement; settlement judge procedure, 29 C.F.R. § 18.9 (2006).
- ¹⁰³ See Department of Labor, *Settlement Judge Program*, at <http://www.oalj.dol.gov> (visited April 19, 2006).

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- ¹⁰⁴ See 29 C.F.R. § 18.9 (2006).
- ¹⁰⁵ See *id.*
- ¹⁰⁶ See 29 C.F.R. § 1980.111.
- ¹⁰⁷ See 29 C.F.R. § 1980.110 (2006).
- ¹⁰⁸ See 29 C.F.R. § 1980.111.
- ¹⁰⁹ See *id.*
- ¹¹⁰ See 29 C.F.R. § 1980.112 (2006).
- ¹¹¹ See 18 U.S.C. § 1514 A (b).
- ¹¹² See District Court jurisdiction of discrimination complaints, 29 C.F.R. § 1980.114 (2006).
- ¹¹³ See Definitions, 29 C.F.R. § 18.2(a) (2006).
- ¹¹⁴ See BLACK'S LAW DICTIONARY 577 (Bryan Garner ed., 7th ed. 1999).
- ¹¹⁵ See 29 C.F.R. § 18.2(l).
- ¹¹⁶ See 29 C.F.R. § 18.2(d).
- ¹¹⁷ See BLACK'S LAW DICTIONARY at 447.
- ¹¹⁸ See 1 EMP. PRAC. GUIDE (CCH) P 2615.12 (1985).
- ¹¹⁹ See 29 C.F.R. § 18.2(e).
- ¹²⁰ See 29 C.F.R. § 18.2(f).
- ¹²¹ See BLACK'S LAW DICTIONARY at 1165.
- ¹²² See BLACK'S LAW DICTIONARY at 1173.
- ¹²³ See BLACK'S LAW DICTIONARY at 1198.
- ¹²⁴ See BLACK'S LAW DICTIONARY at 1209.
- ¹²⁵ See 29 C.F.R. § 18.2(j).
- ¹²⁶ See 29 C.F.R. § 18.9 (e) (1).
- ¹²⁷ See BLACK'S LAW DICTIONARY at 1427.
- ¹²⁸ See BLACK'S LAW DICTIONARY at 580.
- ¹²⁹ See OSHA, DEPARTMENT OF LABOR, OSHA: INVESTIGATIONS MANUAL 1-2 (2003) [hereinafter OSHA, INVESTIGATIONS MANUAL].
- ¹³⁰ See *id.* at (1-2)-(1-3).
- ¹³¹ See *id.* at 1-4.
- ¹³² See *id.* at (1-4)-(1-5).
- ¹³³ See *id.* at 1-5.
- ¹³⁴ See *id.*
- ¹³⁵ See OSHA, DEPARTMENT OF LABOR, OSHA: INVESTIGATIONS MANUAL (1-7) - (1-8) (2003) [hereinafter OSHA, INVESTIGATIONS MANUAL].
- ¹³⁶ See *id.* at 1-7.
- ¹³⁷ See *id.* at 1-8.
- ¹³⁸ See *id.*