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Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era

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Minimizing Corporate Liability Exposure When the Whistle Blows in the Post Sarbanes-Oxley Era

Marc I. Steinberg* & Seth A. Kaufman**

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I. INTRODUCTION

Over the past few years, numerous newspapers and magazines have featured stories discussing whistleblowers.¹ From Sherron Watkins at Enron to Cynthia Cooper at Worldcom, employees who reported perceived corporate fraud have received widespread attention.² With this increased public focus, Congress chose to provide statutory protection in the whistleblower corporate or securities law context through enactment of the Sarbanes-Oxley Act of 2002 (SOX).³

Prior to SOX, federal and state statutes (as well as common law) existed to protect whistleblowers in specific settings.⁴ For example, the False Claims Act provides

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1. Mark R. Attwood, *When the Whistle Blows: Renewed Enthusiasm Among Employee Watchdogs*, in *ADVANCED CORPORATE COMPLIANCE* 2003, at 1157, 1160 (PLI Corp. L. and Practice Course, Handbook Series No. 1378, 2003); Richard Locayo & Amanda Ripley, *Persons of the Year*, *TIME*, Dec. 30, 2002, at 8.

2. Attwood, *supra* note 1, at 1160; Locayo & Ripley, *supra* note 1, at 8.

3. Mike McNamee, *If You Violate the Law You Will Pay For It*, *BUS. WK.*, Dec. 24, 2001, at 33 (interviewing SEC chair Harvey Pitt).

4. William R. McLucas & Mark M. Oh, *Whistleblowing: Protection of Corporate Officials and Employees Who Provide Evidence of Fraud Under The Sarbanes-Oxley Act of 2002*, in *CORPORATION* 2004, at

protection to individuals who report fraudulent activities committed against the federal government.⁵ The Energy Reorganization Act provides similar protection for employees in the energy industry.⁶ Individuals who deal with issues concerning the manufacture, distribution, and disposal of toxic substances receive protection under the whistleblower provision in the Toxic Substance Control Act (TSCA).⁷ Whistleblower protection provided by the Clean Water Act protects employees who work in the water treatment industry.⁸ As another example, the Occupational Safety and Health Administration (OSHA) enforces whistleblower protection provisions under several different statutes associated with worker safety and environmental protection.⁹ States likewise provide some degree of whistleblower protection, but each state's laws can vary regarding the persons protected, the procedural requirements for establishing the existence of retaliation, the type of evidence required to prove retaliation, and the available remedies.¹⁰ In part to eliminate the "patchwork and vagaries of current state [whistleblower] laws," Congress enacted SOX.¹¹

In its scope of coverage, SOX provides greater consistency and protection for whistleblowers than state laws.¹² This legislation also promotes a more hospitable environment for whistleblowers in the corporate and securities context through a decreased threat of employer retaliation.¹³ This consequence is due to the fact that SOX covers employees who report covered corporate fraud that may violate several federal

61, 64 (PLI Corp. L. & Practice Course, Handbook Series No. 1411, 2004).

5. False Claims Act, 31 U.S.C. §§ 3729-3731, 3729(a) (2000) (stating specifically that any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval [or] knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government will be liable for civil damages at a minimum of \$5,000 and at a maximum of \$10,000 plus three times the government's damages). The U.S. government, for example, has brought False Claims Act suits against hospitals for fraudulently obtaining grants from federally funded projects and for improperly billing the Medicare program. *See Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 121 (2003); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 215 (D.C. Cir. 2003).

6. Energy Reorganization Act, 42 U.S.C. § 5851(a) (2000) (providing protection for employees who testify about an alleged violation of energy law or assist in a proceeding regarding an alleged violation of energy law).

7. Toxic Substances Control Act, 15 U.S.C. § 2605(a) (2000) (permitting the government to monitor and control "the manufacture, processing, distribution in commerce, use, or disposal of a chemical substance or mixture, or that any combination or such activities, presents or will present an unreasonable risk of injury to health or the environment"). The TSCA also provides protection for employees who have "commenced, caused to be commenced, or [are] about to commence or cause to be commenced a proceeding under" the TSCA. *Id.*

8. Clean Water Act, 33 U.S.C. § 1367 (2000).

9. Secretary's Order 5-2002, 67 Fed. Reg. 65,008 (Dep't of Labor Oct. 22, 2002); 68 Fed. Reg. 31,860 (May 28, 2003). The Secretary of Labor has the power to receive and investigate matters under SOX, but the Secretary of Labor has delegated this authority to OSHA. 68 Fed. Reg. 31,860 (May 28, 2003).

10. *McLucas & Oh*, *supra* note 4, at 64.

11. Legislative History of Title VIII of H.R. 2673: The Sarbanes-Oxley Act of 2002, 148 CONG. REC. S7391, S7420 (daily ed. July 26, 2002). *See Kunkler v. Global Futures & Forex, Ltd.*, No. 2003-SOX-6 (Dep't of Labor Apr. 24, 2003) (recommended decision and order granting respondent's motion for summary decision) (holding that SOX could not be applied retroactively).

12. *McLucas & Oh*, *supra* note 4, at 64 (outlining the whistleblower protections of SOX).

13. *Id.*

statutes while other federal whistleblower provisions provide more limited protection. Furthermore, SOX holds employers, employees, and other specified persons both civilly and criminally liable for retaliating against whistleblowers.¹⁴

For attorneys who provide legal counsel to corporations, the contours of the SOX whistleblower provisions merit exploration. In-house as well as outside lawyers must understand the complexities implicated to advise their clients to minimize potentially massive liability exposure.

II. OVERVIEW

One of the main purposes of the whistleblower protections contained in SOX is to provide employees a means of reporting fraud in the corporate and securities context without fear of retaliation. A claimant's retaliation claim under SOX consists of three elements: the employee must (1) be engaged in a "protected activity"; (2) suffer some adverse employment action; and (3) establish reasonable cause existed to believe that the employee's lawful act was a contributing factor leading to the employer's adverse treatment of the employee.¹⁵ The employer can avoid an OSHA investigation and/or the imposition of liability by establishing that it would have taken the same adverse action regardless of the employee's whistleblowing.¹⁶

A. Coverage

The whistleblower protection afforded by SOX encompasses publicly held companies and any officer, employee, or other specified person.¹⁷ While this provision

14. Sarbanes-Oxley Act of 2002 § 1107, 18 U.S.C. § 1513 (2002); Sarbanes-Oxley Act of 2002 § 806(c), 18 U.S.C. § 1514A (2002).

15. Victoria Donati, *Whistleblowers and Other Retaliation Claims*, in LITIGATION 2003, at 987, 996 (PLI Litig. & Admin. Practice Course, Handbook Series No. 697, 2003).

16. 29 C.F.R. § 1980.104 (2004).

17. Sarbanes-Oxley Act of 2002 § 806(a). Generally, a publicly held company is one whose securities are registered under Section 12(b) or 12(g) of the Securities Exchange Act or that has had a public offering of its securities under the Securities Act. See Comprehensive Energy Plan, 15 U.S.C. §§ 781(b) (1978). If a company withdraws its registration statement with the SEC prior to it becoming effective, the company is not subject to the SOX whistleblower provision. See Roulett v. Am. Capital Access, No. 2004-SOX-78 (Dep't of Labor Dec. 22, 2004) (order denying motion to amend complaint and decision and order dismissing the complaint). Note that the SOX whistleblower protections do not extend to foreign employees who work for a foreign subsidiary of a U.S. publicly held corporation. See Carnero v. Boston Scientific Corp., [2004 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,910 (D. Mass. 2004). On the other hand, the SOX whistleblower provision does extend to American employees who work for a domestic subsidiary of a U.S. publicly held corporation. To obtain protection in this context, the complainant must file suit against both the subsidiary and the publicly held corporation. Compare Powers v. Pinnacle Airlines, Inc., No. 2003-SOX-18 (Dep't of Labor Mar. 5, 2003) (order granting respondent's request for partial dismissal and denying complainant's request for default judgment) (dismissing the complainant's claim, in part, because the claim failed to name the publicly held parent company) with Gonzalez v. The Colonial Bank, No. 2004-SOX-39 (Dep't of Labor Aug. 20, 2004) (order denying motion for summary judgment) (finding that the complainant can maintain a SOX whistleblower suit against a non-publicly held subsidiary of a publicly held company when the claim names both the subsidiary and the publicly held parent company), Klopfenstein v. PCC Flow Techs. Holdings, Inc., No. 2004-SOX-11 (Dep't of Labor July 6, 2004) (recommended decision and order) (agreeing with the ALJ in *Morefield* but dismissing the complaint for failure to name both the publicly held parent and the subsidiary), and *Morefield v. Exelon Servs., Inc.*, No. 2004-SOX-2 (Dep't of Labor Jan. 28, 2004) (order denying motion to

applies directly to publicly held companies, it applies indirectly to privately held enterprises.¹⁸

Privately held companies and their legal counsel should understand this part of SOX for three reasons. First, many privately held companies act as contractors, subcontractors or other agents of publicly held companies, and thus are covered by this part of SOX.¹⁹ Second, the criminal penalties apply to both publicly and privately held companies.²⁰ Third, state courts may well look to SOX in their interpretation of similar state laws.²¹

SOX specifically forbids employers, employees, and other specified persons from acting in a discriminatory manner towards an employee because of such employee's protected activity.²² The SOX whistleblower provision sets forth the scope of employee conduct that is protected.²³ After successfully asserting his or her rights under the SOX whistleblower provision, the statute entitles an employee to be made "whole."²⁴

dismiss complaint filed by employee of non-publicly traded corporate subsidiary) (finding that "employees of non-public [American] subsidiaries of publicly traded [American] companies are covered by the whistleblower protection provision of Sarbanes-Oxley" and distinguishing this case from *Pinnacle Airlines* because the complainant in this case filed suit against both the subsidiary and the publicly held parent company). See also Leslie Lopez, *Ex-Swatch Managers' Complaint Over Tax Evasion is Dismissed*, WALL ST. J., Aug. 16, 2004, at B3 (discussing the dismissal of a complaint for lack of jurisdiction because the international company did not have securities traded on a U.S. market).

18. Donati, *supra* note 15, at 992.

19. *Id.* But see *Roulett v. Am. Capital Access*, No. 2004-SOX-78 (Dep't of Labor Dec. 22, 2004) (order denying motion to amend complaint and decision and order dismissing the complaint) (opining that "[t]he fact that publicly traded companies rely upon [a privately held entity's] services and purchase its products does not make the [privately held entity] their contractor, subcontractor, or agent").

20. Sarbanes-Oxley Act of 2002 § 1107, 18 U.S.C. § 1513(e) (2002) (using the word "whoever," which arguably applies to any legal person including both publicly and privately held companies); Donati, *supra* note 15, at 992. A corporation is considered a legal person because it "is recognized by law as having the rights and duties of a human being." BLACK'S LAW DICTIONARY 1178 (8th ed. 2004). "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not . . ." JOHN SALMOND, JURISPRUDENCE 318 (Glanville L. Williams ed., 10th ed. 1947).

21. Donati, *supra* note 15, at 992.

22. Sarbanes-Oxley Act of 2002 § 806(a) (not specifically using the phrase "protected activity" but instead employing the phrase "any lawful act done by the employee"). Additionally, other specified persons include "any officer, employee, contractor, subcontractor or agent of such company." *Id.* These specified persons may not discriminate against the employee because of the employee's "lawful act." *Id.* The statute provides examples of discrimination which include "discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], or in any other manner discriminat[ing]" against a subject employee. *Id.*

23. Sarbanes-Oxley Act of 2002 § 806(a) (protecting employees from retaliation when they

provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders . . .

and protecting whistleblowers when "information or assistance is provided to or the investigation is conducted by a Federal regulatory or law enforcement agency, any Member of Congress or any committee of Congress or a person with supervisory authority over the employee"). SOX defines supervisory authority as "the authority to investigate, discover, or terminate [for] misconduct." Sarbanes-Oxley Act of 2002, § 806(a)(1)(C). Whistleblowers are also protected when they "file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed . . . relating to an alleged violation of" covered law. Sarbanes-Oxley Act of 2002 § 806(a)(2).

24. Sarbanes-Oxley Act of 2002 § 806(c)(1) (stating specifically that any "employee prevailing in any

Consequently, an employer, employee, or other specified person could be held civilly liable for unlawfully discriminating against a subject whistleblower.²⁵

To successfully assert a retaliation claim, a whistleblower must file a complaint with OSHA within ninety days of the alleged violation.²⁶ The ninety-day period begins to run at the time the subject employee becomes aware of the alleged violation.²⁷ After receiving the complaint, OSHA will send notification to the person(s) named in such complaint.²⁸ The investigation will not commence until the complainant makes a prima facie case showing that his or her protected activity was a “contributing factor” in the adverse action suffered.²⁹ After the complainant makes a prima facie case, an

action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole”).

25. Sarbanes-Oxley Act of 2002 § 806(c).

26. The SOX complaint procedure is modeled after a similar whistleblower protection provision in the Aviation Investment and Reform Act for the 21st Century. 49 U.S.C. § 42121(b) (2000). The Secretary of Labor has delegated her authority to receive and investigate the complaints under SOX to OSHA. Secretary’s Order S-2002, 67 Fed. Reg. 65,008 (Dep’t of Labor Oct. 22, 2002); 68 Fed. Reg. 31,860 n.1 (May 28, 2003). Therefore, the complainant must file his or her complaint with the OSHA area director or any OSHA officer or employee within the ninety-day period. Secretary’s Order S-2002, 67 Fed. Reg. 65,008 (Dep’t of Labor Oct. 22, 2002); 68 Fed. Reg. 31,860 n.1 (May 28, 2003); see 29 C.F.R. § 1980.103(c) (2004). See also “OSHA Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002,” Title VIII of the Sarbanes-Oxley Act of 2002; 70 Fed. Reg. 13342 (Mar. 18, 2005). As of August 23, 2004, OSHA had received a total of 307 employee complaints under SOX. George Goodman, *Better Governance and Reporting Under Sarbanes-Oxley: Are We There Yet?*, 36 Sec. Reg. & L. Rep. (BNA) 2074, 2079 (Nov. 22, 2004). However, some believe that OSHA may not be adequately equipped to handle these cases. See Deborah Solomon, *For Financial Whistle-Blowers, New Shield Is an Imperfect One*, WALL ST. J., Oct. 4, 2004, at A1 (arguing that OSHA does not have the authority because of its lack of subpoena power, nor the financial expertise to handle complex corporate fraud questions).

27. 29 C.F.R. § 1980.103(d) (2004). SOX specifically states that an alleged violation occurs “when the discriminatory decision has been both made and communicated to the complainant.” See *Lawrence v. AT&T Labs*, No. 2004-SOX-65 (Dep’t of Labor Sept. 9, 2004) (recommended decision and order dismissing the complaint) (concluding that the alleged violation occurred and the ninety-day period began when the employee became aware of the employer’s decision to terminate her even though there was a possibility of avoiding termination); *Kingoff v. Maxim Group L.L.C.*, No. 2004-SOX-57 (Dep’t of Labor July 21, 2004) (recommended decision and order dismissing the complaint) (holding that complainant’s claim was untimely filed because it was done so more than ninety days after he received an arbitration notice); *Hopkins v. ATK Tactical Sys.*, No. 2004-SOX-19 (Dep’t of Labor May 27, 2004) (recommended decision and order dismissing complaint and denying sanctions) (dismissing the claim, in part, because the claimant was discharged on June 4, 2003 and did not file his complaint until Oct. 8, 2003, which was after the ninety-day statutory period); *Dolan v. EMC Corp.*, No. 2004-SOX-1 (Dep’t of Labor Mar. 24, 2004) (recommended decision and order) (finding that the claimant timely filed his SOX whistleblower claim because an unfavorable performance evaluation, absent tangible job consequences, does not qualify as an adverse employment action); *Flood v. Cedant Corp.*, No. 2004-SOX-16 (Dep’t of Labor Feb. 23, 2004) (decision and order granting motion to dismiss) (holding that the alleged violation occurred when the employer gave the employee two weeks’ notice to find another position within the company or lose his job).

28. 29 C.F.R. § 1980.104(a) (2004). The Secretary of Labor, and by delegation OSHA, must also inform the named person of “the allegations contained in the complaint, and of the substance of the evidence supporting the complaint.” *Id.* OSHA also “will notify the named person of its” rights. *Id.* “A copy of the notice to the named person will also be provided to the Securities and Exchange Commission.” *Id.* During the pre-hearing stage “a complaint of alleged violation shall be dismissed unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.” 29 C.F.R. § 1980.104(b) (2004).

29. 29 C.F.R. § 1980.104(b)(2) (2004); *McLucas & Oh*, *supra* note 4, at 68. The employee makes a prima facie showing that his or her fraud report was a contributing factor in causing the employer to discriminate

investigation nonetheless will not be conducted if the employer (that is, “the named person”) establishes, by “clear and convincing evidence,” that it would have taken the same adverse action regarding the employee in the absence of such employee’s fraud report.³⁰

Assuming OSHA conducts an investigation, written findings must be issued within sixty days of the complainant’s initial filing date.³¹ The written findings should indicate if a violation of the SOX whistleblower provision occurred.³² After receiving the written findings, the parties can file objections and request a hearing.³³

At the hearing, the employer (or other named person) can still avoid liability by proving that it would have taken the same action in the absence of the employee’s fraud report.³⁴ An administrative law judge (ALJ) presides at the hearing and issues a decision on the matter.³⁵ After the ALJ renders the decision, the parties can seek review by the Administrative Review Board (ARB).³⁶ Within sixty days of the ARB’s final decision, a disgruntled party can file a petition for review with the United States Court of Appeals.³⁷

against him or her through “either direct or circumstantial evidence.” 29 C.F.R. § 1980.104(b)(2) (2004). “Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action.” 29 C.F.R. § 1980.104(b)(2) (2004).

30. 29 C.F.R. § 1980.104(b)(2) (2004).

Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint shall not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected behavior or conduct.

Id. The named person has twenty days to provide “a written statement and any affidavits or documents substantiating its position.” *Id.* See *Lerbs v. Buca Di Beppo, Inc.*, No. 2004-SOX-8 (Dep’t of Labor Dec. 30, 2003) (recommended decision and order granting respondent’s motion for summary decision) (finding that a respondent was not sufficiently harmed to warrant a dismissal of the case when the respondent received the complainant’s objections a few days after the statutory period expired). If OSHA fails to investigate, employees can bring their cases in federal court. See *Schmidt v. Levi Strauss & Co.*, No. C04-01026 (N.D. Cal. Oct. 29, 2004) (illustrating how two former tax executives brought their SOX case in federal court); Goodman, *supra* note 26, at 2079.

31. 29 C.F.R. § 1980.105 (2004).

32. *Id.*

33. 29 C.F.R. § 1980.106 (2004).

34. The employer’s or other named person’s standard of proof is that of clear and convincing evidence. 29 C.F.R. § 1980.109 (2004). See *McLucas & Oh*, *supra* note 4, at 69.

35. 29 C.F.R. § 1980.109(a) (2004).

36. 29 C.F.R. § 1980.109-1980.112 (2004). See also 29 C.F.R. § 1980.110(c) (2004) (stating that “[t]he final decision of the Board will be issued within 120 days of the conclusion of the hearing” and that the conclusion of the hearing is deemed to be the end of all the proceedings in front of the administrative law judge).

37. *Willis v. Vie Financial Group, Inc.*, No. Civ.A. 04-435, 2004 WL 1774575, at *3 (E.D. Pa. Aug. 6, 2004) (describing the administrative procedure of a SOX claim). The administrative process underlying the SOX whistleblower protection provision is judicial in nature. It is judicial in nature because it is designed to resolve a controversy on its merits. *Id.* Therefore, the parties must exhaust all administrative proceedings before taking their cases to the federal court system. However, if the ALJ who is assigned to the OSHA case fails to render a decision within 180 days of the initial filing, the complainant, absent bad faith, can seek refuge in the federal court system. Sarbanes-Oxley Act of 2002 § 806(b), 18 U.S.C. § 1514A (2002). See, e.g., *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 804 (N.D. Tex. 2003) (allowing former employee to pursue a matter in federal court after the time limits stated were not met by OSHA).

B. Protected Activity

A whistleblower must partake in a protected activity to be entitled to refuge under SOX.³⁸ SOX defines a “protected activity” as providing information concerning a protected subject matter to: (1) a federal law enforcement or regulatory agency; (2) a committee or member of Congress; or (3) a person with supervisory authority over a subject employee or such other person retained by the employer who is authorized “to investigate, discover, or terminate [for] misconduct.”³⁹ This last protected activity presents the key challenge for companies and their legal counsel.⁴⁰ Note also that an effected employee engages in “protected activity” concerning a protected subject matter by filing, causing to be filed, participating in, or otherwise assisting in a subject “proceeding.”⁴¹

A whistleblower can “provide information” by communicating information, causing information to be provided, or assisting in the subject investigation.⁴² The term of investigation should encompass the conducting of an internal investigation by legal counsel retained by an effected corporation to ascertain whether, or the degree to which, applicable law has been violated.⁴³

The statute’s use of the term proceeding may be ambiguous. A proceeding is “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.”⁴⁴ A proceeding also may encompass “any procedural means for seeking redress from a tribunal or agency” or “the business conducted by a court or other official body” including a hearing.⁴⁵ Within the context of SOX, criminal and civil actions, including administrative and judicial actions, should qualify as proceedings.⁴⁶ The broad application of the term proceeding further indicates that it should include private direct actions and shareholder derivative suits.⁴⁷ Uncertainty remains as to whether the term also encompasses intra-company

38. Sarbanes-Oxley Act of 2002 § 806(a).

39. *Id. See, e.g.*, Getman v. Southwest Sec., Inc., No. 2003-SOX-8 (Dep’t of Labor Feb. 2, 2004) (decision and order) (illustrating an action to protect a whistleblower); Platone v. Atl. Coast Airlines Holdings, Inc., No. 2003-SOX-27 (Dep’t of Labor Apr. 30, 2004) (recommended decision and order) (illustrating an action to protect a whistleblower).

40. Donati, *supra* note 15, at 993-94 (explaining that this category is discomfoting for employers because it can be the most broad and amorphous). This is a key challenge for employers and their legal counsel because it increases employers’ liability exposure. Companies employ many individuals that could qualify as supervisors or people who have the authority to investigate, discover or terminate for misconduct. Each one of these individuals could act in a manner, contrary to SOX, which could result in liability for the company.

41. Sarbanes-Oxley Act of 2002 § 806(a)(2), 18 U.S.C. § 1514A(a)(1) (2002).

42. Sarbanes-Oxley Act of 2002 § 806(a)(1), 18 U.S.C. § 1514A(a) (2002).

43. Sarbanes-Oxley Act of 2002 § 806(a)(2), 18 U.S.C. § 1514A(a)(2) (2002). The term investigation should include internal investigations because a person investigates a matter by “inquir[ing] into [it] systematically” or by “mak[ing] an official inquiry.” BLACK’S LAW DICTIONARY 844 (8th ed. 2004). See generally Upjohn Co. v. United States, 449 U.S. 383 (1981); Orrin Harrison III, *Conducting Corporate Investigations Under the Increased Scrutiny of Sarbanes-Oxley*, 31 SEC. REG. L.J. 299 (2003); Michael P. Kenny & William R. Mitchelson, Jr., *Corporate Benefits of Properly Conducted Internal Investigations*, 11 GA. ST. U. L. REV. 657 (1995).

44. BLACK’S LAW DICTIONARY 1241 (8th ed. 2004).

45. *Id.*

46. McLucas & Oh, *supra* note 4, at 68.

47. *Id.*

communications, meetings, and inquiries.⁴⁸

To qualify for protection under SOX, a whistleblower must report violations of a protected subject matter.⁴⁹ SOX defines protected subject matter as a violation of: (1) mail, bank, wire or securities law; (2) any SEC rule or regulation; or (3) any federal law relating to fraud against shareholders.⁵⁰ To come within the parameters of SOX, a whistleblower must assist in the providing of information which he or she “reasonably believes” constitutes a violation of such statute or rule.⁵¹ Hence, a whistleblower does not have to be correct in his or her belief.⁵² Even when the employee is mistaken in his or her belief and a violation of a covered statute or SEC rule did not in fact occur, the employee who receives adverse personnel treatment may invoke SOX’s whistleblower protection provision, provided the belief was reasonable.⁵³

In this context, reasonable belief should be construed as an objective standard.⁵⁴ The statute’s legislative history supports the position that Congress intended to establish a “normal reasonable person standard used and interpreted in a wide variety of legal contexts.”⁵⁵ Whether this definition provides much insight is subject to debate.⁵⁶ Nonetheless, courts should apply an objective standard because of the statute’s clear language and legislative history. As additional support for this position, other federal whistleblower protection provisions similarly employ an objective standard.⁵⁷

In the SOX legislative history, Congress observed that Sherron Watkin’s letter to Kenneth Lay provided a good example of when an employee would have the requisite reasonable belief of a violation.⁵⁸ However, it is questionable whether this example provides much insight.⁵⁹ Congress failed to specify whether Ms. Watkins had a

48. *Id.*

49. Sarbanes-Oxley Act of 2002 § 806(a)(2).

50. Sarbanes-Oxley Act of 2002 § 806(a)(1), 18 U.S.C. § 1514A(a)(1) (2002); *see* Reddy v. Medquist, Inc., No. 2004-SOX-35 (Dep’t of Labor June 10, 2004) (recommended order of dismissal) (holding that an employee’s complaint that her employer intentionally underpaid employees failed to state a claim under the SOX whistleblower protection provision); Hopkins v. ATK Tactical Sys., No. 2004-SOX-19 (Dep’t of Labor May 27, 2004) (recommended decision and order dismissing complaint and denying sanctions) (holding that an employee’s complaint of environmental violations with no mention of securities fraud or defrauding the shareholders does not qualify as protected subject matter).

51. Sarbanes-Oxley Act of 2002 § 806(a)(1); Donati, *supra* note 15, at 993.

52. Sarbanes-Oxley Act of 2002 § 806(a)(1), 18 U.S.C. § 1514A(a)(1) (2002).

53. *Id.*

54. Donati, *supra* note 15, at 993.

55. 148 CONG. REC. S7420 (daily ed. July 26, 2002).

56. Donati, *supra* note 15, at 993.

57. *Id.* *See* Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor, 992 F.2d 474, 478 (3d Cir. 1993).

58. 148 CONG. REC. S6437-44.

59. *See* 148 CONG. REC. S6437-44 (July 9, 2002). While Ms. Watkins “expressed concerns about specific securities laws that were being violated,” an employee does not have to specifically identify a code section to have a reasonable belief. *Id.* *See* Griffiss v. West, No. 00-16813, 2002 WL 31856109, at *1 (9th Cir. Dec. 19, 2002) (upholding the trial court’s decision and determining that an employee did not have a reasonable belief that the employer violated the Whistleblower Protection Act (WPA)); Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1376 (N.D. Ga. 2004) (citing Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor, 992 F.2d 474 (3d Cir. 1993)) (stating that the “reasonable belief” standard “is intended to include all good faith and reasonable reporting of fraud, and there should be no presumption that reporting is otherwise, absent specific evidence”); Chianelli v. Evtl. Prot. Agency, No. 01-6668, 2001 WL 534142, at *6 (Fed. Cir. Nov. 13, 2001) (finding that the employee did not have a “reasonable belief” under the WPA based on “generalized allegations

reasonable belief based on her specialized accounting knowledge or whether a person without an accounting background could successfully assert the same objective reasonable belief.⁶⁰

C. Adverse Action

Whistleblowers under SOX must prove that they suffered some adverse action to successfully assert a claim of retaliation.⁶¹ Significantly, SOX whistleblowers do not incur adverse action only when their employers discharge them.⁶² Rather, adverse employment action includes discharging, demoting, suspending, threatening, harassing, intimidating, coercing, blacklisting, or discriminating against an employee in the terms and conditions of employment.⁶³

D. Contributing Factor

To require OSHA to commence an investigation and then prevail in a retaliation suit, SOX whistleblowers must establish that the protected activity in which they participated was a contributing factor in their discharge or other adverse treatment.⁶⁴ A complainant meets this initial burden by filing a complaint that “give[s] rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action.”⁶⁵ As interpreted, this definition should normally impose a

of the agency’s misconduct”).

60. *Collins*, 334 F. Supp. 2d at 1377. Nonetheless, it may be asserted that the reasonable belief standard applies to employees generally.

[I]f Congress had intended to limit the protection of Sarbanes-Oxley to accountants, or to have required complainants to specifically identify the code section that they believe was being violated, it could have done so. It did not. Congress instead protected “employees” and adopted the “reasonable belief” standard for those who “blow the whistle on fraud and protect investors.”

Id. See 148 CONG. REC. S7420 (daily ed. July 26, 2002) (discussing the application of whistleblower protection to employees of publicly traded companies).

61. Sarbanes-Oxley Act of 2002 § 806(a); 18 U.S.C. § 1514A(a) (2002).

62. *Id.*

63. Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(a) (2002) (authorizing courts to issue temporary restraining orders to prevent harassment of victims or witnesses in criminal cases). See also *McLucas & Oh*, *supra* note 4, at 66 (noting that Sarbanes-Oxley forbids these practices). Unfavorable adverse action does not exist, in the context of SOX, when a former supervisor allegedly made discriminatory comments to a former employee. See *Harvey v. The Home Depot, Inc.*, No. 2004-SOX-36, at 4 (Dep’t of Labor May 28, 2004) (initial decision and order—dismissal of discrimination complaint) (stating that “[t]he timing of events is significant in this case because, with the exception of blacklisting or other active interference with subsequent employment” the SOX whistleblower protection provisions apply only to the discrimination suffered by the complainant when he or she was an employee).

64. 29 C.F.R. § 1980.104(b) (2004); *McLucas & Oh*, *supra* note 4, at 68. Note that § 1980.104(a) authorizes the Assistant Secretary of Labor to take action, but the Secretary of Labor has delegated this authority to OSHA pursuant to Secretary’s Order 5-2002, 67 Fed. Reg. 65,008 (Oct. 22, 2002). See also *supra* notes 9 and 26.

65. 29 C.F.R. § 1980.104(b)(2) (2004) (stating that a SOX whistleblower can meet his or her burden “if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing”). Frequently, the complainant satisfies this burden by showing “that the adverse personnel action took place shortly after the

relatively minimal burden upon a whistleblower.

As discussed in Part II.A., an employer can overcome the complainant's initial claim and prevent OSHA from initiating an investigation by showing clear and convincing evidence that it would have taken the same action against the employee in the absence of the employee's fraud report. Even if OSHA initiates an investigation, an employer can still overcome the complainant's prima facie case with the same clear and convincing evidence that it would have taken the same action against the employee in the absence of the fraud report.⁶⁶

Whistleblowers may be perceived as having a distinct advantage in retaliation claims because they need to carry a relatively minimal burden of proof.⁶⁷ Conversely, employers have a more onerous burden to overcome. Once the whistleblower establishes that his or her fraud report, based on a reasonable belief, concerning a protected subject matter was a "contributing factor," the employer must prove by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the fraud report.⁶⁸ Hence, depending on the underlying circumstances, an employer may have a difficult time discharging, demoting, or transferring a whistleblower that performs incompetently without such whistleblower filing a retaliation claim.

The clear and convincing evidence standard thus may be a difficult hurdle for employers to overcome. For example, in one case involving a somewhat analogous statute, the employer provided evidence that it would have discharged the subject employee in the absence of a fraud report.⁶⁹ Five of its managers offered unimpeached testimony that the company had decided to demote the employee days before he raised his concerns.⁷⁰ Additionally, the company opted to discharge three foremen, one of whom was the whistleblower, because the company was top heavy, as it had nine foremen and thirty-eight workers, which was nearly double its desired one to eight ratio.⁷¹ Despite the court's intimation that the employer had legitimate reasons for demoting the whistleblower, it upheld OSHA's ruling in favor of the whistleblower.⁷²

protected activity, giving rise to the inference that it was a factor in the adverse action." *Id.*

66. Sarbanes-Oxley Act of 2002 § 806(b)(1); 29 C.F.R. § 1980.104(c) (2004). Before issuing findings and a preliminary order, OSHA must "again contact the named person to give notice of the substance of the relevant evidence supporting the complainant's allegation as developed during the course of the investigation." 29 C.F.R. § 1980.104(e) (2004). "[T]he named person may submit to the Assistant Secretary [and by delegation OSHA] a written statement and any affidavits or documents substantiating its position." 29 C.F.R. § 1980.104(c) (2004). The employee may seek de novo review of the case in federal district court if "[OSHA] has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant." Sarbanes-Oxley Act of 2002 § 806(b)(1)(B) (2002).

67. 29 C.F.R. § 1980.104(b)(2) (2004).

68. 29 C.F.R. § 1980.104(c) (2004).

69. *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997) (involving a whistleblower protection statute, 42 U.S.C. § 5851(b)(3)(C) (2000), that provides protection for whistleblowers at nuclear reactors and uses the same clear and convincing evidence standard to describe the employer's burden).

70. *Id.*

71. *Id.* at 1574. See also *Kraushaar v. Dep't of Agric.*, No. 02-3192, 2003 WL 1194290, at *4 (Fed. Cir. Mar. 10, 2003) (upholding the ALJ's finding that an employer met its clear and convincing evidence burden regarding the protected whistleblower under the Whistleblower's Protection Act (WPA) by proving that it took the same adverse action with a similarly situated non-whistleblower).

72. *Stone & Webster*, 115 F.3d at 1574 (indicating the limitations on judicial review of an administrative

This case illustrates the difficulty employers may have in overcoming the clear and convincing evidence standard.⁷³

E. Remedies

After a whistleblower establishes the necessary elements of a retaliation claim, he or she may be entitled to civil damages.⁷⁴ Additionally, the federal government may seek criminal penalties against the responsible parties.⁷⁵ Section 806 of SOX entitles whistleblowers to any relief necessary “to make the employee whole.”⁷⁶ This relief includes compensatory damages in the form of reinstatement with the same seniority, back pay with interest, and special damages including litigation costs, expert witness fees, and reasonable attorney’s fees.⁷⁷ Punitive damages may not be awarded under the statute.⁷⁸ Moreover, the statute does not specifically focus on the availability of damages for mental distress.⁷⁹

Section 1107 of SOX sets forth criminal penalties of up to ten years imprisonment⁸⁰ for “[w]hoever knowingly, with the intent to retaliate, takes action harmful to any person,

finding of a violation of the WPA).

73. *Id.* While it is difficult to overcome the clear and convincing evidence standard, some employers have succeeded. *See also* Tierney v. Dep’t of Justice, No. 03-3187, 2004 WL 886973, at *3 (Fed. Cir. Apr. 21, 2004) (involving the WPA, 5 U.S.C. § 2302(b)(8) (2000), which parallels the SOX whistleblower provision and upholding the ALJ’s finding that the Immigration and Naturalization Service established by clear and convincing evidence that it did not retaliate against an employee by discharging him when the employee sent a letter to Senator Dodd regarding a possible violation of immigration law). The official who discharged the employee overcame the clear and convincing evidence standard by testifying he never knew of the letter to Senator Dodd. *Id. But see* Tenn. Valley Auth. v. United States Sec’y of Labor, No. 01-3724, 2003 WL 932433 (6th Cir. 2003) (affirming the Department of Labor’s decision that employer did not meet its clear and convincing evidence burden under the Energy Reorganization Act when it transferred a complaining employee three months after presenting him with a work-related award); *see also* Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1380 (N.D. Ga. 2004) (denying employer’s motion for summary judgment and calling it a “close question” regarding the clear and convincing evidence burden when supervisors never met with a whistleblower to discuss her job performance and discharged her within the initial ninety-day trial period).

74. Sarbanes-Oxley Act of 2002 § 806(c); 18 U.S.C. § 1514A(c) (2002).

75. Sarbanes-Oxley Act of 2002 § 806(c)(1), 18 U.S.C. § 1514A(c)(1) (2002); Sarbanes-Oxley Act of 2002 § 1107, 18 U.S.C. § 1513(e) (2002).

76. Sarbanes-Oxley Act of 2002 § 806(c)(1).

77. *Id. See* Welch v. Cardinal Bankshares Corp., No. 2003-SOX-15 (Dep’t of Labor Jan. 28, 2004) (recommended decision and order) (finding in favor of Welch, a former chief financial officer (CFO) for attempting to expose what he reasonably believed was fraud and reinstating him in his former position with back pay, interest, and litigation costs including reasonable attorney’s fees and expert witness fees). The ALJs in *Welch* further ordered the employer to purge all references relating to the CFO’s removal from his personnel file. *Id.*

78. Sarbanes-Oxley Act of 2002 § 806(c)(1). Note, however, that punitive damages may be available under an accompanying state claim because this provision of SOX does not diminish an employee’s protection under state law. *Id.* 806(d)(1); Donati, *supra* note 15, at 996.

79. Sarbanes-Oxley Act of 2002 § 806(c). While the statute does not specifically permit remedies for mental distress, it does entitle a whistleblower to “all relief necessary to make the employee whole.” Additionally, nothing regarding the whistleblower provision “shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.” Sarbanes-Oxley Act of 2002 § 806(d). This means that SOX does not eliminate an employee’s rights to damages under any other statute. *Id.*

80. Attwood, *supra* note 1, at 1168.

including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.”⁸¹ The application of the criminal penalties are both broader and narrower than the scope of the private civil remedies.⁸² The criminal penalties are broader than the civil remedies because they apply to “action harmful to any person.”⁸³ In contrast, section 806 (the civil private remedy) prohibits only specific acts.⁸⁴ Section 1107 is narrower than section 806 because to be invoked, a whistleblower must provide *truthful* information to a law enforcement officer.⁸⁵ On the other hand, section 806 becomes applicable when a whistleblower provides information based on a *reasonable belief* related to a protected subject matter to Congress, internal supervisor(s), law enforcement officer(s), or specified others.⁸⁶

III. ISSUES

As a result of the SOX whistleblower protection provision, publicly held enterprises face challenging issues in attempting to abide by the law, provide employees with a comfortable work environment, significantly lessen the likelihood of employee complaints, and effectuate the foregoing in a cost effective manner.

SOX mandates that the audit committee of any publicly-held company promulgate procedures for the reporting of and responding to complaints by company employees concerning accounting, internal accounting controls, and auditing issues.⁸⁷ Although Congress and the SEC have declined to require specific procedures that audit committees must establish, SEC Enforcement Director Stephen Cutler has “urged companies to appoint a permanent ombudsman or business practices officer to receive and investigate complaints.”⁸⁸ Director Cutler emphasized that companies that effectively employ a “private inspector general” approach enhance their ability to prevent problems and/or resolve them at an early stage.⁸⁹ The retention of a private inspector general also may be viewed as an institutional commitment to developing and maintaining the importance of integrity, ethics and legal compliance.⁹⁰

81. Sarbanes-Oxley Act of 2002 § 1107, 18 U.S.C. § 1513(e) (2002).

82. McLucas & Oh, *supra* note 4, at 70.

83. Sarbanes-Oxley Act of 2002 § 1107.

84. Sarbanes-Oxley Act of 2002 § 806(a) (prohibiting the discharge, demotion, suspension, threatening, harassment, or discrimination against whistleblowers).

85. Sarbanes-Oxley Act of 2002 § 1107(3); 18 U.S.C. § 1513(e) (2002).

86. McLucas & Oh, *supra* note 4, at 70.

87. Sarbanes-Oxley Act of 2002 § 301(m)(4); Attwood, *supra* note 1, at 1168.

88. Cutler Calls for Corporate Ombudsman to Enhance Whistleblower Provision, Fed. Sec. L. Rep. No. 2156 (CCH) at 4-5 (Dec. 29, 2004).

89. *Id.*

90. *Id.* In one case, pursuant to a consent decree, the subject company agreed to permanently maintain a chief compliance officer (CCO) who was to report to a committee of outside directors, and whose role includes responding to employee concerns involving matters relating to ethics or questionable business practices. SEC Charges Qwest Communications International Inc. with Multi-Faceted Accounting and Financial Reporting Fraud, SEC Litigation Release No. 18935 (Oct. 21, 2004), available at <http://www.sec.gov/litigation/litreleases/lr18936.htm> (last visited Feb. 3, 2005); SEC Charges Quest Communications International Inc. with Multi-Faceted Accounting Communications and Financial Reporting Fraud, SEC Press Release No. 2004-148 (Oct. 21, 2004), available at <http://www.sec.gov/news/press/2004-148.htm> (last visited Feb. 3, 2005). General

In addition to the appointment of a permanent ombudsman or business practices officer, certain measures should be implemented to create an effective procedure for the complaint process.⁹¹ A sound process should: (1) protect employees against retaliation; (2) allow for the intake of anonymous complaints; (3) encourage employees to lodge legitimate complaints; (4) call for expeditious internal investigation; and (5) facilitate appropriate remedial response.⁹² In this regard, although the audit committee normally is not expected to respond to employee whistleblower complaints, the committee should effectively monitor the functioning of this process.⁹³

Along with the mandate imposed on audit committees, SOX effectively requires employers to ensure that existing procedures and policies comply with legal requirements.⁹⁴ Law compliance programs should be adequately implemented to facilitate obedience to the law, reduce the severity of sanctions in the event of a violation, and promote a work environment in which employees understand the significance of legal mandates and prohibitions.⁹⁵

One of the more difficult challenges in devising an effective law compliance program is creating mechanisms to adequately handle incompetent employees who happen to be whistleblowers. The challenge occurs when an employer desires to discharge, transfer, or demote an incompetent employee who also happens to be a whistleblower, without incurring undue liability exposure for retaliation. This issue calls for employers to delicately balance their business needs with statutory requirements. Retaining incompetent employees can lead to inefficiencies that affect productivity and profitability. Nonetheless, when employers fail to adhere to the SOX whistleblower provisions, they become subject to civil and criminal liability exposure.⁹⁶

Electric Company (GE) has set up an ombudsman program by offering employees several different means of lodging fraud complaints: "employees can raise concerns through their manager, through one of the compliance specialists in the business or at corporate, or through the extensive network of ombudspersons." COMPLIANCE AND INTEGRITY: A GUIDE FOR LEADERS (Feb. 2004), [hereinafter COMPLIANCE], available at <http://www.ge.com/en/commitment/social/integrity/index.html> (last visited Jan. 9, 2005).

91. Attwood, *supra* note 1, at 1168.

92. *Id.*

93. *Id.* See generally *McCall v. Scott*, 250 F.3d 997, 999 (6th Cir. 2001) (recognizing that although the board of directors must provide adequate oversight regarding the company's daily functions, it is not obligated to make daily decisions relating to the operations of the company).

94. See Sarbanes-Oxley Act of 2002 § 806(a); 18 U.S.C. § 1514(a) (2002).

95. *Id.* See generally Sentencing Guidelines for United States Courts, 55 Fed. Reg. 46,600, 46,604 (Nov. 5, 1990) (recognizing establishment and implementation of an effective law compliance program as a mitigating factor when ascertaining appropriate sentences); Richard S. Gruner, *General Counsel in an Era of Compliance Programs and Corporate Self-Policing*, 46 EMORY L.J. 1113 (1997) (examining the changing environment in corporate law compliance and advocating techniques for enhancing compliance); Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990) (encouraging corporate self-regulation instead of government regulation for corporate codes of conduct); Marc I. Steinberg & John Fletcher, *Compliance Programs for Insider Trading*, 47 SMU L. REV. 1783 (1994) (examining present law compliance programs and proposing improvements); *Blakely v. Washington*, 124 S. Ct. 2531 (2004) (declaring the Sentencing Guidelines to be unconstitutional, but nonetheless permitting their use as suggestions for federal judges).

96. Sarbanes-Oxley Act of 2002 § 1107, 18 U.S.C. § 1513(e) (2002); Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A (2002).

IV. POSSIBLE SOLUTIONS

Employers must adapt to SOX to minimize liability exposure. No single measure will guarantee avoidance of liability, but employers can undertake procedures to reduce their risk. In particular, employers should adopt and implement the following: (1) a reasonably effective intake procedure; (2) a well-defined company policy; (3) educational programs for employees, contractors and subcontractors; and (4) extensive documentation procedures. By adequately implementing the aforementioned policies and procedures, employers will take meaningful steps to minimize liability exposure and foster an ethical environment that aids in preventing and detecting fraud.⁹⁷

A. Solid Intake Process

To comply with SOX, publicly held companies should seek to develop an effective process to receive fraud reports.⁹⁸ Subject companies should not only view this intake process as a means of complying with SOX, but also as a means of potentially correcting legal improprieties at an earlier stage and of preventing retaliation claims.⁹⁹

A commendable intake process may provide anonymity, confidentiality, security, and prompt investigation leading to appropriate action.¹⁰⁰ Whistleblowers are more likely to come forward with information when the intake process consists of these characteristics.¹⁰¹ To ensure the existence of these characteristics, employers can provide employee-whistleblowers multiple ways to lodge complaints. For instance, a company

97. Attwood, *supra* note 1, at 1170. Given the complexities and costs involved, employers may want to put arbitration agreements in employment contracts. As thus far decided, arbitration agreements appear to be enforceable in the SOX whistleblower context. *Id.* at 1173. An employer can seek to stay SOX whistleblower litigation in federal district court and compel arbitration when the employee signed an employment agreement that included arbitration as the sole dispute resolution method. *See, e.g.,* Boss v. Salomon Smith Barney, Inc., 263 F. Supp. 2d 684 (S.D.N.Y. 2003) (holding that “nothing in the text of the statute or the legislative history of the Sarbanes-Oxley Act” evinces an intent to preempt arbitration of claims under the Act). One criticism of section 806 is that it inadequately protects employees from the perils of arbitration. *See* Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of The Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1082 (2004) (noting that arbitration “tends to favor the employer”).

98. Attwood, *supra* note 1, at 1170.

99. Allen B. Roberts, *Post Enron Law Affects All Business Owners, Others: Compliance Advice for the Unnoticed Implications of the Sarbanes-Oxley Act*, in BIOTECHNOLOGY LAW 2003, at 751, 763 (PLI Patents, Copyrights, Trademarks, & Literary Property Course, Handbook Series No. 760, 2003). For example, GE believes that it is key to “create a comprehensive compliance infrastructure that prevents compliance failures from occurring; detects such failures when they do occur; and responds promptly and aggressively when they surface.” COMPLIANCE, *supra* note 90 at 7. Part of GE’s infrastructure includes a Compliance Review Board (CRB) in each business unit consisting of “senior operational and functional leaders [who] should meet quarterly.” *Id.* at 6. GE attempts to prevent compliance failure by requiring each CRB to “conduct an assessment at least annually of ethics and compliance risks inherent in [each business’] operating environment.” *Id.* at 17. GE detects compliance failures and monitors its compliance policy by regularly “measuring and monitoring important compliance related . . . behaviors.” *Id.* While GE does not specify how each business should monitor the policy and detect compliance failures, it does require each business to “have a process in place to ensure systematic monitoring of key compliance risk areas.” *Id.* GE provides guidance in responding to complaints by requiring “a leader to act promptly to have the concern evaluated and investigated by counsel and other persons with appropriate expertise.” COMPLIANCE, *supra* note 90 at 14.

100. Attwood, *supra* note 1, at 1170.

101. *Id.* at 1177.

could set up a telephone hotline, establish a dedicated email address for complaints, and receive complaints via standard mail. A process with these options gives employees more incentive to initiate complaints.¹⁰² Furthermore, employers can provide employees access to these means to facilitate the lodging of anonymous complaints.¹⁰³ Also, providing a twenty-four hour venue should facilitate off-site lodging of complaints, further inviting whistleblowers to come forward.¹⁰⁴

Outsourcing this process may be a viable option. For example, a publicly held company could hire another enterprise to receive all complaints. Outsourcing this process would allow for complete anonymity. However, outsourcing may be quite expensive and the employer must be confident that the service provider hires and oversees properly trained personnel.¹⁰⁵

Employers must ensure that they keep all whistleblower reports as confidential as practicable, especially when whistleblowers do not file anonymous complaints. Companies can seek to establish confidentiality by providing access to employee whistleblower reports solely to a supervisor or group of supervisors and administrative personnel on a need-to-know basis. This intake system should provide that supervisors do not receive complaints from employees they supervise.¹⁰⁶ This measure should not only elicit more fraud reports but should also decrease the chances of a retaliation claim. Assuming supervisors are effectively deterred from sharing this information with one another, it is more likely that direct supervisors will not know who made the report.¹⁰⁷

A company also can seek to accomplish the confidentiality objective by funneling all reports to the human resources department. All reports should be forwarded to designated individuals, within that department, and these individuals will allow other employees and supervisors to see the reports on a need-to-know basis.¹⁰⁸ In this process, procedures should be implemented to help ensure that the employee reports and records relating thereto are securely maintained.¹⁰⁹

102. McLucas & Oh, *supra* note 4, at 71.

103. *Id.*

104. Attwood, *supra* note 1, at 1171. Employees also have the opportunity to file complaints online with the Public Company Accounting Oversight Board (PCAOB), at <http://www.pcaobus.org/enforcement/tips> (last visited Feb. 3, 2005). The PCAOB is a private corporation created by SOX "to oversee the auditors of public companies to protect the interests of investors and further the public interest in preparation of informative, fair, and independent reports." *Id.* Additionally, the SEC has a similar intake procedure for complaints which can be lodged on the SEC website at <http://www.sec.gov/complaint.shtml> (last visited Feb. 3, 2005). Goodman, *supra* note 26, at 2079.

105. McLucas & Oh, *supra* note 4, at 71.

106. Attwood, *supra* note 1, at 1174. Attwood specifically suggests that an employee should be able to report to someone outside his or her immediate chain of command. *Id.* Therefore, an employee could report information to a supervisor, just not one in his or her chain of command. For instance, a human resources supervisor is most likely not in a salesperson's chain of command.

107. *Id.*

108. Roberts, *supra* note 99, at 760.

109. Donati, *supra* note 15, at 1020 (stating that companies should guarantee that all complaints will be maintained "as confidentially as possible to permit a meaningful and effective investigation and remedial action").

B. Company Policy

Publicly held companies should consider supplementing their intake procedure with a policy that helps to create a receptive environment for the lodging of fraud reports, educates the employees about SOX, and promotes compliance with the law. First, companies should consider putting their policy in writing and posting portions of the policy where employees can see it on a regular basis.¹¹⁰ The policy should consist of a “clear statement of the company’s commitment to compliance” with SOX, including the whistleblower protection portion.¹¹¹ The policy should also have explicit language that requires supervisors to report violations of law.¹¹²

Furthermore, the company should encourage employees to come forward with information regarding fraud or the reasonable possibility of fraud.¹¹³ In an effort to elicit complaints from employees, companies should consider explaining their intake procedure, specifically that employees can confidentially and/or anonymously submit reports without fear of retaliation.¹¹⁴ The company should provide additional assurances for whistleblowers who do not anonymously report fraud by reiterating that the company will not allow retaliation and emphasizing that only a select group of individuals will have access to the report.¹¹⁵ Indeed, such assurances may include the company’s commitment to take disciplinary action, including termination, regarding any employee who engages in retaliation.¹¹⁶

Employers can further increase the chances of receiving fraud reports by assuring employees that the audit committee, even in areas outside the statutory mandates, will independently oversee investigations of all complaints and ensure that the company will take corrective action when necessary.¹¹⁷ When appropriate, employers should follow up with whistleblowers by informing them of the results of any investigation and, if applicable, the corrective action taken.¹¹⁸

110. *Id.* While a publicly held company is not required to post its whistleblower policy, some confusion exists on “whether the SEC requires public companies to post notices regarding employee’s rights under the whistleblower protection statute.” *Senators Ask SEC to Clarify Issues Related to Whistleblower Protection Law*, 36 Sec. Reg. L. Rep. (BNA) 2054 (Nov. 22, 2004).

111. Attwood, *supra* note 1, at 1170. Jeffery R. Immelt, Chairman of the Board and CEO of GE, wrote an introduction to GE’s Compliance and Integrity Policy, and in it emphasized that “GE leaders must work to create a culture of compliance in which employees understand that nothing is more important than safeguarding the company’s reputation for integrity.” COMPLIANCE, *supra* note 90.

112. Attwood, *supra* note 1, at 1170.

113. *Id.* Many companies are encouraging their employees to lodge fraud reports by establishing hotlines and informing their employees about the benefits of anonymous hotlines. Stephanie Armour, *More Companies Urge Workers to Blow the Whistle*, USA TODAY, Dec. 15, 2002, available at http://www.usatoday.com/money/companies/2002-12-15-ethics_x.htm (last visited Mar. 16, 2005). In fact, National Hotline Services, which provides ethics hotline services, gained a twenty-five percent increase in clients one year after Congress passed SOX. *Id.*

114. Attwood, *supra* note 1, at 1171.

115. *Id.*

116. Donati, *supra* note 15, at 1021.

117. Attwood, *supra* note 1, at 1171.

118. *Id.*

C. Educational Programs

Companies should consider educating their employees on the intricacies of SOX. An informed employee is more likely to provide information than an uninformed employee because the informed employee knows his or her rights.¹¹⁹ Companies can conduct whistleblower training in a manner similar to training focused on prohibitions concerning sexual harassment and discrimination.¹²⁰ As part of this training, companies should contemplate having employees sign a SOX policy acknowledgment form that states that they understand the policy and agree to abide by it.¹²¹ Additionally, the company should include information concerning the whistleblower protection provision in its employee handbook.¹²²

While it is important to provide employees with a comfortable environment for reporting fraud, it is also important to train managers and other supervisors on how to handle complaints. A solid training program should include a description of the available reporting methods. Companies should teach managers and supervisors how to use each method.¹²³ Furthermore, employers should ensure that their managers and supervisors encourage employees to make, where appropriate, fraud and retaliation reports.¹²⁴ The employer must seek to obtain sufficient information when the whistleblower files his or her complaint because the company may not be able to identify the whistleblower.¹²⁵

Publicly held companies should inform and educate their contractors and subcontractors. In some circumstances, contractors and their designees may perceive the presence of fraud earlier than company personnel. This scenario provides the subject company with an opportunity to acknowledge and correct the impropriety before the government initiates action and/or a company employee files a similar complaint. Moreover, after the training session, companies should ask contractors and subcontractors to sign a document that acknowledges that they attended the training session. Additionally, the company may include language in the document indicating that the contractors and subcontractors understand the company's anti-retaliation policy and will comply with it.¹²⁶

119. *Id.* at 1177. Open lines of communication are vital to eliciting employee feedback. Employers can maintain open communication by educating employees and letting them know that the company desires their input.

120. *Id.* at 1172.

121. *Id.*; Donati, *supra* note 15, at 1021.

122. Donati, *supra* note 15, at 1020 (suggesting that the entire written policy be published in the employee handbook).

123. Attwood, *supra* note 1, at 1177. For instance, whoever is responsible for receiving fraud reports should know the appropriate questions, investigate the report properly, and ensure that others do not retaliate against whistleblowers. GE requires supervisors and managers to participate in both on-line and in-person training. COMPLIANCE, *supra* note 90. GE further emphasizes the importance of education by requiring all employees to attend a general integrity and compliance session within 30 days of joining GE or complete a similar session on-line. *Id.* Additionally, every new manager or supervisor "should attend a training session focused on leadership responsibilities for compliance." *Id.*

124. Donati, *supra* note 15, at 1021.

125. Attwood, *supra* note 1, at 1174.

126. *Id.* at 1175. As set forth by GE, GE "[m]anagers, with the advice of counsel, should require third parties, in appropriate contracts, to comply with relevant aspects of GE policies; and leaders should provide third parties with appropriate communications that explain the requirements of GE policies as they apply to the work performed by those third parties." COMPLIANCE, *supra* note 90, at 10.

D. Documentation

Employers may overcome their burden to provide clear and convincing evidence by providing adequate and timely documentation. Employers should document every disciplinary action they take and every investigation they conduct.¹²⁷ When employers discipline employees, they should include the following information to provide adequate documentation of the disciplinary event: (1) the time and date of the employee's conduct leading to the disciplinary action; (2) those who knew of this conduct; (3) the reason for the disciplinary action; (4) the type of disciplinary action taken; and (5) the date of the disciplinary action.¹²⁸ Additionally, the employer should document the disciplinary action as soon as practicable to increase the likelihood of fending off a retaliation claim.¹²⁹ This increases the likelihood of success by establishing that the disciplinary action occurred before the alleged retaliatory action.¹³⁰

An employer has a better chance of succeeding in a retaliation proceeding if it can establish, by documentation, that an employee did not adequately perform the job before he or she filed the fraud report.¹³¹ Hence, an employer would be prudent to document all employee performance reviews.¹³² Documentation of incompetent prior performance helps to establish that the employer would have taken the same action regardless of the whistleblower's fraud report.¹³³ Employers should still continue to document inept performance after the employee files a fraud report, but employers should be careful not to target the whistleblower.¹³⁴

Employers can take another step towards establishing clear and convincing evidence by showing that the supervisor who took the alleged retaliatory action against the whistleblower did not know of the whistleblower's fraud report.¹³⁵ Employers can assert that the supervisor did not know of the fraud report by providing documentation indicating that the individual(s) who received the fraud report differed from the supervisor who took the alleged retaliatory action and that no communications relating to the identity of the whistleblower were exchanged between the supervisor and the individual(s) receiving the fraud report.¹³⁶ The importance of adequate documentation is

127. Donati, *supra* note 15, at 1020.

128. *Id.*

129. *Id.*

130. Lawrence Hecimovich & Lenor Marquis, *Whistleblowers and Other Retaliation Claims*, in LITIGATION 2003, at 1025, 1061 (PLI Litig. & Admin. Practice Course, Handbook Series No. 697, 2003).

131. *Id.* at 1041 (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (giving documentation suggestions for a Title VII case)). Hecimovich and Marquis base their documentation suggestions on those from *Clark County*. See Hecimovich & Marquis, *supra* note 130.

132. Hecimovich & Marquis, *supra* note 130 (stating that by documenting employee evaluations, employers will have a greater probability of justifying adverse action they may take).

133. *Id.*

134. *Id.* at 1061.

135. *Id.* at 1042. Adequate documentation also helps overcome the clear and convincing evidence hurdle by indicating the amount of time that has passed since the whistleblower filed his or her fraud report. *Id.* Employers will have an easier time proving that they would have taken the same action regardless of the complaint when documents indicate that a considerable amount of time elapsed between the whistleblower's complaint and the alleged retaliatory action. *Id.*

136. Hecimovich & Marquis, *supra* note 130 at 1042. Significantly, the definition of a considerable amount of time between the whistleblower's complaint and the alleged retaliatory action is a question of fact and has ranged from as few as four months to as many as twenty months. *Id.* See also *Clark County*, 532 U.S. at 268

clear: a company that implements a solid intake procedure and establishes a company policy encouraging employees to file fraud reports may still have difficulty proving that it acted without regard to the subject whistleblower's complaint absent effective documentation.

V. CONCLUSION

SOX provides whistleblowers with monetary remedies and comprehensive protection from retaliation resulting from their fraud reports. Consequently, employers and other subject persons are faced with increasing liability exposure. In an effort to minimize this risk, a company and its legal counsel should understand the substantive elements and procedural mechanisms of a SOX whistleblower claim. Consideration by a company and its counsel should also be made with respect to implementing a solid intake process, establishing a company whistleblower policy, educating employees, and maintaining adequate and timely documentation. While a subject company cannot eliminate the threat of liability under the SOX whistleblower provision, it can more effectively manage this risk by implementing the aforementioned suggestions.

(holding that an employee failed to carry her burden in a Title VII suit when the employer transferred the employee one month after learning of the employee's suit); *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640, 644 (7th Cir. 2002) (recognizing that "mere temporal proximity . . . will rarely be sufficient in and of itself to create a triable issue" and therefore the employee must show direct evidence of retaliation or "show that after filing the charge only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner").