Whistleblower Protections Under Sarbanes-Oxley and the Dodd-Frank Act

A Note describing the whistleblower provisions of the Sarbanes-Oxley Act (SOX) as modified in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the whistleblower provisions set forth in the Dodd-Frank Act. This Note discusses whistleblower protections under SOX and the Dodd-Frank Act, including the scope of coverage and protected activity, elements of a retaliation claim, adjudication of retaliation claims, and available remedies under SOX and Dodd-Frank. This Note incorporates the Dodd-Frank Act amendments, its final regulations, and OSHA's final rules governing the handling of SOX retaliation claims. This Note covers federal law. State and local law may provide additional whistleblower protections for employees.

The Sarbanes-Oxley Act (SOX) was enacted in response to corporate and accounting scandals at major public companies like Enron and WorldCom. It aims to promote corporate accountability, protect investors, and protect employees who report certain misconduct, also known as whistleblowers. On July 21, 2010, the existing whistleblower protections under SOX were expanded when President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Dodd-Frank), which created new protections for whistleblowers and incentives for them to report wrongdoing to the SEC (see Dodd-Frank Act). On May 25, 2011, the US Securities and Exchange Commission (SEC) released a set of finalized rules to implement the whistleblower provisions contained in Section 922 of the Dodd-Frank Act (15 U.S.C. § 78u-6).

OSHA released final regulations revising the procedures for handling SOX whistleblower claims that became effective March 5, 2015.

This Note provides an overview of the protections afforded to whistleblowers under SOX and the Dodd-Frank Act pursuant to the SEC rules. It specifically:

- Identifies whistleblower protections under SOX and Dodd-Frank.
- Describes the scope of coverage of the most significant whistleblower provisions.
- Explains how claims are adjudicated.
- Identifies the remedies available to whistleblowers.
- Outlines best practices for addressing whistleblower issues in the workplace.
- Describes application of the laws outside of the US.

The SEC provides information on whistleblower reporting and protections on its website (see SEC Office of the Whistleblower: Whistleblower Protections). The Department of Labor (DOL) provides further information about whistleblower protections under other federal laws (see DOL: Whistleblower Protections). The Commodities Futures Trading Commission (CFTC) also provides information about whistleblower protections on its website (see CFTC: Whistleblower Program).

For a comparison of certain SOX and Dodd-Frank provisions, see Box, Key Differences Between Anti-Retaliation Provisions of SOX Section 806 and Dodd-Frank Section 922.

SOX WHISTLEBLOWER PROTECTIONS

OVERVIEW OF SECTION 806 OF SOX

Section 806 of SOX sets out significant whistleblower protections under the statute (18 U.S.C. § 1514A). It protects employees who report or participate in proceedings involving certain corporate wrongdoing.

Section 806 prohibits retaliation against individuals who:

- Are employed by covered employers (see Covered Employers).
- Are covered employees (see Whistleblowers Protected).
- Have engaged in protected activity (see Protected Activity Under Section 806).
The DOL has delegated the authority to investigate and adjudicate Section 806 whistleblower claims to the Occupational Safety and Health Administration (OSHA) and OSHA publishes the companion regulations. OSHA’s Final Rule governing SOX whistleblower claims became effective on March 5, 2015 (80 FR 11865-02 and 29 C.F.R. §§ 1980.100 to 1980.114). Individuals subject to retaliation may file a claim with OSHA, which investigates and issues a determination (see Employee’s Lower Burden of Proof During OSHA Investigation). Either the employee or the employer can object to OSHA’s findings and seek a hearing before a DOL administrative law judge (ALJ). Parties can appeal the ALJ decision to the Administrative Review Board (ARB). If the ARB does not issue a final determination within 180 days, the complainant can file a complaint in federal district court. If the ARB does issue a final decision, the matter can be appealed to a federal appellate court (see Exhaustion of Remedies and Statutes of Limitations Under SOX).

OTHER WHISTLEBLOWER PROTECTIONS UNDER SOX

Although Section 806 is the focus of the SOX portion of this Note, SOX includes additional whistleblower protections, including:

- **Section 301.** This requires the audit committee of a publicly listed company to set up a complaint notification system (or whistleblower system) to allow for the receipt, retention, and treatment of complaints received by the company regarding accounting, internal accounting controls, or auditing matters (15 U.S.C. § 78j-1(m)(4)). For more information, see Practice Note, Corporate Governance Standards: Audit Committee: SEC Rules and Requirements (3-381-8544).

- **Section 307.** This mandates the creation of new rules of professional conduct requiring attorneys who appear or practice before the SEC to make reports of evidence of unlawful activity to the public company’s chief legal counsel, chief executive officer, or board of directors (15 U.S.C. § 7245). These rules are codified in 17 C.F.R. §§ 205.1 to 205.7. For a discussion of these rules, see Practice Note, “Up-the-Ladder” Reporting Obligations for Attorneys Appearing and Practicing Before the SEC (4-504-8740).

- **Section 1107.** This imposes criminal penalties for retaliation against whistleblowers, including:
  - a fine;
  - not more than ten years imprisonment; or
  - both.
  (18 U.S.C. § 1513(e)).

SCOPE OF COVERAGE OF SECTION 806

Section 806 does not cover all employers, all whistleblowers, all whistleblowing activity, or all employer responses to whistleblowing activity. The SOX anti-retaliation provisions, as amended by the Dodd-Frank Act, along with their implementing regulations and cases interpreting the statutes, carve out defined areas of coverage.

COVERED EMPLOYERS UNDER SOX

Section 806 applies primarily to publicly traded companies subject to the registration or reporting requirements of the Securities Exchange Act of 1934 (Exchange Act) and certain individuals and entities related to these public companies. As amended by Dodd-Frank, covered employers under Section 806 include:

- Companies with securities registered under the Exchange Act.
- Companies required to file reports under the Exchange Act.
- Officers, employees, and agents of these public companies. At least one district court held that a corporate director who was not an officer or employee could be held liable as an “agent” under SOX (see Wadler v. Bio-Rad Labs, Inc., 141 F. Supp. 3d 1005, 106-19 (N.D. Cal. 2015); Legal Update, Directors May Be Personally Liable for Retaliating Against Whistleblowers Under SOX and Dodd-Frank: ND California (W-000-7163)).
- The private contractors and subcontractors of a public company (Lawson v. FMR, LLC, 134 S. Ct. 1158 (2014)). However, at least one district court limited this finding to cover contractors and subcontractors only to the extent the public company is an alleged wrongdoer, not a victim of the contractor’s wrongdoing (see Gibney v. Evolution Mktg. Research, LLC, 25 F. Supp. 3d 741, 747-48 (E.D. Pa. 2014)).
- Subsidiaries or affiliates of public companies with financial information that is included in the consolidated financial statements of those companies (added by Section 929A, Dodd-Frank Act (18 U.S.C. § 1514A(a))).
- Nationally recognized statistical rating organizations (NRSROs), such as Moody’s and Standard & Poor’s (S&P) (added by Section 929A, Dodd-Frank Act (18 U.S.C. § 1514A(a))).
(18 U.S.C. § 1514A(a); 29 C.F.R. § 1980.101.)

WHISTLEBLOWERS PROTECTED UNDER SOX

Section 806 prohibits retaliation against employees who engage in certain protected activity (18 U.S.C. § 1514A(a); see Protected Activity Under Section 806). “Employee” is broadly defined by the regulations and includes:

- Present workers.
- Former workers, if the protected activity occurred during the course of their employment. However, at least one court has held that post-termination deposition testimony that caused the plaintiff to be blacklisted may constitute protected activity (see Kshetrapal v. Dish Network, LLC, 90 F. Supp. 3d 108, 112-14 (S.D.N.Y. 2015)).
- Applicants for employment with a covered employer.
- Individuals whose employment may be affected by a covered person, such as:
  - supervisors;
  - managers;
  - officers; and
  - independent contractors, under some circumstances (see Independent Contractors).
(29 C.F.R. § 1980.101(g.).)

Independent Contractors

Whether independent contractors are protected under Section 806 remains an unsettled question. Even the test to determine coverage of independent contractors remains unsettled, as different ALJs have decided the issue based on different considerations.
If an individual is to be an employee, and not an independent contractor, that individual is covered by the statute. For information on the factors involved in assessing independent contractor status, see Using Independent Contractors and Outside Firms: Avoiding Employee Misclassification Checklist (2-501-3609).

However, even true independent contractors may be protected by the statute. For example, an ALJ found that because the regulations defined employee to include “an individual whose employment could be affected by a company or company representative,” even an independent contractor may be protected if the company or its representative may affect the contractual arrangement (see Deremer v. Gulfmark Offshore, Inc., 2007 WL 6888110 (Dep’t of Labor June 29, 2007)). Another ALJ analyzed an independent contractor’s whistleblower claim to determine whether he qualified as an employee under the common law of agency (see Mara v. Sempra Energy Trading, LLC, 2009 WL 6470478 (Dep’t of Labor Oct. 5, 2009).

**Employees of Private Contractors and Subcontractors**

On March 4, 2014, in Lawson v. FMR LLC, the US Supreme Court held that the protections in Section 1514(a) of Section 806 of SOX also protects employees of private contractors and subcontractors that provide services to public companies. In Lawson, the employees worked for a private company that contracted to advise and manage Fidelity mutual funds. The mutual funds are public companies with no employees. The Court relied on the plain language of the statute in reversing and remanding the First Circuit’s decision, reasoning that:

- The ordinary meaning of “employee” in Section 1514A(a) refers to the contractor’s own employees.
- Congress specified “of a public company” in other provisions of the section and did not include it in Section 1514A(a), which allows the court to presume that Congress intended the provision to protect employees of private contractors as well.
- The argument that the provision’s statutory headings “Whistleblower Protections for Employees of Publicly Traded Companies” and “Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud” indicate that the protections are limited to employees of publicly traded companies is not persuasive because:
  - the provision already extends protection to employees of companies that are not publicly traded, such as employees of companies that file reports with the SEC;
  - the provision already extends protection to activities not limited to providing evidence of fraud, including reporting violations of SEC rules and regulations; and
  - the limited headings do not cancel out the other indicators that the statute extends to the private contractor’s own employees.

(134 S. Ct. at 1165-1171.) For more information, see Legal Update, DOL Rules SOX Whistleblower Provision Protects Employees of Private Contractors to Public Companies, Rejecting First Circuit Decision (2-519-9370).

In a case of apparent first impression within the Second Circuit, the US District Court for the Northern District of New York in Anthony v. Northwestern Mutual Life Insurance Company interpreted the boundaries of the Lawson decision. In Anthony, the court held that an employee working for a private contractor of a company covered by SOX is only entitled to SOX whistleblower protections if:

- The whistleblowing relates to the contractor’s provision of services to the public company.
- The whistleblowers are firsthand witnesses to corporate fraud at the public company, whether committed by the public company itself or through its contractors.

The Anthony court further clarified that a private company’s fraudulent practices are not subject to SOX simply because the company incidentally has a contract with a public company. Instead, SOX covers those situations where a contractor employee is functionally acting as an employee of a public company and in that capacity witnesses public company fraud. (130 F. Supp. 3d 644, 652 (N.D.N.Y. 2015).)

**PROTECTED ACTIVITY UNDER SOX SECTION 806**

To fall under Section 806, employees (as defined by the regulations) must either:

- Report or assist in reporting corporate wrongdoing covered by the statute that they reasonably believe has occurred (see Reporting Corporate Wrongdoing).
- File, testify, participate in, or assist in a proceeding filed (or about to be filed) related to alleged wrongdoing covered by the statute (see Participation in Proceedings).

**REPORTING CORPORATE WRONGDOING**

For a whistleblowing report to be protected under Section 806, the employee must have provided information regarding any action or inaction that the employee reasonably believes is a violation of a covered law to one or more of the following:

- Federal regulatory bodies or law enforcement agencies.
- Members of Congress or committees of Congress.
- Supervisors or persons authorized by the employer to investigate, discover, or terminate misconduct.

(18 U.S.C. § 1514A(a)(1).)

Section 806 does not protect whistleblowers from disclosures made to the media (see Tides v. The Boeing Co., 644 F.3d 809, 816 (9th Cir. 2011)).

**Wrongdoing**

For a whistleblowing report to be protected under Section 806, it must be a report about a specified kind of wrongdoing. The report must involve alleged violations of federal laws governing one or more of these activities:

- Any SEC rule or regulation.
- Any provision of federal law relating to fraud against the company’s shareholders.

(18 U.S.C. § 1514A(a)(2).)
Although the law is designed to protect shareholders, the law does not require the reporting of fraud specifically against shareholders for Section 806 liability to attach (see Sylvester v. Parexel Int’l, LLC, 2011 WL 2165854, at *18-19 (ARB, May 25, 2011); Lockheed Martin Corp. v. Admin. Review Bd., 717 F.3d 1121, 1131-32 (10th Cir. 2013); see also Legal Update, Shareholder Fraud Not Required for Sarbanes-Oxley Whistleblower Retaliation: Tenth Circuit (6-531-6237)).

Reports alleging most other violations are generally not deemed protected activity. For example, reports about violations involving the following issues are generally not covered:

- Generally Accepted Accounting Principles (GAAP) (see, for example, Novak v. Kasaks, 216 F.3d 300, 309 (2d Cir. 2000)).
- However, more recent authority suggests that misclassification of items in a financial statement may, in some circumstances, support a SOX claim (see Welch v. Chao, 536 F.3d 269, 278 (4th Cir. 2008)).

For example:

- an employee’s complaint concerning inadequate internal controls over financial reporting implicated SEC regulations (Thomas v. Tyco Intl’l Mgmt. Co., LLC, 262 F. Supp. 3d 1328, 1336-7 (S.D. Fla., 2017)); and
- a plaintiff plausibly alleged his reasonable belief that booking taxes as revenue was securities fraud or violated an SEC rule (Wallace v. Tesoro Corp., 796 F.3d 468, 481 (5th Cir. 2015)).

- Discrimination unrelated to fraud or securities issues.
- Harassment unrelated to fraud or securities issues.
- Other non-securities fraud issues.

However, reports about these kinds of violations may have consequences under other laws, such as the Dodd-Frank Act, Title VII of the Civil Rights Act of 1964 (Title VII), or state whistleblower protection laws.

For a list of the whistleblowing activities protected under Dodd-Frank, see Dodd-Frank Protections Against Retaliation. For more information on employment retaliation under circumstances not involving fraud or securities laws, see Practice Note, Retaliation (5-501-1430).

**PARTICIPATION IN PROCEEDINGS**

Section 806 protects employees who file, testify, participate or otherwise assist in a proceeding involving alleged wrongdoing. Protection also extends to participation in proceedings about to be filed. Like protections for reporting wrongdoing, those seeking protection under this section of the statute must be involved in proceedings alleging violations of law as specified by the statute (see 18 U.S.C. § 1514A(a)(2) and Wrongdoing).

**PROVING A RETALIATION CLAIM UNDER SOX**

To state a prima facie claim under Section 806 claim, an employee must show:

- The employee engaged in protected activity or conduct (see Protected Activity Under SOX Section 806).
- The employer knew or suspected that the employee engaged in the protected activity (see Employer’s Knowledge).
- The employee suffered an unfavorable personnel action (see Adverse Employment Actions Constituting Retaliation).

- The circumstances suggest that the protected activity or conduct was a contributing factor in the unfavorable personnel action (see Contributing Factor in Employment Decision).

(29 C.F.R. § 1980.104(e)(2).)

**EMPLOYEE’S BURDEN OF PROOF**

An employee’s burden of proof varies at different stages of a SOX whistleblower complaint. In its initial filing with OSHA (see Exhaustion of Administrative Remedies and Statutes of Limitations Under SOX), the employee must allege a prima facie claim supported by evidence of facts and either direct and circumstantial evidence regarding each element of the claim (see Proving a Retaliation Claim Under SOX). If the employee fails to do this, OSHA does not proceed with an investigation and dismisses the complaint. If the employee satisfies this initial burden, then OSHA initiates an investigation to determine if it has reasonable cause to believe that the complaint has merit (18 U.S.C. § 1514A; 49 U.S.C. § 42121(b)(2)(A)).

**Employee’s Lower Burden of Proof During OSHA Investigation**

Before January 28, 2016, to receive a merit finding from OSHA, an employee had to establish by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action (OSHA: Whistleblower Investigations Manual (archived), at 3-7 (Apr. 21, 2015)). As of January 28, 2016, OSHA revised its investigations manual, lowering the plaintiff’s burden of proof to a reasonable cause standard. The evidence needed to support a reasonable cause standard is “somewhat lower than” the preponderance of the evidence standard that applies following a hearing or at trial. A merit finding under this standard requires:

- Evidence in support of each element of a violation, but generally not as much as is required at a hearing or at trial.
- Consideration of all the evidence gathered from the employee and the employer during the investigation.
- OSHA’s belief that a reasonable judge could rule in the employee’s favor, but the evidence does not need to establish conclusively that a violation occurred.
- OSHA’s preliminary witness credibility determinations to determine reasonable cause, but this determination does not require a resolution of all possible conflicts or conclusive credibility determinations on all issues.

(OSHA: Whistleblower Investigations Manual, at 3-5 (Jan. 28, 2016.).)

Although the investigations manual does not change an employee’s ultimate burden of proof at a hearing or at trial, the new standard makes it easier for an employee to get a merit determination from OSHA. However, to win a dismissal of the action, the employer must still prove by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the protected activity (see Employer’s Burden of Proof and Defenses).

**PROTECTED ACTIVITY**

Employees must first establish that they engaged in protected activity to qualify for whistleblower protection (see Protected Activity Under Section 806).
Reasonable Belief

To establish that they engaged in protected activity under Section 806, employees must prove they had a reasonable belief that a violation of one of the covered laws occurred (29 C.F.R. § 1980.102(b)(1)). The ARB has defined reasonable belief as comprised of two elements:

- **Subjective.** The employee must have a “personal belief” or have “actually believed” that the particular action or activity being reported was a protected activity (see, for example, Day v. Staples, Inc., 555 F.3d 42, 54 (1st Cir. 2009)).

- **Objective.** The employee’s personal belief that the protected activity occurred must be “reasonable,” considering the employee’s expertise, knowledge, and position with the company (see, for example, Harp v. Charter Komm’ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009)). The objective prong recognizes a higher standard of “reasonableness” for an educated plaintiff who sits at the higher levels of a corporate hierarchy.

(Welch v. Cardinal Bankshares Corp., 2007 WL 2746929 (Dep’t of Labor May 31, 2007).)

The subjective and objective reasonable belief requirement has been uniformly recognized by the circuit courts of appeal, including the:

- **First Circuit:** Day, 555 F.3d at 55-57.
- **Second Circuit:** Nielson v. AECOM Tech. Corp., 762 F.3d 214, 221 (2d Cir. 2014).
- **Third Circuit:** Wiest v. Lynch, 710 F.3d 121, 137 (3d Cir. 2013).
- **Fourth Circuit:** Welch v. Chao, 536 F.3d at 277.
- **Fifth Circuit:** Allen v. Admin. Review Bd., 514 F.3d 468, 477 (5th Cir. 2008).
- **Sixth Circuit:** Rhinehimer v. U.S. Bancorp Inv., Inc., 787 F.3d 797, 811 (6th Cir. 2015).
- **Seventh Circuit:** Harp, 558 F.3d at 723.
- **Eighth Circuit:** Beacom v. Oracle Am., Inc., 825 F.3d 376, 380 (8th Cir. 2016).
- **Ninth Circuit:** Van Asdale v. Int’l Game Tech., 577 F.3d 989, 1000 (9th Cir. 2009).
- **Tenth Circuit:** Lockheed Martin, 717 F.3d at 1132.
- **Eleventh Circuit:** Gale v. U.S. Dept of Labor, 384 F. App’x 926, 929 (11th Cir. 2010).

While the employee making the report must reasonably believe the employer is engaged in a covered unlawful activity, the employee need not be correct in that belief (see, for example, Rhinehimer, 787 F.3d at 812; Allen, 514 F.3d at 476-77). If the employee’s belief is reasonable (applying the test above), the employer cannot retaliate against the employee for reporting the activity, even if the belief ultimately turns out to be wrong. However, the employee must also have sufficient facts to support the reasonable belief to defeat a motion for summary judgment (see Nielsen, 762 F.3d at 222-24).

Future Violations

The courts are split about whether reports about potential future violations qualify as protected activity under SOX. The Fourth Circuit in Livingston v. Wyeth found that employees had to complain about existing violations and that future violations were not protected (520 F.3d 344, 352 (4th Cir. 2008)).

In contrast, the Third Circuit held that it would frustrate the purpose of the statute to require a whistleblower to wait for an actual violation to occur when an earlier report possibly could have prevented it (Wiest v. Lynch, 710 F.3d at 133). Other district courts agree that reports about anticipated future conduct are protected (see Murray v. UBS Secs., LLC, 2017 WL 1498051, at *10 (S.D.N.Y. Apr. 25, 2017); Leshinsky v. Telvent Git. S.A., 942 F. Supp. 2d 432, 446 (S.D.N.Y. 2013); Stewart v. Doral Fin. Corp., 997 F. Supp. 2d 129, 137 (D.P.R. 2014); Zulfer v. Playboy Enters, Inc., 2013 WL 12132075, *5 (C.D. Cal. Apr. 24, 2013)).

Specificity of the Report ("Definitely and Specifically")

The federal circuit courts of appeal are also split about whether an employee’s reports about misconduct must “definitely and specifically” relate to one of the six categories enumerated in Section 806 of SOX. Courts requiring plaintiffs to allege that their communications “definitely and specifically” related to a statute or rule listed in Section 806 include:

- **First Circuit:** Day, 555 F.3d at 55.
- **Fourth Circuit:** Welch v. Chao, 536 F.3d at 275.
- **Fifth Circuit:** Allen, 514 F.3d at 476-77.
- **Ninth Circuit:** Van Asdale, 577 F.3d at 996-97.

More recently, the following circuit courts of appeal have rejected the “definitely and specifically” standard, finding that an employee only needs to have a reasonable belief as to the unlawful conduct, not a reasonable belief as to each element of the suspected fraud:

- **Second Circuit:** Nielson, 762 F.3d at 221-22. This Court held that the “definitely and specifically” test is inapplicable to SOX violations.
- **Third Circuit:** Wiest v. Lynch, 710 F.3d at 134. This court rejected the “definitely and specifically” standard, concluding instead that “the whistleblower’s communication need not ring the bell on each element of one of the stated provisions of federal law to support an inference that the employer knew or suspected that the plaintiff was blowing the whistle on conduct that may fall within the ample reach of the anti-fraud laws listed in [Section] 806”. The Third Circuit majority justified its departure from the stricter standard by giving Chevron deference to the ARB’s decision in Sylvester v. Parexel Int’l LLC (2011 WL 2165854 (Dep’t of Labor May 25, 2011)).
- **Sixth Circuit:** Rhinehimer, 787 F.3d at 811. The court rejected the “definitely and specifically” requirement as inconsistent with Section 806 (18 U.S.C. § 1514A) and the statutory scheme. It adopted what it characterized as the “emerging rule” that the employee’s reasonable belief is a simple factual question that does not require finding that the employee had a justifiable belief as to each of the legally-defined elements of the suspected fraud.
- **Eighth Circuit:** Beacom, 825 F.3d at 380. The court followed the Second, Third, and Sixth Circuits in rejecting the definitely and specifically standard, noting that no court has rejected the Sylvester standard.
- **Tenth Circuit:** Genberg v. Porter, 882 F.3d 1249 (10th Cir. 2018). The court gave Chevron deference to the ARB’s rejection of the
standard in *Sylvestor*. Further, the plaintiff admitted that the “definite and specific” standard no longer applies.

The Fourth Circuit also has addressed the *Sylvestor* standard without adopting it, because the plaintiffs in that case satisfied the more rigorous “definite and specific” standard (see *Feldman v. Law Enforcement Assocs. Corp.*, 752 F.3d 339, 344 n.5 (4th Cir. 2014)).

**Relevance of Materiality**

The question of whether complaints must be material to the unlawful activity to be covered by Section 806 remains unsettled. Materiality refers to the relevance of the reported information to the unlawful activity. ARB decisions suggest that materiality is an important factor.

For example, in *Platone v. FLYi*, the ARB made clear that where the purported protected activity involves reported fraud against shareholders, the materiality of the potential loss is a significant consideration. While the ARB explained that the materiality of a misrepresentation or omission is a basic element of a securities fraud claim, the plaintiff testified to less than $1,500 in potential losses to FLYi. The ARB then reasoned that it was unlikely that a reasonable shareholder would find a loss of less than $1,500 to be material. Because the employee’s report was not material, it was ruled not to be protected activity under Section 806. (2006 WL 3246910 (Dep’t of Labor Sept. 29, 2006).) Similarly, in *Day*, the First Circuit relied on a lack of materiality in concluding that the employee’s belief that the wrongdoing occurred was not objectively reasonable (555 F.3d at 57-58).

On the other hand, in *Sylvestor*, the ARB rejected the materiality requirement applied in *Platone* and *Day*, holding that a SOX whistleblower does not need to establish the elements of criminal fraud, including materiality, to prevail on a Section 806 retaliation claim (2011 WL 2165854, at *18). In *Welch v. Chao*, the Fourth Circuit similarly rejected an independent materiality requirement in Section 806, holding that materiality only is required to the extent it is an element of the laws that the company allegedly violated, such as securities fraud under 18 U.S.C. § 1348 (536 F.3d at 276-77).

**EMPLOYER’S KNOWLEDGE**

An employee must demonstrate that the employer had knowledge of the employee’s complaint about wrongdoing to state a claim for retaliation under SOX. An employer’s knowledge can be shown by demonstrating a supervisor’s or senior executive’s knowledge of the protected activity (see, for example, *Westawski v. Merck & Co., Inc.*, 2015 WL 463949, at *1-7 (E.D. Pa. Feb. 4, 2015)). Similarly, when alleging that a named individual defendant engaged in retaliatory conduct under SOX, a plaintiff must allege that the individual defendant had knowledge of plaintiff’s protected activity (see *Wiest v. Lynch*, 15 F. Supp. 3d 543, 565-66 (E.D. Pa. 2014)). To survive a motion to dismiss, a plaintiff does not need to allege the individual’s actual knowledge, but must allege sufficient facts to justify an inference of knowledge (see, for example, *Wood v. Dow Chem. Co.*, 72 F. Supp. 3d 777, 790 (E.D. Mich. 2014)).

**ADVERSE EMPLOYMENT ACTIONS CONSTITUTING RETALIATION**

Plaintiffs must show that they suffered an adverse or unfavorable employment action to state a SOX retaliation claim. The statute specifically prohibits certain conduct, namely:

- Discharge.
- Demotion.
- Suspension.
- Threats.
- Harassment.
- Other discrimination.

The regulations further include as retaliation conduct that is:

- Intimidating.
- Threatening.
- Restraining.
- Coercing.
- Blacklisting.
- Disciplining.

**OHSA provides other examples of conduct that may constitute unfavorable personnel actions, including:**

- Layoffs.
- Denial of overtime or a promotion.
- Refusal to hire or rehire.
- Reduction in pay or hours.
- Denial of benefits.
- Assignment to undesirable job duties or one affecting promotion prospects.

(See OSHA Fact Sheet: Your Rights as a Whistleblower.)

Case law has interpreted unfavorable personnel actions under SOX to include:

- Disclosure of a whistleblower’s identity to co-employees (see *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 262 (5th Cir. 2014) and Legal Update, Employer’s Disclosure of Whistleblower’s Identity to Colleagues Constitutes Illegal Retaliation Under the Sarbanes-Oxley Act (8-589-5269)).
- Constructive discharge (see *Lockheed Martin*, 717 F.3d at 1134-35).

Conversely, at least one court found that a whistleblower’s stress and alleged ill treatment by coworkers following an investigation of conduct unrelated to his protected activity does not amount to a constructive discharge and is therefore not an adverse employment action (see *Wiest v. Tyco Electronics Corp.*, 812 F.3d 319, 331(3d Cir. 2016)).

**CONTRIBUTING FACTOR IN EMPLOYMENT DECISION**

To prove a Section 806 claim, employees need only show that the protected activity was a “contributing factor” in the employer’s decision to take an unfavorable personnel action against them (*Lockheed Martin*, 717 F.3d at 1136). A “contributing factor” means any factor that, alone or together with other factors, likely affects the outcome of the decision (see *Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Marano v. Dept of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). The whistleblower’s protected
activity does not have to be the employer’s sole or predominant reason for the adverse action. The protected activity only has to play some role in the employer’s decision, however minor, and the employer’s decision does not need to be wrongfully motivated (see Halliburton, Inc., 771 F.3d at 262-63).

Before January 28, 2016, employees had to show by a preponderance of the evidence that the protected activity was a contributing factor to get a merits determination from OSHA. Under the standards in OSHA’s January 2016 Whistleblower Investigations Manual, the burden of proof at the investigation stage in all whistleblower statutes enforced by OSHA, including SOX, has been lowered to “reasonable cause.” However, the preponderance of the evidence standard still applies at hearing and at trial. (See Employee’s Lower Burden of Proof During OSHA Investigation.)

Employees may satisfy the contributing factor standard either by presenting:

- **Direct evidence.** The employee may present what is called direct evidence, such as a supervisor’s warning to the employee that reporting possible fraud to securities regulators would result in termination. In practice, it is rare for an employee to be able to present direct evidence of retaliation.

- **Circumstantial evidence.** More typically the employee presents circumstantial evidence, which may include:
  - close timing between the protected activity and the adverse action (29 C.F.R. § 1980.104(e)(3));
  - the employer’s purportedly having taken an adverse action based on conduct for which it has not disciplined other employees;
  - the employer’s history of retaliating against whistleblowers; or
  - the employer’s failure to comply with its own procedures or exercising false or pretextual reasons for its actions.

For purposes of showing that a protected activity is a contributing factor, temporal proximity is important but not determinative evidence of the motivations behind the employer’s decision (see Feldman, 752 F.3d at 348 (20-month gap weighs against finding that protected activity was a contributing factor); Yang v. Navigator’s Grp., 155 F. Supp. 3d 327, 335 (S.D.N.Y. 2016)).

Once the employee makes this showing, the burden shifts back to the employer to show by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. (29 C.F.R. § 1980.104(b)(1)); see Employer’s Burden of Proof and Defenses.)

**EMPLOYER’S BURDEN OF PROOF AND DEFENSES**

One unique feature of Section 806 retaliation claims is that employees and employers are subject to different burdens of proof. Employees must meet the preponderance of evidence standard common to most civil litigation to establish the elements of the claim at hearing and at trial, although a lower “reasonable cause” standard applies during OSHA’s investigation (see Employee’s Lower Burden of Proof During OSHA Investigation). At all stages of the proceeding, employers must meet the more stringent clear and convincing evidence standard to establish their defenses to an employee’s claim (see Fordham v. Fannie Mae, 2014 WL 5511070 (ARB Oct. 9, 2014)).

Applying this standard, even if there is reasonable cause to believe that the protected activity was a contributing factor to the adverse action, the employer may avoid liability if it can demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the employee’s protected conduct (29 C.F.R. § 1980.104(e)(4) and see, for example, Puffenbarger v. Engility Corp., 151 F. Supp. 3d 651, 661-63 (E.D. Va. 2015); West v. Tyco Elec. Corp., 2015 WL 1636860, at *10-11 (E.D. Pa. Apr. 13, 2015); Hemphill v. Celanese Corp., 430 F. App’x 341 (5th Cir. 2011)). For example, an employer may defeat a retaliation claim if:

- The employer can demonstrate that the complainant performed poorly in the recent past or that the employer otherwise had cause to take the adverse action.
- The justification for the adverse action predates:
  - the complainant’s whistleblowing activity; or
  - the company’s alleged misconduct.
- The complainant’s personnel file contains evidence of the justification for the adverse action and the employer’s intent to take that action if the issue is not corrected or improved by a specific date.

However, a planned termination is not always sufficient to defeat a SOX claim on summary judgment. For example, in Hendrick v. ITT Engineered Valves, LLC, the court denied the employer’s summary judgment motion where the employer had tentatively selected the employee to be terminated in a RIF before any alleged protected activity occurred, but made the final termination decision after the protected activity (2018 WL 837600, at *5 (N.D. Miss. Feb. 12, 2018)).

Employers also can defeat SOX claims by showing that the employee filed either:

- The claim more than 180 days after the retaliatory conduct occurred or the employee became aware of it (see SOX Proceedings Before OSHA).
- A lawsuit without exhausting the employee’s administrative remedies before OSHA (see Exhaustion of Remedies and Statutes of Limitations Under SOX).

In some cases, an employer may defeat a SOX claim by showing that either:

- The employee did not complain about a violation of US law.
- The employee’s complaints are beyond the territorial coverage of SOX whistleblower protections.

However, like many other issues under this statutory scheme, the question of whether SOX whistleblower provisions apply outside of the US remains unsettled. For more information, see Box, Extraterritorial Application of SOX Whistleblower Protections.

**INDIVIDUAL LIABILITY**

Under SOX, employees may bring a claim against the company as well as individual company employees and agents (see 18 U.S.C. § 1514A(a)). The SOX regulations also make it clear that individuals may be held liable under Section 806 (29 C.F.R. § 1980.101(f)) if they are both:

- Materially involved in the retaliation effort (see, for example, Leznik v. Nektar Therapeutics, Inc., 2007 WL 5596626 (Dep’t of Labor Nov. 16, 2007)).
In a position to modify the terms and conditions of the complaining party’s employment (see, for example, *Galagher v. Granada Entm’t USA*, 2004 WL 5633781 (Dep’t of Labor Oct. 19, 2004)).

At least one district court held that a corporate director who was not an officer or employee could be held liable as an agent under SOX (see *Wadler*, 141 F. Supp. 3d at 1015-16; Legal Update, Directors May Be Personally Liable for Retaliating Against Whistleblowers Under SOX and Dodd-Frank: ND California (W-000-7163); see also *Jones v. Southpeak Interactive Corp. of Del.*, 777 F.3d 658, 675 (4th Cir. 2015) (affirming SOX jury award against chairman and CEO because they were involved in the termination decision without discussing basis for imposing individual liability).

Employees must exhaust their administrative remedies before filing a lawsuit against any individual defendants (for more information, see Exhaustion of Remedies and Statutes of Limitations Under SOX).

**WHISTLEBLOWER ADJUDICATION UNDER SOX**

The DOL has delegated its SOX enforcement authority to OSHA (see, Practice Note, Health and Safety in the Workplace: Overview (9-500-9859) and OSHA: The Whistleblower Protection Program). OSHA has issued final rules governing the handling of retaliation claims under SOX, which became effective on March 5, 2015 (80 F.R. 11865-02; 29 C.F.R. §§ 1980.101(a) to 1980.114). OSHA also revised its whistleblower investigations manual effective as of January 28, 2016, establishing a lower burden of proof for employees during OSHA investigations of SOX claims (see OSHA: Whistleblower Investigations Manual, at 3-5 to 3-8 (Jan. 28, 2016) and Employee’s Burden of Proof). The manual provides detailed guidelines about how to handle various types of information disclosed during an investigation (see OSHA: Whistleblower Investigations Manual, at 23-1 to 23-40 (Jan. 28, 2016)).

**EXHAUSTION OF ADMINISTRATIVE REMEDIES AND STATUTES OF LIMITATIONS UNDER SOX**

Before filing a lawsuit in court, an employee with a whistleblower claim under Section 806 must file a written complaint with OSHA within 180 days of the alleged retaliation. The exhaustion of administrative remedies and statute of limitations requirements are strictly interpreted and many cases are dismissed because of non-compliance. For more on exhaustion requirements generally, see Practice Note, Exhaustion of Administrative Remedies and Statutes of Limitations Under Employment Discrimination Laws (9-521-7561).

The exhaustion standard under SOX is the same as under Title VII. Under that standard, the scope of a judicial complaint is limited to the sweep of the OSHA investigation that can reasonably be expected to follow from the administrative complaint. (See *Wallace*, 796 F.3d at 476-77; *Jones*, 777 F.3d at 669). For more information, see Legal Update, Four-Year Limitations Period Applies to Sarbanes-Oxley Retaliation Claims; Emotional Distress Damages Available: Fourth Circuit (O-598-3825).

The exhaustion requirements apply equally to claims brought against any individual named defendants (18 U.S.C. § 1514A(b); see, for example, *Bozeman v. Per-Se Tech. Inc.*, 456 F. Supp. 2d 1282, 1357-58 (N.D. Ga. 2006)). The courts disagree, however, about whether a complainant must specifically name an individual as a respondent to meet the exhaustion requirement.

Courts holding the individual must be specifically named as a respondent include:


Conversely, the following courts have found that identifying the individual in the body of the charge is sufficient to meet the exhaustion requirement:

- **Fourth Circuit**: *Jones*, 777 F.3d at 668-70.
- **N.D. Cal.**: *Wadler*, 141 F. Supp. 3d at 1020-22, with the key being that there was sufficient information in the body of the charge to put the individual on notice of the claim.

For more information, see SOX Proceedings Before OSHA.

**SOX PROCEEDINGS BEFORE OSHA**

After the employee files a complaint, OSHA notifies the employer of the complaint. The employer has 20 days to respond. OSHA makes an initial determination about whether the employee has alleged a prima facie case supported by factual allegations and either direct or circumstantial evidence supporting each element of the employee’s claim. If the employee meets that initial threshold, OSHA then has 60 days to investigate and determine if there is reasonable cause for the allegations (29 C.F.R. § 1980.105(a)). “Reasonable cause” is a finding that, after considering all the evidence gathered in the investigation, a reasonable judge could rule in the employee’s favor.

According to the 2016 OSHA Whistleblower Investigations Manual, there are three possible outcomes following an investigation:

- There is reasonable cause to believe that protected activity was a contributing factor, and so the complaint is meritorious.
- There is reasonable cause to believe that protected activity was a contributing factor, but the employer has presented clear and convincing evidence that it would have taken the same adverse action absent the protected activity, in which case the complaint is dismissed.
- There is no reasonable cause to believe that protected activity was a contributing factor, and so the complaint is dismissed.

Before January 28, 2016, the employee had to demonstrate by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action. As of January 28, 2016, to issue a merits finding, OSHA only needs reasonable cause to believe that a violation occurred, namely, that a reasonable judge could rule in the employee’s favor. This is lower burden of proof than the preponderance of the evidence standard required at hearing or trial. (See OSHA: Whistleblower Investigations Manual, at 3-5 to 3-8.)

Before issuing the determination, if OSHA finds reasonable cause to believe there is a violation and that preliminary reinstatement is appropriate, OSHA provides notice of the findings and evidence used to support it. The respondent has ten days to provide a written response and otherwise support its position. (29 C.F.R. § 1980.104(f)).
OSHA then issues a preliminary determination within 60 days of the initial complaint. If the preliminary order finds that there has been reasonable cause to conclude a violation has occurred, the order includes all the relief necessary to make the employee whole and specified compensatory damages (see Remedies Available Under SOX).

No later than 30 days after OSHA makes its determination and issues a preliminary order, either party may object to the determination and request a hearing before an ALJ (29 C.F.R. § 1980.106). The ALJ conducts a de novo hearing and issues a written decision (29 C.F.R. §§ 1980.107, 1980.109).

For employees who proceed before the ALJ, the ALJ’s decision may be appealed to the ARB within ten business days. The decision of the ALJ is final unless the ARB accepts review within 30 days of the request for review. If the ARB determines that it will review the matter, it issues a decision within 120 days after a hearing. (29 C.F.R. § 1980.110.)

Following a final determination by the ARB, either party has 60 days to appeal in federal appellate court (29 C.F.R. § 1980.112). If the ARB has not issued a final decision within 180 days after the employee filed a complaint with OSHA, the employee can sue in federal court (18 U.S.C. § 1514A(b)(1)(B); 29 C.F.R. § 1980.114; Lawson, 134 S. Ct. at 1163). The case proceeds as a new trial and the prior findings, if any, do not limit the court. The employee can engage in the full range of pretrial discovery, including obtaining relevant documents from the employer and taking depositions of the key decision makers and other witnesses.

SOX is silent about how long an employee can wait before filing in federal court. The Fourth Circuit has applied the catch-all four-year statute of limitations to SOX claims, rejecting the employer’s argument that the two-year limitations period for fraud claims applies to SOX claims (28 U.S.C. § 1658(a); Jones, 777 F.3d at 672; see Legal Update, Four-Year Limitations Period Applies to Sarbanes-Oxley Retaliation Claims; Emotional Distress Damages Available: Fourth Circuit (0-598-3825)).

**RIGHT TO JURY TRIAL UNDER SOX**

Dodd-Frank clarifies that SOX whistleblower claims may be tried before a jury and may be brought in federal court, if OSHA does not issue a decision within 180 days of the whistleblower’s complaint (29 C.F.R. § 1980.114).

**REMEDIES AVAILABLE UNDER SOX**

Both civil and criminal remedies are available under SOX.

**CIVIL REMEDIES**

Under Section 806, an employee who prevails in a civil action may be entitled to:

- Back pay with interest, less interim earnings (OSHA: Whistleblower Investigations Manual, at 6-3-6-4).
- Compensation for any special damages sustained as a result of the retaliation, including:
  - litigation costs;
  - expert witness fees; and
  - reasonable attorneys’ fees.
(18 U.S.C. § 1514A(c)(2); 29 C.F.R. § 1980.105(a).)

**Emotional Distress and Punitive Damages**

All circuit courts that have addressed the issue have concluded that the list of compensatory damages is not exhaustive and that emotional distress damages are an available remedy under SOX (see Jones, 777 F.3d at 668-70, Halliburton, 771 F.3d at 266; Lockheed Martin Corp., 717 F.3d at 1138). Other district courts have reached the same conclusion (see, for example, Feldman-Boland v. Stanely, 2016 WL 3826285, at *6 (S.D.N.Y. July 13, 2016); Rutherford v. Jones Lang LaSalle Am., Inc., 2013 WL 4431269, at *5 (E.D. Mich. Jan. 29, 2013) (allowing recovery under SOX for emotional distress, mental anguish, humiliation, and injury to reputation)).

SOX does not provide for punitive damages. However, the statute does not preempt state or federal law, so employees can file concurrent claims under other federal or state laws that may allow for punitive damages.

**Attorneys’ Fees for Prevailing Employers**

For prevailing employers, at least one circuit court has concluded that attorneys’ fees are neither authorized nor barred by SOX’s fee provision. In Smith v. Psychiatric Solutions, Inc., the district court exercised its discretion under Florida’s whistleblower statute to award attorneys’ fees to the defendant employer, the prevailing party in a suit involving alleged violations of SOX and the Florida statute. The US Court of Appeals for the Eleventh Circuit affirmed the award, concluding that if recovery of attorneys’ fees by prevailing defendants is authorized under another statute, SOX does not prevent that recovery. (750 F.3d 1253, 1257-58 (11th Cir. 2014)).

**CRIMINAL PENALTIES**

In addition to the potential for civil damages, discrimination against whistleblowers may be criminal if the whistleblower made a report to law enforcement. The criminal penalties are outlined in Section 1107 of SOX (18 U.S.C. § 1513(e)), entitled “Retaliation Against Informants,” and apply to a broader set of whistleblowing violations than those relating to securities fraud. A retaliatory action becomes a criminal matter under Section 1107 of SOX if the employee provides information to a law enforcement officer concerning the commission of any federal offense. Under Section 1107, retaliation includes “interference with lawful employment or livelihood” of the whistleblower. Penalties include either a fine or up to ten years imprisonment, or both.

**OVERVIEW OF DODD-FRANK ACT WHISTLEBLOWER PROTECTIONS**

Sections 922 and 748 of the Dodd-Frank Act create a whistleblower program relating to securities and commodities law violations regulated under the SEC and CFTC (15 U.S.C. § 78u-6(b);
Whistleblower Protections Under Sarbanes-Oxley and the Dodd-Frank Act

7 U.S.C. § 26). The law encourages the reporting of wrongdoing to the SEC and CFTC by rewarding whistleblowers for a voluntary tip that results in:

- A successful enforcement of a single federal court action or administrative action brought by the SEC or the CFTC.
- Funds collected in excess of $1 million.

Between 10% and 30% of the funds collected are awarded to the whistleblower.

Between 10% and 30% of the funds collected are awarded to the whistleblower.

(15 U.S.C. § 78u-6(b); 7 U.S.C. § 26(b).)

For more information see Dodd-Frank Whistleblower Incentives.

Dodd-Frank also provides protection against workplace retaliation for those individuals who qualify as whistleblowers under the Act (see Dodd-Frank Protections Against Retaliation).

Dodd-Frank claims under these sections can be brought directly in federal court, without the need to exhaust administrative remedies.

If successful, plaintiffs can be awarded:

- Restatement.
- Double back pay with interest.
- Litigation costs.
- Expert witness and reasonable attorneys’ fees.


Section 1057 of the Dodd-Frank Act (12 U.S.C. § 5567) also creates whistleblower protections specific to financial services employees (see Additional Protections for Financial Service Employees). However, plaintiffs must exhaust their administrative remedies before filing suit in federal court under this section of Dodd-Frank. For more information, see Whistleblower Adjudication Under Dodd-Frank.

DODD-FRANK REGULATIONS

SEC Final Rule

On May 25, 2011, the SEC issued regulations under Dodd-Frank describing the whistleblower program it created to implement the provisions of Dodd-Frank and explaining the procedures for obtaining an award (17 C.F.R. §§ 240.21F-1 to 240.21F-17; Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, SEC Release No. 34-64545 (May 25, 2011) (SEC whistleblower rule)).

SEC Rule 21F-2 applies different definitions of whistleblower for purposes of award eligibility and retaliation protections. To qualify for the award program, whistleblowers must provide information to the SEC (17 C.F.R. § 240.21F-2(a)(1)). The Rule expanded the anti-retaliation protections to cover whistleblowers who would not otherwise qualify for an award, such as when they only report internally and do not provide information to the SEC (17 C.F.R. § 240.21F-2(b)). However, the US Supreme Court has since rejected the expanded whistleblower definition as expressed by the SEC’s rule (see Supreme Court Holds That Dodd-Frank Requires Reporting to the SEC and SEC Interpretation Rejected).

Rule 21F-9 provides that to qualify as a whistleblower under Section 922, an individual must submit information about a possible securities law violation to the SEC either:

- Online using the SEC’s website.
- By mailing or faxing a Form TCR (Tip, Complaint or Referral) to the SEC.

(17 C.F.R. § 240.21F-9(a).)

The SEC’s rules provide that an employee involved in a scheme that may be subject to an SEC or CFTC action will not receive amnesty because of a whistleblowing tip provided to the SEC. However, the SEC can consider a whistleblower’s cooperation when deciding whether to take action against the individual. Only individuals can qualify as whistleblowers. Corporate entities are ineligible for protection or rewards under the SEC’s rules. (See 17 C.F.R. §§ 240.21F-15, 240.21F-16.)

Other portions of the rule restrict employers from using confidentiality provisions that prevent current or former employees from communicating with SEC staff about securities law violations (see Confidentiality Provisions in Employment, Severance, and Settlement Agreements).

CFTC Final Rule

On May 22, 2017, the CFTC approved a final rule amending the whistleblower program under Part 165 of the CFTC’s regulations to provide for greater anti-retaliation protections and revisions to the process for reviewing whistleblower claims (CFTC Final Rule) (82 FR 24487-01, 2017 WL 2316323; 17 C.F.R. §§ 165.1 to 165.20 and 17 C.F.R. Pt. 165, App. A). The rule became effective as of July 31, 2017, and provides greater alignment between the CFTC program and the SEC’s whistleblower program. For highlights of the amendments, see Legal Update, CFTC Adopts Amendments to Whistleblower Program (W-008-2764).

OSHA Final Rule

The DOL has delegated the authority to investigate and adjudicate Section 1057 claims to OSHA and OSHA publishes the companion regulations. OSHA’s final rule governing Dodd-Frank whistleblower claims under Section 1057 became effective on March 17, 2016 (81 FR 14374-01; 29 C.F.R. §§ 1985.100 to 1980.115).

DODD-FRANK PROTECTIONS AGAINST RETALIATION

In addition to the whistleblower award programs, Sections 922 and 748 create a private cause of action for whistleblowers to sue their employers for retaliation resulting from their protected whistleblowing activities (15 U.S.C. § 78u-6(b); 7 U.S.C. § 26). The retaliatory act must relate to the whistleblower’s employment (Johnson v. DocuLynx, Inc., 2016 WL 9344258, at *6 (D. Colo. Oct. 25, 2016)).

COVERED EMPLOYERS UNDER DODD-FRANK

Dodd-Frank does not define employer or address whether employers can include individuals (15 U.S.C. §§ 78u-6(h)(1)(A)). At least one court has held that an individual corporate director could be held liable for unlawful retaliation under Dodd-Frank (see Wadler, 141 F. Supp. 3d at 1022-24; Legal Update, Directors May Be Personally Liable for Retaliating Against Whistleblowers Under SOX and Dodd-Frank: ND California (W-000-7163)).
WHISTLEBLOWERS PROTECTED UNDER DODD-FRANK

As a threshold matter, an individual must first qualify as a whistleblower to be entitled to Dodd-Frank’s anti-retaliation protections. Section 922 (78u-6) of Dodd-Frank defines a whistleblower as “any individual who provides ... information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC]” (15 U.S.C. § 78u–6(a)(6)). This definition applies throughout Section 922 (15 U.S.C. § 78u–6(a)).

Section 748 contains a similar definition, differing only in requiring that information be provided to the CFTC (7 U.S.C. § 26(a)(7)).

Individuals must report wrongdoing to the SEC or the CFTC before the retaliatory conduct occurs to be protected as a whistleblower under Dodd-Frank. Individuals who only report wrongdoing internally or to the Financial Industry Regulatory Authority (FINRA), which is overseen by the SEC, are not protected. (Digital Realty Trust, Inc. v. Somers, 2018 WL 987345 (U.S. Feb. 21, 2018); Price v. UBS Fin. Servs., Inc., 2018 WL 1885669, at *2 (D.N.J. Apr. 19, 2018) (reporting to FINRA not protected based on Digital Realty decision); see also Supreme Court Holds That Dodd-Frank Requires Reporting to the SEC).

Whistleblower protections apply to a broader group of individuals under Section 1057 (see Additional Protections for Financial Service Employees).

CONDUCT PROTECTED UNDER DODD-FRANK

To be covered under Dodd-Frank, whistleblowers must report a violation of US securities under the jurisdiction of the SEC or commodities laws under the jurisdiction of the CFTC. Complaints about violations of general banking regulations are not covered (see, for example, Boyle v. Evolve Bank & Trust, 2017 WL 3075157, at *5 (W.D. Tenn. July 19, 2017) (Dodd-Frank whistleblower protection provision is not a “general-purpose anti-retaliation provision”); Zillges v. Kenney Bank & Trust, 24 F. Supp. 3d 795, 801 (E.D. Wis. 2014)).

Section 922 of Dodd-Frank prohibits retaliation by an employer because of any lawful act done by a whistleblower in:

- Providing information to the SEC in any “covered judicial or administrative action,” defined as:
  - any judicial or administrative action brought by the SEC under the securities laws; and
  - resulting in monetary sanctions exceeding $1 million.
- Initiating, testifying in, or assisting in any investigation or covered judicial or administrative action of the SEC based on information provided to the SEC under 15 U.S.C. § 78u–6.
- Making disclosures that are required or protected under a law, rule, or regulation under the jurisdiction of the SEC, including SOX. (15 U.S.C. § 78u–6(h).)

Qualified whistleblowers who report both to the SEC and internally but suffer retaliation only because of their internal report are protected under this section (Digital Realty, 2018 WL 987345, at *11).

Section 748 of Dodd-Frank similarly protects whistleblowers against retaliation under the Commodity Exchange Act (CEA) for any lawful act done by the whistleblower in:

- Providing information to the CFTC in any “covered judicial or administrative action,” defined as:
  - any judicial or administrative action brought by the CFTC under the commodities laws; and
  - resulting in monetary sanctions exceeding $1 million.
- Assisting in any investigation or judicial or administrative action of the CFTC based on or related to the information provided.

Protected activity under this section does not include disclosures that are protected under SOX. (7 U.S.C. § 26(h)(1)).

SUPREME COURT HOLDS THAT DODD-FRANK REQUIRES REPORTING TO THE SEC

On February 21, 2018, the US Supreme Court unanimously held that to be protected as a “whistleblower” under Section 922 of the Dodd-Frank Act an individual must first provide information to the SEC. Individuals who only report internally fall outside the whistleblower definition and therefore are not protected by the statute. (15 U.S.C. § 78u–6(a)(6); Digital Realty, 2018 WL 987345 (Feb. 21, 2018)).

The court found that the statutory definition of whistleblower was clear and unambiguous in requiring that an eligible whistleblower provide information “to the Commission,” and that it applied throughout Section 922. The court also held that this interpretation was consistent with Dodd-Frank’s “purpose and design,” which was to motivate people to “tell the SEC” about securities law violations (though two concurring opinions differed on the import of the legislative history). The court expressly rejected the SEC’s rule stating that anti-retaliation protections to those employees who only reported internally. (Digital Realty, 2018 WL 987345, at *8-9; see SEC Interpretation Rejected.)

For more on the decision, see Legal Update, Supreme Court Refuses to Expand Definition of Whistleblower in Dodd-Frank Act (W-013-3073).

Following the Digital Realty decision, at least one court has held that reporting to FINRA, an agency which the SEC oversees, is not the same as reporting to the SEC and therefore does not qualify for whistleblower protection (Price, 2018 WL 1885669 at *2).

Circuit Split Resolved

The Supreme Court’s decision resolved a circuit split between the Fifth Circuit, which held that Dodd-Frank requires reporting to the SEC, and the Second and Ninth Circuits, which held that individuals reporting internally were protected by Dodd-Frank’s anti-retaliation provisions (compare Asadi v. C.E. Energy (USA), LLC, 720 F.3d 620, 625 (5th Cir. 2013) with Berman v. Neo@Ogilvy, LLC, 801 F.3d 145 (2d Cir. 2015) and Somers v. Digital Realty Trust, Inc., 850 F.3d 1045, 1049 (9th Cir. 2017)). The trend in the district courts increasingly had been following the Second and Ninth Circuits in rejecting Asadi. However, the Supreme Court adopted the reasoning in Asadi.

For more on these decisions, see Legal Updates:

- Dodd-Frank Protects Whistleblowers Filing Internal Complaints: Second Circuit (7-618-7045).
Ninth Circuit Agrees with Second Circuit That Dodd-Frank Protects Internal Whistleblowers (W-006-8630).

SEC Interpretation Rejected
The SEC issued an interpretation in 2015 after oral argument in *Berman v. Neo@Ogilvy, LLC* (then pending before the Second Circuit), which clarified its view of the whistleblower definition and the qualifications for retaliation protections contained in its 2011 regulations (see 17 C.F.R. § 240.21F-2). The interpretation explained that an individual may qualify as a whistleblower for purposes of Dodd-Frank’s anti-retaliation protections whether or not the individual has reported wrongdoing to the SEC (as the individual must do to be eligible for payment of an award under the statute). For more information, see SEC Release No. 34-75592 (Aug. 4, 2015) and Legal Update, SEC Clarifies Requirements for Whistleblower Status to Qualify for Employment Retaliation Protections (1-618-0018).

The Supreme Court rejected the SEC’s view of the whistleblower definition as expressed in Rule 21F-2, and by extension, the SEC’s later interpretation.

**REASONABLE BELIEF**
To be entitled to the anti-retaliation protections, a whistleblower must have a “reasonable belief that the information he is providing relates to a possible securities law violation... that has occurred, is ongoing, or is about to occur” (17 C.F.R. § 240.21F-2(b)(1)(i)). Reasonable belief is comprised of both:

- A subjective belief. An employee must subjectively and genuinely believe that the information demonstrates a possible violation.

- An objective belief. The belief must be one that a similarly situated employee may reasonably possess.

(See, for example, *McManus v. Tetra Tech Constr., Inc.*, 260 F. Supp. 3d 197, 206 (N.D.N.Y. 2017); *Williams v. Rosenblatt Sec., Inc.*, 136 F. Supp. 3d 593, 605 (S.D.N.Y. 2015).)

**ADDITIONAL PROTECTIONS FOR FINANCIAL SERVICES EMPLOYEES**
Section 1057 of the Dodd-Frank Act prohibits “covered persons” or “service providers” from terminating or discriminating against any “covered employee” (as defined below) or authorized representative of covered employees because that employee or representative has done any of the following:

- Provided, caused to be provided, or is about to provide or cause to be provided information to the employer, the Consumer Financial Protection Bureau (CFPB), or any other state, local, or federal governmental authority relating to any violation of or any act or omission that the employee reasonably believes to be a violation of any provision of Title X of the Dodd-Frank Act (the Consumer Protection Act) or any other provision of law subject to the jurisdiction of the CFPB.

- Testified or will testify in any proceeding resulting from the administration or enforcement of any provision of the Consumer Protection Act or any other provision of law subject to the jurisdiction of the CFPB.

- Filed, instituted, or caused to be filed or instituted any proceeding under any federal consumer financial law.

- Objected to or refused to participate in any activity, policy, practice, or assigned task that the employee reasonably believed to be in violation of any law, rule, order, standard, or prohibition subject to the jurisdiction of or enforceable by the CFPB.

(12 U.S.C. § 5567(a).)

“Covered employee” means any individual performing tasks related to the offering or provision of a consumer financial product or service (12 U.S.C. § 5567(b)).

“Covered person” means any person who engages in offering or providing a consumer financial product or service and any affiliate of that person if the affiliate acts as a service provider to that person (12 U.S.C. § 5481(6)).

“Service provider” means any person who provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service (12 U.S.C. § 5481(26)).

By definition, these anti-retaliation and anti-discrimination provisions are broader than the anti-retaliation provisions in other sections of Dodd-Frank because they protect employees who report wrongdoing only internally to their employers, and do not require the covered employee to report information to the SEC, the CFPB, or any other governmental or administrative agency (*Digital Realty*, 2018 WL 987345, at * 9).

**DODD-FRANK WHISTLEBLOWER INCENTIVES**
The Dodd-Frank Act creates incentives for potential whistleblowers by rewarding these individuals with between 10% and 30% of the monetary sanctions imposed in the covered action or “related actions” if:

- The whistleblower voluntarily provides the SEC or CFTC with original information relating to a possible violation of the federal securities laws (see Original Information).

- The information leads to a successful enforcement action.

- The action results in monetary sanctions exceeding $1 million (see Actions Resulting in Monetary Sanctions).

(See 15 U.S.C. §§ 78u-6(a)(1), (a)(3), (b); 7 U.S.C. §§ 26(a)(1), (a)(4), (b); 17 C.F.R. §§ 165.5, 165.7, 240.21F-4.)

The SEC whistleblower website reports that the agency has awarded more than $175 million to whistleblowers since the program’s inception in 2011.

**ORIGINAL INFORMATION**
Original information is defined as information that is:

- Derived from the independent knowledge or analysis of the whistleblower (see Independent Knowledge).

- Not known to the SEC or CFTC from any other source.

- Unless the whistleblower is a source of the information, not exclusively derived from an allegation made in:
  - a covered judicial or administrative hearing;
  - a governmental report, hearing, audit, or investigation; or
  - the news media.

(15 U.S.C. § 78u-6(3); 7 U.S.C. §26(a)(4); 17 C.F.R. §§ 165.2(k), 240.21F-4(a).)
To qualify as original information, information generally must be provided to the SEC and comply with the SEC’s rules and regulations, which became effective on August 12, 2011 (17 C.F.R. § 240.21F-4), or the CFTC’s rules, which became effective on July 31, 2017 (17 C.F.R. §§ 165.2(k)). A safe harbor provision also allows whistleblowers to qualify for an award if they initially report to another federal agency and then report the same information to the SEC within 120 days, if they otherwise meet the criteria for whistleblower status (17 C.F.R. § 240.21F-4(b)(7)). The SEC issued its first whistleblower award of more than $2.2 million under this safe harbor on April 5, 2018 (see SEC Release No. 2018-58).

The Rule also provides that any original information submitted after Dodd-Frank’s enactment on July 21, 2010, but before the SEC regulations were in effect, is treated as if it complies with the SEC regulations (15 U.S.C. § 78u-7(b), 17 C.F.R. §§ 165.2(k)(5)). However, the regulations and case law have clarified that information submitted before July 21, 2010 cannot by definition qualify as original information under the Dodd-Frank Act (17 C.F.R. §§ 165.2(k)(4), 240.21F-4(b)(iv), Stryker v. S.E.C., 780 F.3d 163, 166 (2d Cir. 2015)).

INDEPENDENT KNOWLEDGE

Independent knowledge is defined as factual information that is not derived from publicly available sources. Independent analysis can rely on publicly available information if the evaluation of that information results in new information that was not publicly known (17 C.F.R. §§ 165.2(g), 240.21F-4(b)).

Under the SEC’s rules, the “independent knowledge” requirement excludes information obtained in certain circumstances, including information:

- Obtained from a communication subject to the attorney-client privilege.
- Obtained by a whistleblower during legal representation of a client for whom the whistleblower (or the employee’s employer or firm) provides services and the whistleblower attempts to submit the information for the whistleblower’s benefit.
- Discovered because the whistleblower is:
  - an officer, director, trustee, or partner of an entity and either another person informed the whistleblower of any alleged misconduct or the whistleblower learned of the information from the company’s compliance program or procedures;
  - a company employee whose principal duties are compliance or internal audit;
  - employed by a firm retained by the company to perform compliance or internal audit functions;
  - employed by a firm retained by the company to conduct an internal investigation; or
  - employed by or a partner of the company’s outside auditor if the whistleblower obtained the information in connection with the audit or review of the company’s financial statements (or other engagement required under federal securities laws).

However, under certain circumstances, these company officers, directors, employees, and third-party compliance, accounting, and auditing personnel may be considered to have independent knowledge or analysis and therefore eligible for a whistleblower award. Among other exceptions, these persons may report this information and be credited with providing original information if 120 days have elapsed since either:

- They reported the information to their supervisor or the audit committee, chief legal officer, or chief compliance officer.
- They received the information under circumstances indicating that their supervisor or the audit committee, chief legal officer, or chief compliance officer also received it.

(17 C.F.R. §§ 165.2(g)(7), 240.21F-4(b)(4)).

In March 2015, a corporate officer received a substantial whistleblower award for reporting wrongdoing that the officer had learned about because another company employee initially reported the information through an internal compliance program (SEC News Release, 2015 WL 858975 (March 2, 2015)). This was the first SEC whistleblower award to a company officer relying on one of the exceptions to the independent knowledge exclusion.

In April 2015, the SEC issued its first-ever whistleblower award to a “compliance officer” for providing original information that helped the SEC resolve an enforcement action against the officer’s company (SEC Release No. 74781, 2015 WL 1814377 (April 22, 2015)).

ACTIONS RESULTING IN MONETARY SANCTIONS

For purposes of determining whether the $1 million threshold is met, the SEC aggregates sanctions from two or more proceedings that arise from the same set of operative facts (15 U.S.C. § 78u-6(a)(5); 7 U.S.C. § 26(a)(5)). For example, if a whistleblower’s submission leads to two separate enforcement actions, each with total sanctions of $600,000, then a whistleblower award would be authorized if the actions result from the same core information.

RELATED ACTIONS

The SEC or CFTC may also pay whistleblower awards based on amounts collected in related actions. A related action is any judicial or administrative action:

- Brought by:
  - the US Attorney General;
  - an appropriate regulatory authority;
  - a self-regulatory organization; or
  - a state attorney general in a criminal investigation.

- Based on the same original information provided by a whistleblower that led to the successful enforcement of an SEC or a CFTC action in which the SEC or CFTC obtained monetary sanctions exceeding $1 million.

(17 C.F.R. §§ 165.11, 240.21F-3(b).)

The SEC’s rules clarify that a whistleblower is not entitled to a double recovery on the same related action. For example, if the CFTC makes an award of 10% to 30% on a criminal action brought by the US Department of Justice (DOJ), the whistleblower cannot obtain a second recovery of 10% to 30% from the SEC on the same action. (17 C.F.R. § 240.21F-3(b)(3).)

The SEC’s rules further clarify that once the CFTC decides an issue of fact or law against a whistleblower in a related action, the whistleblower cannot relitigate the same issue before the SEC. If the CFTC determines that the whistleblower’s information did not lead
to the successful enforcement of a related action, the whistleblower cannot attempt to circumvent this adverse determination by raising the same issue before the SEC. (17 C.F.R. § 240.21F-3(b)(3).)

The CFTC Final Rule contains similar provisions (17 C.F.R. § 165.11(b)).

**CALCULATING THE AWARD**

The SEC or the CFTC has discretion to determine the amount of an award based on certain criteria (17 C.F.R. §§ 165.8, 240.21F-5). Factors that may increase the amount of a whistleblower award include:

- The significance of the information provided to the success of the action.
- The degree of assistance provided in that action.
- The “programmatic interest” in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of these laws.
- The whistleblower’s participation in internal compliance systems.

Factors that may decrease the amount of an award include:

- The whistleblower’s interference with the company’s internal compliance and reporting systems.
- The culpability of the whistleblower.
- Any unreasonable delay by the whistleblower in reporting information.

(17 C.F.R. §§ 165.9, 240.21F-6.)

If multiple whistleblowers are entitled to an award, the total award is limited to 10% to 30% of the recovery, with the whistleblowers sharing that amount (17 C.F.R. §§ 165.8(b), 240.21F-5(c)). For example, one whistleblower can receive 20% and another receive 10%, but they cannot both receive 30%.

**ENCOURAGING USE OF INTERNAL COMPLIANCE SYSTEMS**

To encourage the use of internal compliance programs, the SEC’s rules state that whistleblowers who report potential violations internally can receive an award based on a company’s later disclosures if enforcement efforts are successful. Whistleblowers who participate in internal compliance programs are also given the benefit of a 120-day window in which they can report to the SEC and be treated as if the SEC report had been made on the earlier date (17 C.F.R. § 240.21F-4(b)(7)).

The SEC also may consider a whistleblower’s participation in or interference with internal compliance systems in determining the amount of an award (17 C.F.R. §§ 165.9(b)(4), 240.21F-6(a)(4)).

However, an individual who only reports internally and does not report to the SEC is not entitled to anti-retaliation protections as a whistleblower under Dodd-Frank (Somers v. Digital Realty, Inc., 2018 WL 987345, at *4). Therefore, an employee who reports internally and is fired before having an opportunity to report to the SEC has no retaliation claim under Dodd-Frank, and only has 180 days to bring a claim under SOX. While the full impact of the Somers decision is not yet known, sophisticated whistleblowers aware of the SEC reporting requirements may be less likely to report internally before going to the SEC.

**ELIGIBILITY**

Among other eligibility requirements, no award may be made to any whistleblower who:

- Is or was at the time the whistleblower acquired the information submitted to the SEC or CFTC, a member, officer, or employee of:
  - an applicable regulatory agency;
  - the Department of Justice (DOJ);
  - a self-regulatory organization (SRO);
  - the Public Company Accounting Oversight Board (PCAOB); or
  - a law enforcement organization.

- Is convicted of a crime related to the covered judicial or administrative action for which the whistleblower otherwise can receive an award.

- Fails to submit information to the SEC or CFTC according to applicable procedures. Rule 21F-9 sets out the procedures for submitting original information to the SEC to be eligible for a whistleblower award (17 C.F.R. § 240.21F-9).


**WHISTLEBLOWER ADJUDICATION UNDER DODD-FRANK**

The Dodd-Frank Act creates a private right of action in federal district court for an individual who alleges discharge or other adverse employment action in violation of its prohibition against retaliation for engaging in protected activity under Section 922 or 748. Individuals pursuing claims under Section 1057 must first proceed before OSHA.

**EXHAUSTION OF ADMINISTRATIVE REMEDIES AND STATUTES OF LIMITATIONS UNDER DODD-FRANK**

The Dodd-Frank Act allows individuals to bring claims in federal district court alleging employer retaliation for engaging in protected activity. Individuals are not required to satisfy any administrative prerequisites before bringing an action in federal court for claims filed under Section 922 or 748 (15 U.S.C. § 78u-6(h)(1)(B)(i) and 7 U.S.C. § 26(h)(1)(B)(i)). However, for claims filed under Section 1057 (regarding complaints to the CFPB) an employee must first file a complaint with OSHA before suing in federal court (12 U.S.C. § 5567(c)(1)(a); 29 C.F.R. § 1985.103; see Actions by Financial Service Employees Under Section 1057).

The main difference between Section 922 (amending the Exchange Act) and Section 748 (amending the Commodity Exchange Act) of Dodd-Frank is the statute of limitations for bringing an action alleging employer retaliation against an employee for engaging in protected whistleblower activity (15 U.S.C. § 78u-6; 7 U.S.C. § 26).
Under Section 922 of the Dodd-Frank Act, an individual must bring an action not more than either:
- Six years after the prohibited retaliation occurred.
- Three years after material facts were known or reasonably should have been known by the employee alleging the violation, but no later than ten years after the prohibited retaliation occurred.

(15 U.S.C. § 78u-6(h)(1)(B)(iii).) At least one court has held that the three-year limitations period added by Dodd-Frank does not apply retroactively, at least in the context of claims under the False Claims Act (see US ex rel. Seif v. Animas Corp., 607 F. App’x 165, 167 (3d Cir. 2015); Third Circuit: Dodd-Frank Statute of Limitations Under False Claims Act Not Retroactive (5-608-8946)).

However, under Section 748 of the Dodd-Frank Act, the action must be brought within two years of when the prohibited retaliation occurs (7 U.S.C. § 26(h)(1)(B)(iii)).

**NO RIGHT TO JURY TRIAL UNDER DODD-FRANK**

On an issue of apparent first impression nationwide, the US District Court for the Northern District of Georgia ruled that Dodd-Frank whistleblowers are not entitled to a jury trial to determine damages awards for their retaliation claims.

In Pruett v. BlueLinx Holdings, Inc., the court noted that, unlike Section 806 of SOX that explicitly entitles whistleblowers to a jury trial, the Dodd-Frank whistleblower provision is silent on the issue. The court concluded that reinstatement and back pay, the principal relief available under Dodd-Frank, are generally considered equitable remedies not determined by juries. The court explained that even Dodd-Frank’s provision for doubling back pay is an “automatic calculation” that lacks the discretion normally associated with damages awarded by a jury. (2013 WL 6335887 (N.D. Ga. Nov. 12, 2013).)

However, whistleblowers who bring claims under Section 1057 are entitled to a jury trial after filing a complaint with OSHA and where OSHA has not acted within 210 days of filing a complaint or within 90 days after receipt of a written determination (12 U.S.C. § 5567(c)(4)(D)(i); 29 C.F.R. § 1985.114).

**ACTIONS BY FINANCIAL SERVICE EMPLOYEES UNDER SECTION 1057 OF DODD-FRANK**

**Statute of Limitations and Exhaustion of Administrative Remedies**

To pursue a claim under Section 1057, an individual must file a complaint with OSHA within 180 days of the alleged violation. This limitations period begins when the employee is aware or reasonably should be aware of the employer’s decision to take an adverse action (EEOC v. United Parcel Serv., Inc., 249 F.3d 557, 561-62 (6th Cir. 2001)) and is subject to equitable tolling. (12 U.S.C. § 5567(c)(1)(A); 29 C.F.R. § 1985.103(d); see Practice Note, Exhaustion of Administrative Remedies and Statutes of Limitations Under Employment Discrimination Laws (9-521-7563)).

**Employee’s Prima Facie Case**

The procedures and respective burdens of proof governing an investigation under Dodd-Frank are essentially the same as under SOX (see Whistleblower Adjudication Under SOX). OSHA does not investigate and dismisses the complaint if either:
- The employee fails to make a prima facie showing in the complaint supplemented by interviews of the employee that:
  - the employee engaged in protected activity;
  - the employer knew or suspected that the employee engaged in the protected activity;
  - the employee suffered an adverse employment action; and
  - the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.
- (29 C.F.R. § 1985.104(e)(2).)

- The employer establishes by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity (29 C.F.R. § 1985.104(e)(4)).

**OSHA Investigation Procedures**

If OSHA proceeds with an investigation, it must determine whether there is reasonable cause to believe that protected activity was a contributing factor in the alleged adverse action (see OSHA: Whistleblower Investigations Manual, at 3-5 to 3-8 (Jan. 28, 2016); Employee’s Burden of Proof). The Assistant Secretary of Labor must issue preliminary findings within 60 days of the filing the complaint (29 C.F.R. § 1985.105(a); 81 FR 14374-01). If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, then the Assistant Secretary issues written findings and a preliminary order requiring the person who committed the violation, as appropriate, to:
- Take affirmative actions to abate the violation.
- Reinstate the individual to his former position with compensation (including back pay with interest), or if reinstatement is inappropriate or unavailable, compensate the employee with front pay.
- Restore the terms, conditions, and privileges associated with his employment.
- Pay compensatory damages.
- Award litigation costs to the employee, including reasonable attorneys’ and expert witness fees.
- Award attorneys’ fees up to $1,000 to a prevailing employer if the claim was frivolous or brought in bad faith.

(12 U.S.C. §§ 5567(c)(4)(B) and (C); 29 C.F.R. § 1985.105(a), (b); OSHA Investigations Manual, § 6-2 (Reinstatement and Front Pay)).

The parties have 30 days from receipt of the findings to object in writing and request a hearing before an ALJ (29 C.F.R. § 1985.106(a)). If neither party files an objection, the preliminary order becomes final and is not appealable (29 C.F.R. § 1985.106(b)).

**ALJ Hearing and Right of Review**

At the hearing, the employer must demonstrate by a preponderance of the evidence that the protected activity was a contributing factor in the adverse employment action. The employer can defeat the claim if it demonstrates by clear and convincing evidence that it would have taken the same action absent the protected activity. (29 C.F.R. §§ 1985.109(a), (b).) After the ALJ issues a decision, the parties have 14 days to petition the ARB for review, which is not a matter of right but within the ARB’s discretion. If no petition for
review is filed or the petition is denied, the ALJ’s decision becomes the final order. The parties have 60 days to appeal the order to a federal appeals court. (29 C.F.R. § 1985.112(a).)

If no final order has been issued within 210 days after the date of filing of a complaint or within 90 days after the receipt of the written findings issued at the close of OSHA’s investigation, the employee may bring an action for de novo review in federal district court and is entitled to a jury trial (12 U.S.C. § 5567(c)(4)(D)(i); 29 C.F.R. § 1985.114).

Pre-dispute arbitration agreements generally are not valid or enforceable to the extent they require arbitration of a dispute arising under Section 1057 (see Arbitration of Whistleblower Claims).

REMEDIES AVAILABLE UNDER DODD-FRANK

Prevailing plaintiffs under Dodd-Frank’s private right of action may be awarded remedies including:

- Reinstatement with the same seniority status that the individual would have had but for the retaliation.
- Up to two times the amount of back pay otherwise owed to the individual, with interest, noting that:
  - Sections 748 and 1057 provide that an individual may receive up to the amount of back pay, with interest; and
  - Section 922 provides that the individual may receive up to two times that amount, with interest.
- Compensation for:
  - litigation costs;
  - expert witness fees; and
  - reasonable attorneys’ fees.

Punitive damages are not available under the Dodd-Frank Act (see, for example, Pruett v. BlueLinx Holdings, Inc., 2013 WL 6335887; Kramer v. Trans-Lux Corp., 2012 WL 4444820, at *7 (S.D.N.Y. Sept. 25, 2012)).

ARBITRATION OF WHISTLEBLOWER CLAIMS

In decisions predating the Dodd-Frank Act, courts in the Second Circuit, the Fifth Circuit, and district courts in the District of Columbia all concluded that SOX whistleblower claims may be arbitrable (see, for example, Guyden v. Aetna, Inc., 544 F.3d 376, 384-84 (2d Cir. 2008)). The Dodd-Frank Act, however, clearly prohibits mandatory arbitration of SOX whistleblower retaliation claims and Dodd-Frank Sections 748 and 1057 claims (18 U.S.C. § 1514A(e)(2); 7 U.S.C. § 26(n); 12 U.S.C. § 5567(d)(2)). Some courts have found that Dodd-Frank’s prohibition on mandatory arbitration can be applied retroactively (see Wong v. CKX, Inc., 890 F. Supp. 2d 411, 423 (S.D.N.Y. 2012) and Pezza v. Investors Capital Corp., 767 F. Supp. 2d 225 (D. Mass. 2011)).

However, the Third Circuit concluded that the prohibitions against arbitration do not extend to Dodd-Frank retaliation claims brought under Section 922 (15 U.S.C. § 78u-6(h)) (Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488 (3rd Cir. 2014); see Legal Update, Dodd-Frank Whistleblower Retaliation Claims Are Not Exempt from Pre-Dispute Arbitration Agreements: Third Circuit (4-591-6706)).


Dodd-Frank also does not prohibit the arbitration of non-whistleblower claims simply because an arbitration agreement does not carve-out Dodd-Frank whistleblower claims (see Santoro v. Accenture Fed. Servs., LLC, 748 F.3d 217, 223-24 (4th Cir. 2014); Legal Update, Dodd-Frank Whistleblower Provisions Do Not Override FAA Arbitration Mandate for Non-Whistleblower Claims: Fourth Circuit (0-567-7005)).

SETTLEMENT OF WHISTLEBLOWER CLAIMS

To settle a SOX whistleblower case, the parties to the agreement must obtain the written approval of OSHA, the ALJ, or the ARB, depending on where the cases is pending at the time of settlement (29 C.F.R. § 1980.111). OSHA reviews settlements to ensure that they are:

- In the public interest.
- Fair, adequate, and reasonable.

The parties must disclose to OSHA the consideration paid and the terms of the settlement agreement, including the amount of attorneys’ fees and expenses. Although the agreement is not confidential, the Dodd-Frank Act clarifies that the identity of the whistleblower is confidential except in specified circumstances (see 15 U.S.C. § 78u-6(h)(2)(A)).

Although the entire settlement agreement must be submitted for approval and placed on the record in a case, a party may, under the DOL’s Freedom of Information Act (FOIA) regulations, designate some or all of the settlement as confidential business information and request that the agency not disclose the agreement. However, designating the information as potentially non-disclosable does not automatically protect the confidentiality of the settlement.

The settlement agreement is a DOL record that must be made available for public inspection and copying under FOIA, as requested, unless an exception applies. If an exception applies, the DOL determines at the time of the request whether to exercise its discretion and withhold the document. If no exception applies, the document must be disclosed. The DOL website provides more information about FOIA and its exemptions (see DOL: Freedom of Information Act and Exemptions).

A settlement can only be approved if OSHA, the employee, and the employer consent to it (29 C.F.R. § 1980.111(d)(1)). OSHA will not approve a settlement that attempts to silence or impose a “gag order” on an employee (see OSHA, New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases (Aug. 23, 2016)). Therefore, the settlement agreement should expressly acknowledge the employee’s continued right to engage in protected conduct (see,
for example, Conn. Light & Power Co. v. Sec’y, U.S. Dep’t of Labor, 85 F.3d 89, 95–6 (2d Cir. 1996)). An agreement can be approved by OSHA even if a party later attempts to back out, provided that the parties had previously reached an unequivocal agreement on all material terms (see Gonzales v. J.C. Penney Corp., 2012 WL 4753923, at * 6-7 (ARB Sept. 28, 2012)). Oral agreements may also be binding on the parties.

OSHA has jurisdiction to approve only those portions of a settlement that concern SOX whistleblower issues. If a settlement agreement resolves other legal issues, as it often does, the DOL’s approval of the agreement is neither required nor constitutes approval of the settlement as it relates to other claims (see Gault v. Carpenter Tech. Corp., 2003 WL 25316949 (ALJ, Sept. 3, 2003)).

A settlement agreement approved by OSHA, the ALJ, or the ARB constitutes an enforceable final order of the US Secretary of Labor (29 C.F.R. § 1980.111(e)). The terms of a settlement may be enforced in federal court (29 C.F.R. § 1980.113).

**BEST PRACTICES FOR ADDRESSING WHISTLEBLOWING IN THE WORKPLACE**

**POLICIES AND TRAINING**

Employers should consider developing educational programs to train and inform directors, officers, managers, and all other employees on what constitutes a violation under SOX and Dodd-Frank and how to use the company’s formal process for ensuring a proper response. This is more important after the enactment of the Dodd-Frank Act because there are financial incentives for employees to engage in whistleblowing activities outside of the company (see Dodd-Frank Whistleblower Incentives).

Managers and supervisors should also be trained to keep detailed records of employee performance so that an employee who is terminated for valid reasons cannot falsely claim protection under whistleblower laws (see Best Practices for Employee Discipline Checklist (0-501-7972) and Standard Document, Employee Counseling Form (1-501-5595)).

In the wake of the Dodd-Frank Act, companies should also evaluate risks concerning the policies and practices of their subsidiaries and affiliates.

For more information, see Standard Document, Whistleblower Reporting: Presentation Materials (W-002-7300).

**CONFIDENTIALITY PROVISIONS IN EMPLOYMENT, SEVERANCE, AND SETTLEMENT AGREEMENTS**

Companies should review their internal confidentiality policies and agreements and related training materials to ensure they do not include language that hinders an employee’s ability or right to report potential securities violations to the SEC or any other regulatory agency. The SEC Final Rule specifically prohibits impeding an individual from communicating directly with SEC staff about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement that prohibits whistleblowers from communicating with the SEC (17 C.F.R. § 240.21F-17).

Like Rule 21F-17, the CFTC Final Rule prohibits any action impeding an individual from communicating directly with the CFTC’s staff about a violation of the commodities laws, including by enforcing, or threatening to enforce, a confidentiality agreement or pre-dispute arbitration agreement regarding those communications (17 C.F.R. § 165.19).

The SEC has taken the position that many common confidentiality provisions in employment agreements, severance agreements, and settlement agreements violate Rule 21F-17. For example, the SEC has:

- Announced on April 1, 2015, its first enforcement action against a company for using improperly restrictive language in its confidentiality agreements, which the SEC believed had the potential to stifle whistleblowers (see Legal Update, SEC Brings First-Ever Enforcement Action Targeting Confidentiality Agreements for Impeding Whistleblowers (2-607-8765)).
- Announced on August 10, 2016, its settlement with another company based on claims that it violated Rule 21F-17 by using severance agreements that required outgoing employees to waive their rights to monetary recovery should they file a charge or complaint with the SEC or other federal agencies, for more information, see Legal Update, Company Settles with SEC for Violating Whistleblower Protection Rule in Severance Agreements (W-002-9798).

FINRA also has issued guidance on acceptable confidentiality language in settlement agreements (see FINRA Notice 14-40).

Based on these developments, employers should avoid any provisions in existing employment, confidentiality, severance, and settlement agreements that could be interpreted as impeding employees from reporting suspected wrongdoing to the SEC or prevent them from receiving whistleblower awards.

For more on recommended carve-outs from confidentiality provisions in settlement agreements, see Standard Document, Settlement and Release of Claims Agreement: Single Plaintiff Employment Dispute: Drafting Notes: Authorized Communications with Securities Regulators (3-521-1350), OSHA Guidelines (3-521-1350), and NLRA Compliance (3-521-1350).

For a sample confidentiality agreement, see Standard Document, Employee Confidentiality and Proprietary Rights Agreement (6-501-1547).

**POTENTIAL EXTRATERRITORIAL SCOPE**

Because SOX whistleblower protections may apply outside of the US, companies with publicly traded securities in the US should develop internal controls to manage risks both domestically and internationally (see Box, Extraterritorial Application of SOX Whistleblower Protections and Box, Extraterritorial Application of Dodd-Frank Protections). Companies should also consider adopting effective global whistleblower policies to support SOX compliance.

**ADVANTAGES OF MAINTAINING A WHISTLEBLOWER POLICY**

Well drafted and effectively implemented whistleblower policies can:

- Reduce the risk that fraud and other malfeasance go undiscovered.
- Be used as a marketing tool to help instill consumer and market confidence in the company.
- Enhance an employer’s reputation, as it demonstrates that the employer attaches importance to identifying and remedying malfeasance.
Encourage employees to raise matters of concern internally, avoiding the potential damage that may result from external disclosure (although internal reporting alone does not qualify for whistleblower protection under Dodd-Frank, except for certain financial services employees).

Put the employer in the best possible position to defend against any speculative or unfounded claims brought by employees.

DEALING WITH A WHISTLEBLOWER

When an employee makes a complaint or threatens to report the employer, the employer should take the complaint seriously and immediately commence an investigation or proactively disclose information to the government. The employer should ensure that the company's internal processes result in the complaint reaching the highest levels of management, such as the chief executive officer or board of directors. An employer may also commission an independent investigation of the complaint by a neutral fact finder. The employer should follow up with the employee (if the employee’s identity is known) to find and fix any impropriety that is identified. The employer must not retaliate, even if the claim is meritless. For more on handling employee complaints, see Standard Document, Responding to Employee Concerns: Supervisor Guidelines (7-501-8765) and Conducting Internal Investigations: Addressing Employee Complaints and Compliance Issues Toolkit (2-502-1874).

Employers should exercise caution if taking any unfavorable personnel action against employees who have reported corporate wrongdoing. Actions taken in close temporal proximity to the employee’s report are more suspect and subject to greater scrutiny. Employers taking any such action against these employees should:

- Ensure the decision is supported by a legitimate business justification.
- Clearly and objectively document the action taken and reasons supporting it.
- Review their past practices to ensure the employee is treated consistently with similarly situated employees.

Under the SEC’s rules stemming from the Dodd-Frank Act, a whistleblower may not be restricted from communicating with the SEC about a potential securities law violation. For example, a corporation cannot seek to enforce a confidentiality agreement against an individual to prevent that individual from disclosing a violation. Doing so subjects the corporation to both a retaliation claim by the SEC in an enforcement action and to a private action by the whistleblower. For more on confidentiality provisions, see Confidentiality Provisions in Employment, Severance, and Settlement Agreements.

The SEC’s rules also create strong incentives for compliance officers and other employees to report potential violations to the SEC after the 120-day waiting period has elapsed (see Independent Knowledge). Therefore, once a company learns of a potential compliance issue, it effectively has 120 days to complete its internal investigations and self-report possible violations to the SEC. Otherwise, the company runs the risk that an employee in the compliance department or on the margins of an investigation may become a whistleblower.

KEY DIFFERENCES BETWEEN ANTI-RETLAITION PROVISIONS OF SOX SECTION 806 AND DODD-FRANK SECTION 922

Section 806 of SOX and the Section 922 of the Dodd-Frank Act differ in several key respects. Though not an exhaustive list, these differences include:

- Statutes of limitations:
  - SOX: 180 days after the violation occurred or after the date when the employee became aware of it.
  - Dodd-Frank: Six years after the violation occurred, or three years after the employee knows or should have known of material facts, but in no event more than ten years after the violation occurred.

- Exhaustion of administrative requirements:
  - SOX: Plaintiffs must file with OSHA. If OSHA does not issue a decision within 180 days then claimant can proceed in federal court. Some courts have applied the catch-all four-year statute of limitations to SOX claims brought after satisfying the exhaustion requirement.
  - Dodd-Frank: Plaintiffs have direct access to federal court without having to first file with any administrative agency.

- Reporting to the SEC:
  - SOX: External reporting is covered but not required. Reporting internally is protected.
  - Dodd-Frank: Individuals must report to SEC to receive a whistleblower award or be protected against retaliation under Section 922.

- Remedies:
  - SOX: Plaintiffs can recover actual back pay with interest, plus reinstatement (or front pay), litigation costs, expert witness fees, and reasonable attorneys’ fees.
  - Dodd-Frank: Prevailing plaintiffs can recover double back pay with interest, plus the other remedies available under SOX.

- Jury trial:
  - SOX: The statute expressly provides for the right to a jury trial.
  - Dodd-Frank: The statute is silent but at least one court has held that there is no right to a jury trial.

EXTRATERRITORIAL APPLICATION OF SOX WHISTLEBLOWER PROTECTIONS

Like many other issues under SOX, the question of its extraterritorial reach remains unsettled. The statutory language supports an argument for extraterritorial application. Section 806 contains jurisdictional language that explicitly covers any company that has a class of securities registered under Section 12 of the Exchange Act (15 U.S.C. § 78l) or that is required to file reports under Section 15(d) of the Exchange Act (15 U.S.C. § 780(d)). Under the Exchange Act, foreign companies...
that issue debt or equity securities in the US are not distinguished from US companies. Therefore, if a foreign company has publicly traded securities in the US, it is apparently subject to Section 806.

However, other indicators suggest that SOX whistleblower provisions do not apply outside the US. In the first few years following the enactment of SOX, the First Circuit rejected the extraterritorial application argument (Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006)). An ALJ reached the same conclusion (Concone v. Capital One Fin. Corp., 2004 WL 3127233 (OSHA Dec. 3, 2004)).

In Carnero and Concone, employees of foreign companies subject to SOX sued for damages for discriminatory dismissal based on their reporting of accounting irregularities and violations of the Exchange Act. In both cases, employees were denied whistleblower protection under SOX. The issue of whether SOX applied to employees in a foreign jurisdiction turned on the intent of Congress to apply the whistleblowing protections extraterritorially, with the conclusion in both cases that the necessary intent was not evident (Carnero, 433 F.3d at 8-9; Concone, 2004 WL 3127233, at *2-4).

However, on February 5, 2008, the Southern District of New York issued a decision suggesting that the SOX provisions may, under certain circumstances, apply to employees working outside the US. In O’Mahony v. Accenture Ltd., the plaintiff, an Irish national, was a partner and employee of Accenture LLP, a US subsidiary of Accenture Ltd., a Bermuda company listed on the New York Stock Exchange, making it subject to SOX (537 F. Supp. 2d 506 (S.D.N.Y. 2008)). The plaintiff was employed in the US from 1984 through September 1992 and then spent the remainder of her employment with the company on an expatriate assignment in France. She continued to work for the US subsidiary in France until August 2004, after which she became a partner and employee of Accenture SAS, Accenture Ltd.’s French subsidiary. She was employed by the French subsidiary until October 31, 2006.

In her complaint, the plaintiff claimed that she suffered retaliation in violation of the SOX provisions for reporting fraud relating to certain social security contributions that Accenture was obligated to make on her behalf to the French government. Accenture cited the Carnero decision and sought dismissal on grounds that she was employed outside the US and that SOX had no extraterritorial application. Refusing to dismiss the case, the New York court distinguished Carnero on three grounds:

- The plaintiff worked in the US for Accenture for eight years before being transferred to France, and even after her transfer, she was compensated by the US entity for another 12 years. As a result, the court gave little weight to the fact that, for the two years before her complaint, O’Mahony was an employee of Accenture’s French subsidiary. In contrast, Carnero was at all times a foreign employee, employed and compensated exclusively by foreign subsidiaries of a US company.
- The fraud in O’Mahony allegedly took place in the US, when Accenture executives in New York and California decided not to pay social security contributions owed on O’Mahony’s behalf to the French tax authorities and then demoted O’Mahony for saying that she would not be a party to tax fraud. In Carnero, the wrongful conduct giving rise to the claim occurred wholly in Latin America.
- O’Mahony sued a foreign parent and its US subsidiary for the alleged misconduct of the US subsidiary in the US. Carnero, on the other hand, sued a US parent company for the alleged misconduct abroad at its Latin American subsidiary.

The O’Mahony decision (which pre-dates Dodd-Frank) is the first decision where SOX’s protection was extended beyond the US and was originally perceived to be an avenue to future extraterritorial application of SOX provisions. However, since that time, the US Supreme Court clarified the extraterritorial reach of other US securities laws in Morrison v. National Australia Bank, which also pre-dates Dodd-Frank (130 S. Ct. 2869 (2010)).

In Morrison, the Supreme Court applied a “transactional” analysis to extraterritorial claims under the US securities laws (not SOX), concluding that they do not apply to so-called “foreign cubed” transactions that are:

- By non-US investors.
- In securities of non-US companies.
- Conducted on non-US exchanges.

(130 S. Ct. 2869.)

The Morrison court focused on where the purchase and sale of securities occurred, rather than where the fraudulent conduct took place, making it irrelevant whether fraudulent conduct within the US gave rise to the loss (130 S. Ct. 2869).

Since the enactment of the Dodd-Frank Act, the ARB held that Section 806 does not allow for extraterritorial application of SOX (see Villanueva v. Core Labs. NV, 2011 WL 7021145, “9 (ARB Dec. 22, 2011), aff’d on other grounds, Villanueva v. DOL, 743 F.3d 103 (5th Cir. 2014)). Since that decision, the Supreme Court held that in RGR Nabisco, Inc. v. European Community, finding that RICO applies extraterritorially (136 S. Ct. 2090 (2016)).

Based on RGR Nabisco, the ARB has recently reversed course and questioned its conclusion in Villanueva, finding (in dicta) that SOX “contains a clear indication that it applies extraterritorially to cover all publicly-traded domestic and foreign companies and their employees regardless of the location of the affected employer/employee.” However, SOX does not necessarily cover all foreign conduct, as the misconduct must “affect [the US] in some significant way.” (Blanchard v. Exelis Systems Corporation/ Vectrus Systems Corp., 2017 WL 3953474, at *7 (ARB Aug. 29, 2017) (applying SOX to former employee who worked for a US-based corporation exclusively in Afghanistan on a US military base, but based on the domestic reach of the statute because the complainant alleged violations of US mail and wire fraud).)

Although Dodd-Frank redefined extraterritoriality to some extent, questions about the extraterritorial reach of private retaliation claims under that statute remain unanswered. For more information, see In Dispute: Morrison/National Australia Bank (9-501-3130) and Box, Extraterritorial Application of Dodd-Frank Protections.
EXTRATERRITORIAL APPLICATION OF DODD-FRANK PROTECTIONS

Section 929P of the Dodd-Frank Act (15 U.S.C. § 78t(e)) expands the extraterritorial reach of the anti-fraud provisions of the US securities laws to cover SEC or US government actions involving:

- Conduct within the US that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the US and involves only foreign investors.
- Conduct occurring outside the US that has a foreseeable substantial effect within the US.

(15 U.S.C. § 78t(e).) However, Section 929P explicitly addresses actions by the SEC or the US government, not private actions by whistleblowers.

For more information, see Practice Note, Summary of the Dodd-Frank Act: SEC Authority and Selected Securities Act and Exchange Act Provisions (3-502-8592).

The language of Dodd-Frank’s anti-retaliation provision is silent regarding extraterritoriality. Section 922 of the Dodd-Frank Act defines “whistleblower” broadly and does not appear to limit the whistleblowing program to individuals in the US (15 U.S.C. § 78u-6).

However, the US Court of Appeals for the Second Circuit has held that the anti-retaliation provision in Section 922 does not apply extraterritorially (Liu v. Siemens A.G., 763 F.3d 175 (2d Cir. 2014)). In Liu, the plaintiff was a citizen and resident of Taiwan who worked as a compliance officer for a division of a Chinese company that is a wholly owned subsidiary of a German corporation (with stocks listed on the NYSE). Liu reported to his superiors about alleged improper payments to North Korean and Chinese officials. He was demoted and later terminated and then informed the SEC that the company had allegedly violated the Foreign Corrupt Practices Act (FCPA). He sued in federal district court alleging his termination violated Dodd-Frank’s anti-retaliation provision.

The district court dismissed the case on the basis that Dodd-Frank does not apply extraterritorially. The Second Circuit affirmed, noting that the whistleblower, the employer, and all the entities involved were foreigners based outside of the US, and the whistleblowing, corrupt activity, and retaliation all occurred abroad. The court concluded that nothing in the legislation or its history suggested that Congress intended the Dodd-Frank to regulate relationships between foreign employers and their foreign employees working outside the US. (Liu, 763 F.3d at 175.)

Following Liu, the Second Circuit affirmed dismissal of an employee’s Dodd-Frank and SOX claims where:

- The plaintiff was an overseas permanent resident.
- The plaintiff worked for a foreign subsidiary of the defendant corporation.
- The alleged misconduct occurred outside the US.

The court found that the statutes did not apply to the plaintiff, even though he was a US citizen who sometimes interacted with the employer’s US managers. (Ulrich v. Moddy’s Corp., 2018 WL 357539, at *1 (2d Cir. Jan. 11, 2018).)

Another federal district court similarly held that the Dodd-Frank anti-retaliation provisions do not apply extraterritorially. In Asadi v. G.E. Energy (USA), LLC, the US District Court for the Southern District of Texas concluded that a dual US and Iraqi citizen, employed by a US company and working in Jordan, was not entitled to protection under the Dodd-Frank anti-retaliation provisions when he was terminated after reporting a possible violation of the FCPA and company policies to his supervisor (2012 WL 2522599 (S.D. Tex. June 28, 2012) aff’d, 720 F.3d 620). The district court noted that most of the events giving rise to the action occurred in Jordan and that the statute’s anti-retaliation provisions did not extend to this extraterritorial whistleblowing activity (Asadi, 2012 WL 2522599).

On appeal, the Fifth Circuit held that the plaintiff was not a whistleblower under the Dodd-Frank anti-retaliation provisions because “the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC.” Having decided that the plaintiff was not a whistleblower, the circuit court declined to reach the issue of extraterritorial application. (Asadi, 720 F.3d at 623.)


For more on the extraterritorial application of US employment laws generally, see Practice Note, Extraterritorial Scope of Major US Employment Laws (4-610-9365) and Extraterritorial Coverage Under Major US Employment Laws Chart: Overview (4-614-6565).

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call 1-800-733-2889 or e-mail referenceattorneys@tr.com.

© 2018 Thomson Reuters. All rights reserved. Use of Practical Law websites and services is subject to the Terms of Use (http://static.legalsolutions.thomsonreuters.com/static/agreement/westlaw-additional-terms.pdf) and Privacy Policy (https://a.next.westlaw.com/Privacy).