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C O U N S E L O R S A T L A W

**THE SARBANES-OXLEY ACT
NEW WHISTLEBLOWER
PROTECTIONS FOR EMPLOYEES**

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THE SARBANES-OXLEY ACT NEW WHISTLEBLOWER PROTECTIONS FOR EMPLOYEES

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I. INTRODUCTION

On July 30, 2002, in the aftermath of a series of accounting scandals involving major U.S. corporations, President Bush signed into law the Sarbanes-Oxley Act of 2002 (the “Act”),¹ which is aimed at reining in corporate wrongdoers and providing greater oversight of the accounting industry by increasing disclosure requirements, accounting regulation, auditor regulation, and penalties for existing federal crimes, as well as creating new federal crimes. The law also includes two separate provisions, one civil and the other criminal, designed to prohibit retaliation against employees and others who report improper conduct regarding securities fraud and corruption.²

This Paper will provide an analysis of both provisions as well as examine the establishment of a mandatory audit committee. The Paper also examines other Federal and State whistleblower laws. The Paper also considers practical implications for public companies’ in-house and outside counsel in the context of this new whistleblower legislation and provides a

¹ The Act amends various provisions of the Securities and Exchange Act of 1933, the Securities and Exchange Act of 1934, the Employee Retirement Income Security Act, the Investment Advisers Act of 1940 and the federal Criminal Code. The pertinent sections of the Act are attached at Tab 1.

² See 18 U.S.C. §§ 1514A, 1513(e).

framework for conducting investigations as a result of an employee who reports improper conduct either internally or to a governmental entity.

II. NEW FEDERAL WHISTLEBLOWER LEGISLATION

A. THE CIVIL LIABILITY PROVISION – 18 U.S.C. § 1514A

The first whistleblower provision contained in the new law, which is to be codified at 18 U.S.C. § 1514A, and became effective immediately upon the Act's enactment on July 30, 2002, imposes civil liability. The "legislative history" of the Act indicates that the whistleblower provisions were designed to protect employees of publicly traded companies who act in the public interest by reporting wrongdoing, and "to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies." 148 Cong. Rec. § 7418-01. These provisions were also designed to subject publicly traded companies, who typically do business nationwide, to a uniform set of minimum rules, as state whistleblower laws differ to the extent that a whistleblowing employee in one state may be far more vulnerable to retaliation than a fellow employee in another state who takes the same actions. As the Act does not preempt state law, however, employers are still subject to the various requirements of state law that may differ from state to state and with the Act itself.

1. PROTECTED COMMUNICATIONS

Under the civil whistleblower provision of the Act: "No [public] company . . . or officer, employee, contractor, subcontractor or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee —

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding conduct that the employee reasonably believes constitutes a violation of:

(a) any rule or regulation of the SEC; (b) any provision of federal law relating to fraud against

shareholders; or (c) federal criminal law provisions prohibiting mail fraud, bank fraud, or fraud by wire, radio, or television, when the 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; [or]
- [a] person working for the employer who has the authority to investigate, discover, or terminate misconduct; or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding³ filed or about to be filed . . . relating to [an alleged violation of any rule, regulation or law listed in paragraph (1) above.]”

An employee clearly is protected when providing information to, or assisting in a formal official “investigation” (concerning the various kinds of alleged unlawful activity) that is being conducted by one of the enumerated categories of entities or persons. Less clear, however, is whether employees are protected when providing information to one of the enumerated categories of entities or persons when no “investigation” is ongoing or when such entity or person is not involved in the ongoing “investigation.”

The White House and members of Congress have been publicly debating whether a person who provides unsolicited information to a member of Congress who is not participating in

³ While the Act does not define “proceeding,” employees seeking protection under the Act and the plaintiffs’ bar will undoubtedly seek to include any legal or administrative proceeding including, but not limited to, proceedings conducted pursuant to a complaint filed in state or federal court, or an investigation conducted by the SEC, Department of Labor, any other administration or Congress. In support of this contention, they may cite to the Congressional Record. *See* 148 Cong. Rec. § 7418-01 (“This section would provide whistleblower protection to employees of publicly traded companies. It specifically protects them, when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud.”).

a Congressional investigation, or when no investigation is ongoing, is protected under the Act.

The White House has stated that the statute protects only employees who reveal information “in the course of an investigation.” Specifically, in connection with reporting wrongdoing to

“Members of Congress” or “any committee of Congress,” the White House has stated that:

[g]iven that the legislative purpose of [the Whistleblower section] is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority to grant new investigative authority, the executive branch shall construe [the provision concerning the providing of information to a member of Congress or any Committee of Congress] as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.

Press Release of Senator Chuck Grassley, “Grassley, Leahy Continue Whistleblower Talks With White House,” (August 1, 2002), [available at http://grassley.senate.gov](http://grassley.senate.gov).

Certain members of Congress disagree, believing that the statute protects an employee who provides unsolicited information to any Member of Congress at any time, whether or not the Member is involved in any Congressional investigation, and whether or not any investigation is ongoing. Senators Leahy and Grassley wrote to the White House and asked whether their interpretation of the statute is shared by the President; our research and calls to the Judiciary Committee has not revealed any response to that letter. *Id.*

While it is not clear which side of this debate will ultimately prevail, one thing is certain: until the courts or Congress resolve this apparent conflict, employees seeking protection under this Act and the plaintiffs’ bar will contend that an investigation is not a prerequisite to filing a claim. As such, employers should be prepared for this expansive reading of the Act.

2. COVERAGE

The civil whistleblower provision applies to all domestic public companies, all non-public companies whose debt securities are publicly traded, and all registered foreign companies.⁴

Case law under the whistleblower provisions of the Energy Reorganization Act of 1974 suggests that Sarbanes-Oxley's whistleblower protections are likely to apply to former, as well as current employees. See Connecticut Light & Power v. Secretary of Labor, 85 F.3d 89, 94 (“Despite Delcore’s status as a former employee, he fell within the scope of the term ‘employee’ because the alleged discrimination arose out of the employment relationship.”). See also Robinson v. Shell Oil Co., 519 U.S. 337 (1997) (holding that the term “employees” as used in the retaliation provisions of Title VII include former employees).

3. PROCEDURES AND BURDENS OF PROOF⁵

Sarbanes-Oxley adopted the enforcement procedures set forth in the Aviation Investment and Reform Act for the 21st Century (“AIR21”) (49 U.S.C. § 42121) (“AIR21”),⁶ which protects

⁴ The Act covers any entity, domestic or foreign (i) that has filed a registration statement under the Securities Act of 1933 (“Securities Act”) that has not become effective and has not been withdrawn; (ii) that is obligated to file periodic reports under Section 15(d) of the Securities Exchange Act of 1934 (“Exchange Act”); or (iii) that has registered a class of securities under either Section 12(b) or 12(g) of the Exchange Act. Coverage is also extended to any officer, employee, contractor, subcontractor or agent of a covered company. Courts have construed the term “agent” to include supervisory or managerial employees to whom some employment decisions have been delegated by the employer. See, e.g., Levendos v. Stern Entm’t, 909 F.2d 747, 752 (3d Cir. 1990); York v. Tenn. Crushed Stone Ass’n, 684 F.2d 360, 362 (6th Cir. 1982).

⁵ It should be noted that the Securities and Exchange Commission (the “SEC”) has been given the authority to promulgate rules and regulations in furtherance of the Act. Section 3 of the Act states that “[t]he Commission shall promulgate rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.” To date, the SEC has not promulgated any such rules and/or regulations and it does not appear that any such rules or regulations are imminent.

⁶ A copy of AIR21 is attached at Tab 2. It should be noted that the interpretation of AIR21, in turn, has relied upon the analysis of the Energy Reorganization Act, 42 U.S.C. § 5851. In fact, the language of AIR21 regarding the procedure and burden of proof is nearly identical to the language in the Energy Reorganization Act. Compare 49 U.S.C. § 42121(b)(2)(B) with 42 U.S.C. § 5851(b)(3)(A)-(D).

employees who provide information about violations of air carrier regulations. Specifically, Sarbanes-Oxley provides for individuals with whistleblower claims under the Act to “seek relief . . . by (A) filing a complaint with the Secretary of Labor . . . [which] shall be governed under the rules and procedures set forth in [AIR21].” The primary method of seeking relief is through the Secretary of Labor.⁷ However, because a private right of action in federal court exists if the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint, it remains to be seen whether these cases will ultimately be litigated primarily in federal court.

a. Filing of a Complaint with Department of Labor

Aggrieved employees must file a complaint with the Department of Labor within 90 days after the date on which an alleged violation of the provision occurred. Upon such filing, the Department of Labor must notify, in writing, the party named in the complaint. Within 60 days after the filing, and after affording the party named in the complaint an opportunity to submit a written response to the complaint and to present statements from witnesses, the Department of Labor must conduct an investigation into the alleged violation and determine whether there is reasonable cause to believe that the complaint has merit. Under the statutory framework, the Secretary of Labor will not conduct an investigation and will dismiss the complaint unless the complainant makes a *prima facie*⁸ showing that the protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. Even if the Secretary of Labor makes

⁷ It should be noted, however, that under AIR21 the Secretary of Labor has delegated its authority to the Occupational Safety and Health Administration (“OSHA”). OSHA already enforces the whistleblower provisions under environmental laws and in specific industries, such as the nuclear and motor freight industries. It remains to be seen whether the Department of Labor will again delegate its authority to OSHA with regard to Sarbanes-Oxley.

⁸ In Taylor v. Express One Int’l. Inc., 2001-AIR-2 (ALJ Feb. 15, 2002), the ALJ, while interpreting AIR21, looked to the Tenth Circuit’s decision in Trimmer v. U.S. Dep’t of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999) when establishing the elements of a *prima facie* case. In order to establish a *prima facie* AIR21 whistleblower case the employee must demonstrate that: (1) the employer is covered by the Act; (2) the employee engaged in protected activity as defined in the Act; (3) the employee suffered an adverse employment action; and (4) a nexus existed

a finding that the complainant has established a *prima facie* case, no investigation is required if the employer demonstrates by “clear and convincing” evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior. See Trimmer v. U.S. Dep’t of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999) (“only if the employee establishes a *prima facie* case and the employer fails to disprove the allegation by clear and convincing evidence may the Secretary even investigate the complaint”); Stone & Webster Engineering Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997) (“Under this framework, a complainant must first pass a gatekeeper test before an inquiry may commence.”)

b. The Investigation

If a complainant can establish a *prima facie* case and assuming the complainant is not knocked out by a preemptory “clear and convincing” response from the employer, the Secretary of Labor must then investigate whether the complainant’s behavior was a “contributing factor” in the unfavorable personnel action. This burden is upon the complainant and must be met by a preponderance of the evidence. Id.; see also Dysert v. Sec’y of Labor, 105 F.3d 607, 610 (11th Cir. 1997) (affirming the Secretary’s decision that the word “demonstrate” means to prove by a preponderance of the evidence). In regard to the interpretation of what is “a contributing factor,” an ALJ in the context of an AIR21 decision in Taylor, supra, adopted the definition stated in Marano v. Dep’t of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1) stating:

[t]he words a contributing factor . . . mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which

between the protected activity (as a contributing factor) and the adverse action, or circumstances are sufficient to raise an inference that the protected activity was likely a contributing actor in the unfavorable action.

requires a whistleblower to prove that his protected conduct was a ‘significant,’ ‘motivating,’ ‘substantial,’ or ‘predominant’ factor in a personnel action in order to overturn that action.

c. Reinstatement

If the complainant succeeds in establishing the employee’s behavior was a contributing factor in the adverse employment action, the employer has an opportunity to offer “clear and convincing evidence” that it would have done the same thing anyway, i.e. “in the absence of that behavior.” 49 U.S.C. § 42121(b)(2)(B)(iii). If, after the investigation, the Department of Labor determines that there is “reasonable cause” to believe that the complaint has merit, “it shall issue” a preliminary order requiring the Company to take affirmative action to abate the violation and to reinstate the complainant with back pay. *Id.* at § 42121(b)(3)(B). Reinstatement orders are immediately effective, and are not stayed pending the resolution of any objections that may be filed at a hearing on the record or any appeal from any final order. *See* 49 U.S.C. § 4212(b)(2)(A).

This authority to order reinstatement of a complainant prior to an evidentiary hearing, is a significant grant of agency authority to intervene in the discipline and termination of an employee. Federal whistleblower statutes governing other industries (beyond those covered by AIC 21) do not grant enforcing agencies this extraordinary power. For example, the whistleblower protection provisions covering the nuclear industry permit a Department of Labor administrative law judge to order reinstatement and backpay, but only after a formal hearing on the record. *See* 42 U.S.C. § 5851(b)(2)(b). This extraordinary power will be at the disposal of the Department of Labor.

Because of the Secretary’s ability to order reinstatement of an employee at the investigatory stage, the consequences are substantial for the employer who does not prevail at

this stage of the litigation. Substantial amount of time and effort should be applied during the investigatory stage to avoid the potential of reinstatement pending a hearing.

d. Hearings Before Administrative Law Judges

Challenges to the initial findings on any preliminary order following an investigation must be filed within 30 days. Id. If the party adversely affected by the preliminary order provides such notice, there will be a full hearing before an ALJ who will in turn make a recommendation to the Secretary of Labor. We believe that the plaintiffs' bar will contend that the pre-investigatory "clear and convincing" standard will apply to a hearing conducted by an ALJ. Cases interpreting AIR21 and the Energy Reorganization Act, however, have held that the burden is on the complainant to prove, by a preponderance of the evidence, that the employer retaliated against him for engaging in protected activity. See Taylor, supra at 27; see also Carroll v. Dep't of Labor, 78 F.3d 352, 356 (8th Cir. 1996) (once case had been fully tried, the Secretary's analysis "properly focused on the ultimate issue: whether, based on the record as a whole, [the complainant] proved by a preponderance of the evidence that [the respondent] had retaliated against him for engaging in protected activity."). Once the ALJ has held a hearing and made a recommendation to the Secretary of Labor, the Secretary of Labor must enter a final order either affirming or modifying that recommendation.

e. The Admissibility of Pre-Act Conduct

An additional hurdle that employers may face is the admissibility of evidence of pre-Sarbanes-Oxley Act conduct to prove a violation of the Act. In Taylor, supra, the ALJ, again interpreting AIR21, denied the employer's motion to exclude evidence relating to pre-AIR21 activity, ruling that such conduct is relevant if it has a temporal relationship to the adverse employment action, and was a "contributing factor" in the alleged unfavorable personnel action taken by the employer. Similarly, in Taylor, the ALJ held observed that:

to the extent such alleged [pre AIR21] protected activity can be shown to be the basis of [the employer's] motivation or intent to engage in adverse action against Complainant, Complainant is entitled to present such evidence in his case-in-chief. However, Complainant cannot rely upon such alleged events as evidence of independent violations by [the employer] unless they were the subject of a properly filed and timely complaint under AIR21.

Taylor, supra at 27. This evidentiary burden will present greater difficulties for employers as they may be called upon to defend acts that are not directly related to the complaint.

f. Appeals

Any party may appeal a final order of the Department of Labor to the Circuit Court of the United States Court of Appeals in which the alleged violation occurred, or the circuit in which the complainant resided on the date of such violation. As the Act itself does not state what level of legal review would govern the appeals process, the Administrative Procedures Act controls and a circuit court may only “set aside agency action, findings and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A circuit court may not overturn an agency decision if an agency “demonstrate[s] that it considered relevant factors and alternatives after a full ventilation of issues and that the choice it made was reasonably based on that consideration.” Mount Evans Co. v. Madigan, 14 F.3d 1444, 1453 (10th Cir. 1994); see also Doane v. Espy, 26 F.3d 783 (7th Cir. 1994); Sentara-Hampton Gen. Hosp. v. Sullivan, 980 F.2d 749 (D.C. Cir. 1992).

g. Settlement Agreements

Once a complaint has been filed with the Department of Labor, any settlement agreement between the parties' must be approved by the Secretary of Labor, the Assistant Secretary or the administrative law judge assigned to the case. 49 U.S.C. § 42121 (b)(3)(A). See also 29 C.F.R. § 1979.111(d)(1) (“At any time after the filing of a complaint, and before the findings and/or

order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.”); 29 C.F.R. § 1979.111(d)(2) (“At any time after the filing of objections to the Assistant Secretary’s findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board.”). This may pose a significant burden in individual cases. Requiring third party approval of settlements is yet another hurdle facing employers defending an alleged violation of the whistleblower provisions of the Act.

h. Federal Court and the Private Cause of Action

If the Secretary has not issued a final decision within 180 days of the filing of the complaint, the complaining employee has the right to initiate a private lawsuit in federal district court under a de novo standard. 18 U.S.C. § 1514A(b)(1)(B). Whether the Department of Labor will act on these cases with sufficient dispatch to issue a final decision within 180 days, or whether these cases will end up in court, remains to be seen. In addition, it is unclear whether the Department of Labor will be divested of its jurisdiction after the filing of a complaint in federal court. It is equally unclear what the federal court will be “reviewing” under a de novo standard, as a prerequisite to filing in federal court is that the Secretary not issue a final decision within 180 days of the filing of the complaint. Presumably, the district court will be reviewing any preliminary orders by the Secretary, or if none, litigating the entire matter. The private lawsuit can be filed in the “appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.” See 18 U.S.C.

§ 1514A(b)(1)(B).² The Act does not specify address the burden and allocation of proof in federal court, but retaliatory discharge cases involving other whistleblower laws support the application of the traditional burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Am. Nuclear Res., Inc. v. U. S. Dep't of Labor, 134 F.3d 1292 (6th Cir. 1998); Kahn v. Sec'y of Labor, 64 F.3d 271 (7th Cir. 1995) (“[w]e see no reason why the method prescribed by McDonnell Douglas should not be employed in ‘whistleblower’ retaliation claims as well.”); Bechtel Constr. Co. v. Sec'y of Labor, 50 F.3d 926 (11th Cir. 1995). According to the Seventh circuit in Kahn, for example:

[t]here are three phases to the burden-shifting method. In the first phase, the burden rests squarely on the employee . . . to establish a *prima facie* case. [] Once an inference of retaliation is created, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for the discharge. In this second phase, if there is no evidence that dual motives exist, the employer need not persuade the court; the burden is simply one of production. The burden of proof remains on the employee at all times. However, once the plaintiff has shown that the protected activity played a role in the employer’s decision, the employer has the burden to prove by a preponderance of the evidence that it would have terminated the employee even if the employee had not engaged in the protected conduct. Once the employer satisfies his burden, either of persuasion or production, the rebuttable presumption is dissolved. The employee is then required to prove that the employer’s proffered reason for the termination is a mere pretext for an unlawful discharge.

Kahn, 64 F.3d at 278. (citations and footnotes omitted).

² The plaintiffs’ bar will likely argue that a jury trial is available citing the Seventh Amendment to the Constitution and the legislative history of the Act which states that a complainant “may bring a de novo case in federal court with a jury trial available,” 148 Cong. Rec. § 7418-01. The Act itself does not, however, expressly provide for a jury trial and, because of the equitable nature of the available remedies (e.g., reinstatement), employers have a basis to argue that there is no right to a jury trial.

Despite these cases, however, we would expect complainants and the plaintiffs' bar to argue that the burdens discussed above regarding the pre-investigatory stage at the Department of Labor would apply to both the investigatory stage, the ALJ hearing, the findings of the Secretary of Labor, and a case filed in federal court, and that once the complainant has set forth a *prima facie* case, an employer must demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected behavior. The principal "basis" for this argument would be the Act's declaration that "[a]n action [filed in federal court] shall be governed by **the legal burdens of proof** set forth in [AIR21]," see 18 U.S.C. § 1514A(b)(2)(C) (emphasis added), and that those burdens are different than those set forth in McDonnell Douglas.

The better argument, however, and the one that is supported by interpretations of nearly identical language in the Energy Reorganization Act, is that the clear and convincing evidence standard is only part of the gatekeeper analysis used by the Secretary of Labor prior to the investigation, and that a complainant ultimately has the burden to prove, by a preponderance of the evidence, that the employer retaliated against him for engaging in protected activity.

As will be discussed below, many states have their own whistleblower legislation that afford various degrees of protection to employees. The Sarbanes-Oxley Act does not preempt any state law. The Act specifically states that "[n]othing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under . . . State law, or under any collective bargaining agreement." 18 U.S.C. § 1514A(d) As such, while exclusive jurisdiction under the Act is given to the Federal Courts, it will not act as a bar from a plaintiff bringing supplemental state claims in federal court.

i. The Effect of an Arbitration Clause

Whether the courts will uphold an agreement between an employer and an employee to arbitrate an employment-related dispute relating to the whistleblower provisions under Sarbanes-Oxley remains to be seen. Some commentators have suggested that, under EEOC v. Waffle House, Inc., 122 S.Ct. 754 (2002), employees cannot waive their right to file a complaint with the U. S. Department of Labor. While we agree that an arbitration agreement most likely would not bar the filing of a complaint with the DOL, or the investigation and processing of that complaint by the DOL, it is less clear what effect an arbitration agreement would have on the DOL's ability to require an evidentiary hearing before an ALJ or to order monetary or other individual relief for the employee. An arbitration agreement would likely be enforceable, however, with respect to any private lawsuit filed in federal district court by a whistleblower who elects to pursue his or her complaint in a private court action after the Secretary of Labor has had 180 days to process the complaint.

4. REMEDIES

Remedies specifically mentioned in the Act include reinstatement, back pay, and compensation for any "special damages" sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorneys' fees. 18 U.S.C. § 1514A(c)(2). An employee who establishes a violation of the Act is entitled to recover "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). As a result, an employee who invokes the Act, will most likely argue that he is entitled to damages for pain and suffering or emotional distress that is proximately caused by the employer and that such damages not be capped as they are under other discrimination statutes such as Title VII. This view is supported by two recent circuit court decisions interpreting the False Claims Act, a statute that does not specifically address emotional distress and/or pain and suffering, but where the courts of appeals endorsed

such damages. See Hammond, M.D. v. Northland Counseling Ctr, Inc., 218 F.3d 886, 893-94 (8th Cir. 2000) (“The FCA whistleblower provision explicitly mandates ‘compensation for any special damages sustained as a result of the discrimination.’ Damages for emotional distress caused by an employer’s retaliatory conduct plainly fall within this category of ‘special damages.’”); Neal v. Honeywell Inc., 191 F.3d 827 (7th Cir. 1999) (permitting emotional distress damages under False Claims Act).

Unlike other federal discrimination laws, however, there is no provision for the recovery of punitive or liquidated damages and an ALJ in Peck v. Safe Air Int’l, Inc., 2001-AIR-3 (ALJ Dec. 19, 2001), while interpreting AIR21, found that punitive damages were not an available remedy under that act.

B. CRIMINAL LIABILITY – 18 U.S.C. § 1513(e)

The Sarbanes-Oxley Act also includes another provision, to be codified at 18 U.S.C. § 1513(e), that imposes criminal penalties for retaliation against whistleblowers.

This provision imposes criminal penalties for retaliation against persons who report or provide information to a law enforcement officer¹⁰ relating to the possible commission of *any* federal offense, NOT JUST offenses relating to accounting or securities issues. The criminal liability provisions are also not limited to public companies. Criminal liability can be imposed on any company or person.

This criminal provision makes it unlawful to “knowingly, with the intent to retaliate, take [] any action harmful to any person, including interference with lawful employment or livelihood

¹⁰ See 18 U.S.C. § 1515 (“the term ‘law enforcement officer’ means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant--(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or (B) serving as a probation or pretrial services officer under this title”).

of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.”

Thus, while this whistleblower provision broadly covers the reporting or providing of information relating to the commission or possible commission of *any* federal offense and any type of retaliatory action, not just adverse employment action, it applies only in circumstances where the information is provided to a law enforcement officer *and* the information provided is truthful.

Individuals who violate this provision are subject to a fine of up to \$250,000, imprisonment for up to 10 years, or both. Entities may also be subject to criminal penalties under this provision and face fines of up to \$500,000.

III. SARBANES-OXLEY AND THE ESTABLISHMENT OF A MANDATORY AUDIT COMMITTEE

Sarbanes-Oxley mandates the establishment, by April 30, 2003, of an audit committee responsible for the appointment, compensation and oversight of the work of the “registered public accounting firm” which is employed on behalf of the company to issue an audit report or for related work. Among other things, the audit committee is required to establish procedures for “(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal account controls, or auditing matters; and (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.” 15 U.S.C. § 301(m)(4). Failure to comply with this provision could result in the delisting of the of the company. *Id.* at § 301(m)(1)(A).

While these “procedures” are not defined in the Act itself, experience dictates that good practice will lead to the development of training and policies similar to those we are accustomed to with respect to workplace harassment and which also has been successfully implemented in

the nuclear industry. It is important for employers covered under the Act to realize that this is their opportunity to minimize the risk of having to defend against a whistleblower claim and develop training and policies that will educate employees about, and establish an appropriate practice for reporting questionable accounting or auditing matters. The development and implementation of these reporting policies and procedures are crucial and will not only act as a deterrent to future claims, but also as a built-in defense that the employer had in effect a “whistleblower policy” and routinely trained its employees on their reporting procedures. The establishment and maintenance of appropriate policies and procedures cannot be underestimated and will be discussed in further detail below.

IV. EXISTING FEDERAL WHISTLEBLOWER LAWS

There are a variety of federal statutes that provide job protection to an employee for reporting the illegal conduct of his employer. Each of these statutes contains both civil and criminal penalties for anyone who violates its requirements.

A. AVIATION INVESTMENT AND REFORM ACT for the 21st CENTURY (“AIR21”) (49 U.S.C. § 42121)

AIR21 provides that “[n]o carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) – (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation or standard of the FAA or any other provision of Federal law relating to air carrier safety . . . ; (2) has filed, caused to be filed or is about to file (with any knowledge of the employer) or cause to be filed in a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the FAA or any other provision of Federal law relating to air carrier safety . . . ; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.

B. ENVIRONMENTAL

These environmental Acts provide protection from discharge or other discriminatory actions by employers in retaliation for employees' good faith complaints about safety and health hazards in the workplace and in the environment.

1. Energy Reorganization Act of 1974 [42 U.S.C. § 5851, as amended by Section 2902, PL 102-486 (106 Stat. 2776)]

Whistleblower Protection: An employer may not discharge or otherwise discriminate against an employee because the employee (1) notified employer of violation of this Act of Atomic Energy Act of 1954; (2) refused to engaged in act unlawful under this chapter or the Atomic Energy Act; (3) testified before Congress of at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act; (4) commenced, caused to be commenced, or is about to commence a proceeding under this chapter or the Atomic Energy Act, or a proceeding for the administration or enforcement of these Acts; (5) testified or is about to testify in any such proceeding; or (6) assisted or participated in or is about to assist or participate in any such proceeding or action carrying out the purposes of this chapter or the Atomic Energy Act. Any employee who believes he has been discharged or discriminated in violation of this section may file a complaint with the Secretary of Labor.

2. Occupational Health and Safety Act ("OSHA") (29 U.S.C. § 660(c))

Whistleblower Protection: An employer may not discharge or discriminate against an employee who institutes or causes to be instituted any proceeding related to OSHA, or testifies in such a proceeding, or exercises any rights under OSHA on behalf of himself or others. 29 U.S.C. § 660(c)(1). If an employee believes he is subject to such action, he may file a complaint with the Secretary of Labor. If the Secretary determines that the employment action violated OSHA, he must bring an action in federal district court for relief. 29 U.S.C. § 660(c)(2).

3. Federal Water Pollution Control Act ("FWPCA") (also known as the Clean Water Act) (33 U.S.C.S. § 1367).

Whistleblower Protection: An employer may not fire or discriminate against an employee who files, institutes, or causes to be filed or instituted any proceeding under the FWPCA, or testifies or is about to testify in any proceeding resulting from the administration or enforcement of the Act. 33 U.S.C.S. § 1367. If an employee believes his employer has taken such action, the employee may file an application with the Secretary of Labor, who may order reinstatement and the payment of the employee's legal

expenses incurred in bringing the action. 33 U.S.C. §§ 1367(b) and (c).

4. Toxic Substances Control Act (“TSCA”) (15 U.S.C.S. § 2622)

Whistleblower Protection: No employer may discharge or otherwise discriminate against an employee because the employee has commenced or caused to be commenced any proceedings under the Act, testified or is about to testify in such a proceeding, or assisted or about to assist such a proceeding. 15 U.S.C.S. § 2622(a). Any employee who believes he has been discriminated against by a person in violation of section 2622(a) may file a complaint with the Secretary of Labor within 30 days after the alleged violation. If the Secretary determines that a violation occurred, the Secretary shall order “(i) the person who committed such violation to take affirmative action to abate the violation, (ii) such person to reinstate the complainant to the complainant’s former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant’s employment, (iii) compensatory damages, and (iv) where appropriate, exemplary damages.” 15 U.S.C.S. § 2622(b). The Secretary may also order the employer to pay the employee’s attorney’s fees. 15 U.S.C.S. § 2622(b)(2)(B).

5. Solid Waste Disposal Act (“SWDA”) (42 U.S.C.S. § 6971)

Whistleblower Protection: No employer may discharge or discriminate against an employee for commencing, or causing to commence, testifying in, or assisting a proceeding under the SWDA. Any employee who believes he is subject to such action may file a complaint with the Secretary of Labor. 42 U.S.C.S. § 6971.

6. Clean Air Act (42 U.S.C.S. § 7622)

Whistleblower Protection: An employer is prohibited from discharging an employee who commences, causes to be commenced, testifies in, or assists a proceeding for the administration or enforcement of any requirement imposed under the Clean Air Act. 42 U.S.C.S. § 7622(a). An employee who believes he is subject to such action may file a complaint with the Secretary of Labor. 42 U.S.C.S. § 7622(b).

7. Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) (42 U.S.C.S. § 9610)

Whistleblower Protection: No person shall discharge or otherwise discriminate against any employee or his representative because such employee or his representative provided information to a State or to a Federal Government, “filed, instituted, or caused to be filed or instituted” any proceeding under CERCLA, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of CERCLA. 42 U.S.C.S. § 9610 (a). An employee or employee

representative who believes he has been discharged or discriminated against in violation of this section may apply to the Secretary of Labor for a review of such actions. 42 U.S.C.S. § 9610 (b).

8. International Safe Container Act (46 App. § U.S.C.A. 1506)

Whistleblower Protection: No person shall discharge or discriminate against an employee for reporting a violation of this Act to the “Secretary or his agents.” If an employee believes he has been discharged or discriminated against in violation of this Act, he may file a complaint with the Secretary of Labor. The Secretary may investigate the complaint and, if the Secretary determines this section of the Act has been violated, bring an action in the appropriate U.S. District Court.

The District Court shall have jurisdiction to restrain violations of this section and to order “appropriate relief, including rehiring and reinstatement ... with back pay.” 46 App. § 1506 (c).

9. Asbestos Hazard Emergency Response Act (15 U.S.C. § 2651)

Whistleblower Protection: No state or local educational agency may discriminate against a person because the person provided information relating to a potential violation of this subchapter to any other person, including a State or the Federal Government. Any employee who believes he has been discharged or discriminated against in violation of this subchapter may apply to the Secretary of Labor for a review of the alleged discrimination or discharge. The review is conducted in accordance with OSHA (29 U.S.C. § 660(c)).

C. SURFACE TRANSPORT ASSISTANCE ACT (“STAA”) (49 U.S.C. § 31105)

The STAA protects employees of motor carriers who provide information about possible violations of commercial motor vehicle safety regulations. If an employee is subject to such action, he may file a complaint with the Secretary of Labor. If Secretary determines it is reasonable to believe a violation occurred, the Secretary issues findings and a preliminary order for relief. Potential relief includes abatement of violation, reinstatement, compensatory damages, including back pay, as well as reasonable costs when requested by complainant.

If a hearing is requested and held, and a final order issued, the person adversely affected by the order may file a petition for review in the US Court of Appeals for the Circuit in which the violation occurred.

D. BANKING LAWS

1. Federal Deposit Insurance (Corporation Improvement) Act (“FDIA”)

No federally insured depository institution may discharge or otherwise

discriminate against any employee because the employee provided information to any federal banking agency or to the Attorney General regarding a possible violation of any law or regulation by the depository institution or any of its officers, directors, or employees. The Act provides for a private right of action.

2. Federal Credit Union Act (“FCUA”)

The FCUA has similar requirements, criminal penalties, and whistleblower protection to the FDIA. The Act provides for a private right of action.

E. WHISTLEBLOWER PROTECTION ACT of 1989 (5 U.S.C. § 1201 et seq.)

Protects Federal employees from retaliatory actions taken by the Government employer in response to employee whistleblowing activities.

F. FEDERAL EMPLOYERS’ LIABILITY ACT (“FELA”)

Whistleblower Protection: FELA prohibits a railroad employer from discharging or otherwise disciplining any employee for voluntarily furnishing information to a “person in interest” as to the facts incident to the injury or death of any employee. An employer who takes such action may be punished by a fine of not more than \$1,000 and/or imprisoned for not more than one year. 45 U.S.C. § 60. The Department of Justice enforces this statute.

G. FALSE CLAIMS ACT (31 U.S.C. § 3730(h))

An employee who is discharged or otherwise discriminated against by the employer for lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all necessary relief. The protection extends to whistleblowers whose allegations could legitimately support a False Claims Act case even if the case is never filed. This Act gives the employee a private right of action.

H. OTHER FEDERAL STATUTES PROVIDING SPECIFIC PROTECTION FOR EMPLOYEES WHO REPORT VIOLATIONS OF THEIR PARTICULAR PROVISIONS INCLUDE:

1. Title VII of The Civil Rights Act of 1964, 42 U.S.C. § 2000(e)

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”

2. Age Discrimination in Employment Act, 29 U.S.C. § 623 (1994)

“it shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section or because such individual . . . has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or litigation under this chapter.”

3. National Labor Relations Act, 29 U.S.C. § 158(a)(4) (1994)

“It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter.”

4. Family and Medical Leave Act, 29 U.S.C. § 2615 (1993)

“It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual (1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this subchapter; (2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this subchapter; or (3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this subchapter.”

5. Employment Retirement Investment Securities Act, 29 U.S.C. § 1140 (1994)

“It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, [or] this subchapter.” See also *McLean v. Carlson Cos., Inc.*, 777 F. Supp. 1480, 1484 (holding “plaintiff clearly would have had recourse under [29 U.S.C. § 1140] had she been discharged in retaliation for commencing a legal action against defendant to correct what she perceived to be violations of ERISA”).

6. Fair Labor Standards Act, 29 U.S.C. § 201

“it shall be unlawful for any employer to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or caused to be initiated any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding”

7. Job Training and Partnership Act, 29 U.S.C. § 1574 (1994)

“No person or agency may discharge, or in any other manner discriminate or retaliate against any person, or deny to any person a benefit to which that person is entitled under the provisions of the Act or the regulations because such person has filed any complaint, instituted or caused to be instituted any proceeding under or related to the Act or the regulations because such person has filed any complaint, instituted or caused to be instituted any proceeding under or related to the Act”
8. Migrant and Seasonal Worker Protection Act, 29 U.S.C. § 1855 (1994)

“No person shall intimidate, threaten, restrain coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted . . . any proceeding under or related to this chapter, or has testified . . . in any such proceedings”
9. Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1293 (1994)

“No person shall discharge, or in any other way discriminate against, or cause to be fired or discriminated against, any employee . . . by reason of the fact that such employee . . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.”
10. Vessels and Seamen Act, 46 U.S.C. § 2114(a) (1999)

“An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.”
11. Asbestos School Hazard Detection and Control Act, 20 U.S.C. § 3608

“No State or local educational agency receiving assistance under this chapter may discharge any employee or otherwise discriminate . . . because the employee has brought to the attention of the public information concerning any asbestos problem in the school buildings within the jurisdiction of such agency.”
12. The Federal Mine Safety & Health Act, 30 U.S.C. § 815(c)

“No person shall discharge or in any manner discriminate against . . . the exercise of the statutory rights of any miner . . . because such miner . . .

has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine”

13. The Safe Drinking Water Act, 42 U.S.C. § 300j-9(i)(1)

“No employer may discharge any employee or otherwise discriminate against any employee . . . because the employee . . . has (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations”

14. Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997

“No person reporting conditions which may constitute a violation under this subchapter shall be subjected to retaliation in any manner for so reporting.”

15. Conspiracy to Obstruct Justice Act, 42 U.S.C. § 1985(2)

“If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.”

16. The Consumer Credit Protection Act, 15 U.S.C. § 1674(a)

“No employer may discharge any employee by reason of the fact that his earnings have been subjected to garnishment for any one indebtedness.”

17. The Department of Defense Authorization Act, 10 U.S.C. § 2409(a)

“An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract”

18. The Jury Duty Act, 28 U.S.C. 1875(a)

“No employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee’s jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States.”

19. Office of Research Integrity, 42 U.S.C. § 289b(a)(e)

The Office of Research Integrity (ORI) promotes integrity in biomedical and behavioral research supported by the Public Health Service (PHS) at about 4,000 institutions worldwide. ORI monitors institutional investigations of research misconduct and facilitates the responsible conduct of research through educational, preventive, and regulatory activities. Organizationally, ORI is located in the Office of Public Health and Science within the Office of the Secretary of Health and Human Services .

“In the case of an entity required to establish administrative processes under subsection (b) of this section, the Secretary shall by regulation establish standards for preventing, and for responding to the occurrence of retaliation by such entity . . . against an employee . . . in response to the employee having in good faith (A) made an allegation that the entity . . . has engaged in or failed to adequately respond to an allegation of research misconduct; or (B) cooperated with an investigation of such an allegation.”

20. State Long-term Care Ombudsman Program, 42 U.S.C. § 3058g(2)

Long-Term Care Ombudsmen are advocates for residents of nursing homes, board and care homes, assisted living facilities and similar adult care facilities. Begun in 1972 as a demonstration program, the Ombudsman Program today is established in all states under the Older Americans Act, which is administered by the Administration on Aging.

The State shall “prohibit retaliation and reprisals by a long-term care facility or other entity with respect to any resident, employee or other person filing a complaint with, providing information to, or otherwise cooperating with any representative of, the Office.”

21. Public Contracts, 41 U.S.C. § 265(a)

“An employee of a contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract.” An individual who believes they have been subject

to reprisal may submit a claim to the Inspector General of the executive agency. Any appeal from the Inspector General's decision is directly to the appropriate circuit court.

V. STATE LAWS¹¹

A. NEW YORK – Labor Law § 215

New York Labor Law § 215 (“Labor Law § 215”) protects whistleblowers from discharge or discrimination for making a complaint to their employer or to the Commissioner of Labor that the employer has violated any provision of the New York Labor Law or for instituting a proceeding or testifying in a proceeding under the New York Labor Law.

New York Labor Law § 740 (1)-(7) (“Labor Law § 740”) protects whistleblowers against retaliatory action, but only for disclosing to a supervisor or public body that their employer violated a “law, rule or regulation” that presented a “substantial and specific danger” to the public health or safety. N.Y. Lab. Law § 740.2. Because the protections afforded by this law are limited to employees who report violations that present a substantial and specific danger to the public health or safety, it has limited relevance in many industries, including securities and financial services. Indeed, this law does not protect employees who report fraud against shareholders, securities law violations and the like. In addition, an employee will not be protected if he reports generalized suspicions; the report must establish an “actual violation” of the law rule or regulation. See Bordell v. Gen. Elec. Co., 88 N.Y.2d 869, 644 N.Y.S.2d 912, 667 N.E.2d 923 (1996). Finally, the employee must be able to prove that the termination or other alleged retaliation was a result of the disclosure. See Lambert v. Gen. Elec. Co., 244 A.D.2d 841, 666 N.Y.S.2d 289 (3d Dep’t 1997).

¹¹ For a review of other state statutes, see generally, “Silencing the Whistleblower: The Gap Between Federal and State Retaliatory Discharge Laws,” 85 Iowa L. Rev. 663, 671 n.34 (2000).

New York courts have declined to create a public policy exception to the at-will doctrine for whistleblowers because employees “have already been afforded express statutory protection from firing for engaging in certain protected activities.” Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 292, 302 n.1 (1986).

Labor Law § 740 does, however, contain a waiver clause that states that “the institution of an action in accordance with this section shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation under the common law. New York Labor Law § 740(7). This clause has been interpreted as foreclosing other rights and remedies protecting whistleblowers that arise from the same course of conduct. Collette v. St. Luke’s Roosevelt Hosp., 132 F.Supp.2d 256, 275 (S.D.N.Y. 2001) (holding that Section 740’s “waiver provision applies only to rights and remedies concerning whistleblowing as defined in the Act. This standard effectuates the Act’s remedial purpose by permitting employees to pursue legitimately independent claims, while prohibiting claims that duplicate or overlap the statutory remedies for retaliation on account of whistleblowing activity alone.”)

B. NEW JERSEY – Conscientious Employee Protection Act (NJSA § 34:19-3)

New Jersey’s Conscientious Employee Protection Act prohibits employers from retaliating or otherwise discriminating against an employee because the employee (a) discloses or threatens to disclose to a supervisor or to a public body an act the employee reasonably believes is in violation of a law, rule or regulation; (b) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry in violation of a law, rule or regulation by the employer; or (c) objects to or refuses to participate in any activity, policy or practice which the employee reasonably believes violates a law, rule or regulation; is fraudulent

or criminal; or is incompatible with public policy concerning the public health, safety or welfare or protection of the environment.

In addition, New Jersey applies the public policy exception to the at-will employment doctrine to protect whistleblowers. However, if an employee brings suit under the statute, s/he waives certain common law rights based upon the same conduct. NJSA § 34:19-8.

C. PENNSYLVANIA – 43 Pa. Cons. Stat. Acc. § 1423(a)

Pennsylvania's Whistleblower law applies to public employees only. This law prohibits employers from retaliating against a public employee because the employee: reports what is believed to be a violation of state or federal law, rule or regulation; refuses to carry out an employer's order where there is an objective basis in fact that carrying out such action would be in violation of state or federal law, rule or regulation; participates in an investigation, hearing, or inquiry.

Pennsylvania courts have carved out limited exceptions to the employment-at-will doctrine applicable to private employees. Cases have held that an at-will employee may bring an action for wrongful discharge ONLY when an employer discharges an employee (a) who refuses to violate the law; (b) for performing a duty mandated by statute; or (c) in direct contravention of a well-defined policy embodied in a statute.

D. CALIFORNIA – several laws relating to Whistleblower protection

California law prohibits employers from discharging employees who have exercised employee rights covered in California Labor Code at Div. 1, Ch. 4, §§ 98.6-7. Generally, employers cannot discriminate against employees because of a complaint, claim, proceeding, or testimony that relates to employee rights falling under jurisdiction of the labor commissioner. In addition, California law relating to employee disclosure of information to government or law

enforcement agencies is covered in California Labor Code at Div. 2, Part 3, Ch 5, §§ 1102.5-1106.

Moreover, the Public Employment Whistleblower Protection protects state employees from retaliatory acts in connection with good faith disclosure of improper governmental activities. Cal. Gov't Code, Tit. 2, Div. 1, Ch. 6.5, Art. 3, §§ 8547-8547.12. Employees are also protected from retaliation under law prohibiting discrimination in employment, covered under California Government Code, Tit. 2, Div. 5, Part 2, Ch 10, Art 2, § 19702. Finally, it should be noted that California common law has a public policy exception to at-will employment that is applied to protect whistleblowers. See, e.g., Green v. Ralee Eng'g Co., 19 Cal.4th 66 (1998); Phillips v. St. Mary Reg'l Mtg. Ctr., 98 Cal.App.4th 218 (Ct. App. 2002).

VI. ADDITIONAL OBLIGATIONS FOR ATTORNEYS UNDER SARBANES-OXLEY ACT – THE RULES OF PROFESSIONAL RESPONSIBILITY

Section 307 of the Act, entitled “Rules of professional responsibility for attorneys,” requires the SEC to adopt rules setting forth minimum standards of professional conduct for attorneys **appearing and practicing before the SEC on behalf of issuers**, including rules (a) requiring attorneys to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or its agents to the chief legal counsel or CEO (or equivalent); and (b) if counsel or the officer does not appropriately respond to the evidence, requiring the attorney to report the evidence to the audit committee of the board of directors of the company or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

If the rules promulgated by the SEC are limited to the obligations set forth in the statute – requiring the internal reporting to company officials (i.e., the attorney’s client) – neither issues concerning the attorney-client privilege or attorney work product doctrine, nor principles of

conflict of interest, will arise. Such issues may arise, however, if the SEC broadens or creates additional reporting requirements, such as requiring the person or entity to whom the attorney reported evidence of a material violation of law to, in turn, report such evidence to it or another law enforcement agency.

Additionally, if the SEC were to investigate whether an attorney complied with his or her obligation to report matters internally, that investigation may purport to require the production of attorney-client privileged and other protectable information. The SEC increasingly has placed pressure on targets of investigations to waive the attorney-client privilege, and the attorney reporting obligations may serve to strengthen the SEC's resolve in this regard.

Recently, the ABA Corporate Responsibility Task Force issued a preliminary report that suggested that the ABA Model Rules of Professional Conduct need to be changed to provide better guidance to corporate lawyers who learn of misconduct by insiders. Among the model rules that should be amended according to the Task Force, is Rule 1.6 which bars attorneys from revealing confidences unless the clients consents or disclosure is needed to prevent reasonably certain death or substantial harm. The proposed amendment to Rule 1.6 would require lawyers to disclose confidences to prevent the consequences of a crime or fraud that was reasonably certain to result in substantial injury to the financial interests or property of another.

Even more recently, SEC Chairman Harvey L. Pitt, in his remarks before the Annual Meeting of the American Bar Association's Business Law Section on August 12, 2002, remarked that "every corporate lawyer is taught to ask at the outset of a representation is, 'Who is my client?' . . . [This is] so they'll know whose interests they are sworn to protect. When a corporation hires a lawyer, the lawyer represents the corporation and its shareholders. Being ever mindful of this answer can help protect lawyers from the fate visited upon the accounting

profession. [] Corporate lawyers must be vigilant and protect against conflicts arising between management and shareholders.” See <http://www.sec.gov/news/speech.shtml#chair>.

Similarly, on September 20, 2002 Chairman Pitt cautioned state bar associations to act more aggressively to discipline securities lawyers. He remarked “if the state bars want to preserve their turf, they had better do their job. If it means we have to do the job for them, we will.” See Peter Spiegel, “SEC Chief warns of own action against lawyers,” *Financial Times* (September 20, 2002).

VII. THE PROHIBITION ON PERSONAL LOANS TO EXECUTIVE OFFICERS AND DIRECTORS

The Act includes a provision entitled, “Prohibition on Personal Loans to Executives,” that makes it “unlawful” for an “issuer”¹² “to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof).” See 15 U.S.C. § 78m(k). Two issues of particular interest with regard to this prohibition are (1) who qualifies as an “executive officer”¹³ and (2) whether the prohibition against personal loans prohibits a corporation’s advancement of litigation defense costs to a director or officer.

¹² This includes every issuer of a security registered pursuant to 15 U.S.C. § 781.

¹³ The term “executive officer” is not defined in the Act, and the legislative history is silent on the issue. Some practitioners, however, have observed that courts may be likely to borrow from Rule 3(b)(7) which was promulgated by the SEC under the 1934 Act which defines that terms as “[the] president, any vice president or the registrant in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the registrant.”

VIII. ACTION RECOMMENDED FOR EMPLOYERS PURSUANT TO NEW WHISTLEBLOWER LEGISLATION

- Employers should promptly establish policies and procedures to encourage employees to complain about any adverse employment actions that they believe were based on protected conduct. This will allow the employer to become aware of the alleged misconduct, investigate it, and, if appropriate, take remedial action which, in turn, may reduce the risk of liability.
- Employers should promptly educate their officers, employees, and other agents about the Act, including advising them that they risk discipline up to and including discharge as well as civil liability and criminal penalties if they violate the law.
- Employers should review and revise, as necessary, employment, settlement and confidentiality agreements, as well as company policies, handbooks, codes of conduct and directives governing reporting of corporate wrongdoing or improper conduct, communications with regulatory or law enforcement agencies and protection of confidential information to ensure that they do not prohibit communications or conduct protected by the Act.
 - For example, employers should review such documents for restrictions on communicating with, providing information to, assisting in an investigation by, or filing or participating in proceedings before government agencies. Such restrictions may be found in non-disclosure and non-disparagement provisions and in covenants not to sue.
- Employers should take special care in dealing with employees who have provided information or assisted in an investigation involving possible violations of federal law

including, but not limited to, the securities laws. Indeed, even if the employee is wrong, and a violation has not occurred, the employee may still be protected from retaliation if she or he reasonably believed that a violation occurred, or if the information was provided to a law enforcement officer and was truthful.

These recommendations are discussed in further detail below.

IX. PRACTICAL IMPLICATIONS IN THE CONTEXT OF A WHISTLEBLOWER INVESTIGATION FOR IN-HOUSE AND OUTSIDE COUNSEL

In light of the economic climate and the newsworthy criminal prosecutions that have been taking place recently, in-house or outside counsel may be called upon to conduct internal investigations of complaints from employees that may qualify for protection under Sarbanes-Oxley or another Federal or State whistleblower law. In addition, in-house or outside counsel may be called upon to conduct audits from time to time. Whether the catalyst is an employee's complaint, a suspicion of corporate embezzlement, securities fraud, a government investigation, or other wrongdoing, prudence requires that the company have in place guidelines and procedures for conducting internal investigations and audits, which will enable it to obtain promptly the requisite details and make a reasoned and informed decision on how to best protect the company, its shareholders and its employees while at the same time minimizing the risk of unintended disclosures outside the company.

A. COMPLAINT CHANNELS FOR EMPLOYEES

- Establish well-publicized, readily accessible complaint procedures.
- Establish multiple avenues/individuals to whom employees can report complaints.

This minimizes discomfort in reporting complaints and vitiates later arguments by complainant that the failure to report arose from fear of retaliation.

- Limit, however, the class of complaint intake personnel to appropriate personnel.
Appropriate personnel include: designated managers, in-house counsel, and/or human resources personnel.
- Remember that the investigator is the face of the company and should be a compelling, credible witness for the company.
- Consider anonymous reporting procedures.
- Once employee reports the improper conduct, the employer must take prompt, reasonable, preventive and corrective action, if warranted. Once employee complains, the employer, not the employee, controls the investigation.

B. WHEN SHOULD AN INVESTIGATION OR AUDIT BE CONDUCTED ?

Whenever a potential problem is uncovered – whether through an employee complaint, routine compliance review, a hotline call, or receipt of a grand jury subpoena – the employer will need to decide whether to undertake an internal investigation. This decision presents the employer with a host of special concerns. For example, the benefits of conducting the investigation and acquiring information concerning the problem need to be balanced against the potential disclosure of both the fact of the investigation and its fruits during potential follow-on civil litigation. With that in mind, counsel should always first be aware of various privilege and ethical considerations.

1. Ethical Considerations Implicated By Internal Investigations

The Model Rules of Professional Conduct specifically address the obligations of lawyers representing a corporation when interviewing a corporate employee. Model Rule 1.13 provides:

1. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

2. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7 (governing conflict of interest). If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Additionally, corporate counsel has an ethical obligation to avoid misrepresenting his or her loyalties. Model Rule 4.3, "Dealing with Unrepresented Person," provides that: "When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The District of Columbia Bar Legal Ethics Committee set forth its views on the obligation of a lawyer to clarify his or her role in an internal corporate investigation. See D.C. Bar Op. No. 269, Obligation of a Lawyer for Corporation to Clarify Role in Internal Investigation (1997). According to the opinion, disclosure of a potential conflict of interest must be made whenever there "may be" an adversity between the interests of the corporation and employee. As to confidentiality, the opinion emphasizes the lawyer's responsibility to clarify the nature of the privileges available before interviewing corporate employee witnesses:

Notwithstanding the law on this subject, a corporate interviewee might reasonably conclude that the information she provides to the investigating lawyer will be treated as confidential by the lawyer, perhaps because she mistakenly believes that the lawyer is representing her also. This, then is another situation in which Rule 4.3(b) and 1.13(b) may require the lawyer to clarify his role and the status of the information to be provided by the interviewee.

2. Possible Benefits of Conducting An Internal Audit And/Or Investigation

With those thoughts about privilege and ethics constraints in mind, a lawyer must consider the benefits and risks of an audit and/or investigation. Internal audits and investigations

can be exceptionally valuable to the company. In the context of Sarbanes-Oxley, an employer can demonstrate that it took seriously the complaint of its employee and that any adverse employment action was not the result of the employee reporting the improper conduct. In addition, an internal audit and/or investigation can be used to avoid or minimize the risk of criminal liability. For example, under the “willful blindness” doctrine, criminal intent has been established by a corporation’s “willful blindness,” “plain indifference,” or a “conscious avoidance” of the law’s requirements.¹⁴ Willful blindness may be established where an employer ignores information suggesting a potential violation, or where it consciously avoids acquiring information. Thus, internal audits and investigations can be used to identify areas of non-compliance that require corrective action.

Self-audits may also be viewed as an mitigating factor by government prosecutors. For example, the Department of Justice Guidelines, promulgated in 1991, attempt to establish national uniformity regarding the exercise of prosecutorial discretion in bringing environmental criminal cases. Specifically, the Guidelines state that self-auditing, self-policing, and voluntary disclosure will be viewed as mitigating factors in the decision whether to prosecute. Also, the U.S. Sentencing Commission’s Guidelines of November 1, 1991, directed specifically at organizational defendants, permits self-policing and self-reporting as a mitigating factor.

Other reasons to conduct an internal audit and/or investigation include:

- Identification and control of particular problems which have come to light as the result of existing compliance programs;

¹⁴ See, e.g., U.S. v. Bank of New England, N.A., 821 F.2d 844, 855 (1st Cir.), cert. denied, 484 U.S. 943 (1987) (evidence of a company’s “willfulness” includes “its effort to check on [its employees’] compliance [and] its response to various bits of information.”); U.S. v. DeMauro, 581 F.2d 50, 54 (2d Cir. 1978).

- Compliance with regulations, statutes and consent decrees imposing investigatory obligations;
- To gather information to support the defense of an actual or threatened government investigation or private civil litigation.

In each of these situations, there is a compelling need to gather the facts in order to develop an appropriate response and to minimize potential damage to the company's interests.

A well-constructed audit may also be used to enhance compliance with applicable securities laws and regulations, and to discover areas of noncompliance that require attention. Internal investigations also help to raise the level of awareness of all employees, including those who take no part in the procedure, but who observe that the company is interested in its operations. This awareness can result in more information for better decision making, better preparation for any emergencies, and increased employee motivation. Moreover, it can avoid the appearance of taking adverse employment action against employees or former employees who have reported conduct which they believe evidences securities fraud or other types of conduct protected by the Sarbanes-Oxley Act as well as other federal and state statutes.

3. The Risks of Internal Audits and Investigations

Unfortunately, audits and internal investigations also involve significant risks. First, it may result in more employees actually "blowing the whistle" on certain types of misconduct. Also, the risk of individual criminal liability is enlarged under the "responsible corporate officer" doctrine, by which corporate officers with knowledge and authority over an area of non-compliance may incur criminal liability. Thus, by increasing the number of officials who are aware of some kind of non-compliance and who could cure it, internal audits may simply ensnare more officials in the net of criminal liability.

Internal audits and investigations may also provide the government or a future litigant with an evidentiary “smoking gun.” In the regulatory context, the kinds of information discovered may provide the government with the necessary evidence to convict a corporation as well as individual employees of criminal non-compliance with regulatory laws and regulations. For example, OSHA has consistently asserted in its enforcement actions that internal self-audits of safety and health compliance are not only discoverable, but provide clear admissions of OSHA violations.¹⁵

C. IN-HOUSE VS. OUTSIDE COUNSEL

The decision whether to use in-house or outside counsel in connection with a whistleblower investigation and/or audit is important and should be made at the outset. The principal reasons for using in-house counsel are:

- their greater initial familiarity with the Company’s business practices and personnel;
- the desire to minimize interference with the normal operations of the business; and
- cost.

The principal reasons for using outside counsel, particularly where alleged or suspected misconduct by employees or executives is involved are:

- the need to complete the investigation within a time frame or in a depth which is beyond the resources of in-house counsel;
- avoidance of actual or potential conflicts of interest or other personal inhibitions which in-house counsel might experience;

¹⁵ In 1992 OSHA successfully subpoenaed records of a voluntary safety and health audit performed by Hammermill Paper and then used these audits to prove safety and health violations against Hammermill. Martin v. Hammermill Paper Div. of Int’l Paper Co., 796 F. Supp. 1474 (S.D. Ala. 1992). Despite Hammermill’s vehement objections premised upon the belief that it should not be penalized for good faith efforts to self-audit for compliance

- outside counsel's greater experience in the substantive areas of law involved in the investigation and/or in criminal defense work;
- the greater appearance of independence and objectivity outside counsel's work will have to prosecutors and administrators; and
- a somewhat greater ability to structure the investigation in a manner best calculated to preserve the attorney-client privilege and attorney work-product protection.

One approach is to have senior counsel within the company be assigned to work closely with outside counsel, who actual conducts the investigation.

D. PROCEDURES FOR CONDUCTING AUDITS AND/OR INTERNAL INVESTIGATIONS.

Regardless of who performs the investigation, certain standardized procedures should be followed. These procedures should be understood by all concerned before the need to begin an investigation arises whether it is an investigation regarding an actual report of misconduct by an employee regarding potential securities or accounting fraud or an investigation resulting from a complaint alleging a violation of the civil whistleblowing provisions of Sarbanes-Oxley. In order to maintain the integrity and confidentiality of the investigation, minimize the potential risk of unintended disclosures and avoid violations of the Sarbanes-Oxley Act or obstruction of justice statutes, the following points should be integral to every internal investigation:

- The investigation should be done at the direction of counsel. If counsel is not involved in the initial decision to conduct an investigation, or in directing who will participate in the investigation and what product they will prepare, it will be impossible to cloak any of the work product created with the attorney-work product or attorney-client privileges.

with OSHA Standards, OSHA successfully convinced a federal court in Alabama that such audits should not be exempt from disclosure under the so-called "self-critical analysis" privilege.

- With respect to a complaint alleging a violation of the civil whistleblower provision of Sarbanes-Oxley, shape the investigation such that information gathered allows investigator to determine whether or not adverse employment action was causally connected to whistleblowing by employee.
- Counsel should keep in mind the stringent “clear and convincing” standard analyzed above as well as the expansive interpretation of “contributing factor” and the fact that evidence and/or facts that may be barred by the statute of limitations or are not pled in the complaint, may be used as evidence by the employee/complainant when attempting to set-forth their case.
- Once the SEC establishes its rules pursuant to Section 307 of the Act regarding professional responsibility for attorneys, counsel may have a duty to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company to the chief legal counsel or the CEO of the company and if the counsel or officer “does not appropriately respond to the evidence,” the attorney may have to report the evidence to the audit committee of the board of directors or to the board itself.
- This requirement, as set-forth in Section 307 of the Act, unless expanded by the SEC, will only govern “attorneys appearing and practicing before the Commission in any way in the representation of issuers.”
- A memorandum should be prepared for signature by the responsible senior executive, directing the general counsel or designated outside counsel to conduct a confidential investigation on behalf of the corporation. It should refer to known litigation or investigations in order to invoke both the attorney-client privilege and the work product doctrine. It should be clear that the purpose of the investigation is to provide legal advice to the corporation. It should stress the need for confidentiality and direct the lawyers to use any other departments or personnel, internal or external, that they feel are necessary. Those personnel, in their assigned tasks, must report to lawyers directly and not through their usual chain of command. This is designed to be precautionary so that years later there will be no doubt that the attorney-client privilege was intended to be invoked.
- Counsel should confirm, in writing, the direction to conduct the privileged investigation. A simple memo back to the senior executive will do.
- Anyone else assigned to work on the investigation should receive written instruction from counsel describing the general outlines of the investigation (e.g., the caption of the case and/or what divisions or products are involved) and advising them that: (i) they have been asked to help the lawyers conduct the investigation; (ii) they are to treat all information as privileged and confidential; (iii) they should not discuss their work or findings with others; and (iv) they should not make copies of their notes or reports but should deliver all originals and work papers to the lawyers.

- Be careful with whatever form of communication is used, be it e-mail and other electronic communications or more traditional modes of communication that could compromise the privileged and confidential nature of the investigation. Anyone asked to assist in the investigation should be reminded that electronic communications are subject to disclosure under the same rules as other forms of written communication and are subject to disclosure unless protected by the attorney-client or work-product privileges.
- All files and documents generated during the course of the lawyer's investigation should be marked:

PRIVILEGED AND CONFIDENTIAL.
ATTORNEY-CLIENT COMMUNICATION
AND/OR WORK PRODUCT MATERIAL.
DO NOT DUPLICATE. DO NOT DISSEMINATE.

- If you do not have them, get some rubber stamps that can be used to conspicuously stamp every document.
- Treat all the privileged and confidential information in a manner which tells the world that you are serious about protecting it. The more you do, the more likely that a court will uphold the privilege. Limit any disclosure to those people absolutely necessary for providing legal advice to the corporation. Establish procedures for maintaining the confidentiality of documents and information gathered in the investigation.
- If you generate summaries of witness statements, make them summaries, not transcripts. Sprinkle them liberally with observations about the witness, mental impressions and analysis of how that witness fits in the overall case. That will help bolster the work product opinion quality of the summaries.
- When written reports are generated, number each copy and limit the distribution. Good practice suggests that the lawyers keep all the copies and only lend them to people who have an absolute need to know, will not copy them, and who will promptly read and return them.
- If a search warrant is being executed that could be deemed to encompass privileged material, alert the agents and quickly call the assistant U.S. attorney or district attorney in charge. Generally, they will respect the privilege. Do not be shy about seeking judicial relief.

- The responsibility for responding to press inquiries and government inquiries directed to the corporation should be clearly established. A senior management official should be designated to respond to press inquiries after consultation with the law department (who, in turn, will coordinate with management and counsel conducting the investigation). Responses to government inquiries which relate in any fashion to the subject matter of the investigation must also be coordinated through counsel in touch with the investigators to insure that the corporation does not make inconsistent or incorrect (untrue) responses to different inquiries.
- Senior management must be firmly discouraged from initiating non-privileged fact-gathering in the shape of demands for immediate answers addressed to junior management. These reports would not be privileged and may be inconsistent with the internal investigation. These activities can give the appearance of “headhunting,” and may also poison the well for the formal investigators.
- To protect senior management officials from liability under the “responsible corporate officer” doctrine, senior management should be insulated from personal knowledge about details of an investigation until such time as the investigation is complete and the results of the investigation and broad outlines of the facts can be communicated to them together with any recommendations for action.
- Two principal components of any internal investigation are identifying and understanding the relevant documents, and determining the extent of knowledge of the employees. While review of the documents prior to employee interviews is preferable, time constraints often do not permit that luxury, and counsel must begin with the immediate interview of employees. At the outset, an effort should be made to identify the general categories of relevant documents and to issue a request to various departments which may house them. This is best accomplished by a memorandum over the signature of a responsible corporate official, showing that the request was made by counsel and the information is for use by counsel in providing legal advice to the company. This memorandum should also explain (i) that the requested documents should be sent directly to counsel or to the corporate official who will immediately forward them to counsel, (ii) that the documents and memo should be treated as privileged and confidential and should not be discussed with or shown to anyone else, and (iii) that they should not generate any new memos or documents relating to the request. In some cases special steps may be necessary to prevent the alteration or destruction of pertinent documents.
- In some cases, it may be beneficial to make a company-wide announcement concerning the investigation. Such an announcement can help prevent rumors and help employee morale. It may also prevent the employees from being surprised by contacts from government agents outside the workplace.

- Individuals may come and go from the investigation and from the company. Remind them regularly that the privilege still applies after they leave. Try to keep track of everyone who worked on the investigation. Keep current addresses and phone numbers for them. Ask them to notify you immediately if anyone asks them about the investigation or subpoenas them to testify about it.
- Bear in mind the burdens of proof when conducting the investigation as well as the Act's use of prior acts to demonstrate a current violation.
- Do not take any adverse employment action with respect to the whistleblower unless such action is well supported in evidence and has absolutely nothing to do with the complaint.

E. INTERVIEWS OF EMPLOYEES AS PART OF THE INVESTIGATION.

When the company decides to conduct an internal investigation, it is generally entitled to insist upon the full cooperation of its employees in that effort. The interviewed employee must be advised clearly at the outset that the lawyer is counsel for the company and not for the employee. The employee should be told (i) the purpose of the interview and, if so, that the government also is conducting an investigation, (ii) the nature of the problem being investigated, (iii) that counsel has been retained to provide advice to the company, and (iv) that the interview is necessary in order for counsel to obtain the information needed to provide appropriate advice to the company. The employee should also be told not to discuss the conversation with others. The employee must not be told or led to believe that information provided to company will not be disclosed to management or to the government. The company, and not the employee has the privilege to determine whether the substance of the conversation is confidential.

When interviewing the Whistleblower:

- Conduct interview in confidential location.
- Describe the investigative process.
- Explain seriousness of investigation and necessity for truthful cooperation.
- Assure complainant of no retaliation for reporting conduct.

- Carefully identify and flesh out facts.
- Discuss any corroborating or contradictory evidence.
- Document everything.
- Do not make conclusions or ignore damaging information.
- Do not make legal conclusions.
- During the course of the interview, counsel must avoid any statements or comments which could be construed as an attempt to mislead the witness or to influence his or her possible testimony. The close of the interview will provide counsel with convenient occasion to restate the employee's rights and the importance of answering any questions posed by government investigators truthfully.

If the employee has been reinstated by the Department of Labor after the filing of a complaint, the employer should ensure that the employee is not treated differently because of the complaint. To that end, no adverse employment decisions should be made unless it can be demonstrated through clear evidence that such decision is based on evidence unrelated to the complaint. The complaint cannot be a factor in the adverse employment decision and if it is later found to be a factor, civil and criminal liability could ensue.

F. THE INVESTIGATIVE REPORT

After counsel has completed the interviews of the relevant employees and has reviewed the documents, an internal report should be made consisting of the following components:

- A description of the investigative process, including why, by whom, and how the investigation was conducted, and what issues were explored;
- A detailed summary of the facts;
- An analysis of applicable legal principles;
- An identification of perceived weaknesses in the Company's practices and procedures;
- A review of the potential administrative and criminal sanctions;
- An outline of the arguments against those sanctions and criminal prosecution; and

- Recommendations of corrective action to cure the deficiencies and enhance the Company's administrative and criminal defenses.

Access to the report should be strictly limited to counsel and directly responsible corporate officials. The report should be kept confidential and clearly marked:

PRIVILEGED AND CONFIDENTIAL.
ATTORNEY-CLIENT COMMUNICATION
AND/OR WORK PRODUCT MATERIAL.
DO NOT DUPLICATE. DO NOT DISSEMINATE.

If a report is prepared for outside disclosure, its emphasis may be somewhat different than the internal report. However, any report prepared for outside disclosure must be absolutely consistent on all material points with any internal report. The internal report and the outside report must also be completely consistent with any underlying notes or memoranda. An outside report might include the following elements:

- An introduction addressing how and why the investigation was begun, by whom it was conducted, over what time period, and what issue(s) it addressed;
- A description of the investigate process set forth in a fashion designed to show its thoroughness (for example, setting forth the number of documents reviewed and interviews conducted);
- A summary of the pertinent factual findings;
- A description of any corrective actions taken, with emphasis on how they will help prevent the problem from recurring;
- A brief description of any disciplinary actions taken (probably without names); and
- Any financial action which the company has taken or intends to take (for example, refunds or restitution to customers).

An outside report may also include appendices containing more detailed findings and pertinent documents. These must be tailored to the purpose which the outside report is intended to serve and its expected audience.

G. AVOIDING CHARGES OF OBSTRUCTION OF JUSTICE OR CRIMINAL LIABILITY UNDER SARBANES-OXLEY

Familiarity with the obstruction of justice statutes is essential. Avoiding a charge of obstruction of justice is a key concern in conducting interviews, even of company employees by company counsel. In 1982, Congress enacted the Victim and Witness Protection Act (18 U.S.C. §§ 1512-15) which expanded the scope of federal criminal liability for activities which are commonly described as “witness tampering.”

Section 1512, which encompasses the traditional obstruction of justice offenses, now also makes it a felony offense, *inter alia*, for any person to engage in “misleading conduct”¹⁶ to influence the testimony of any person in an official proceeding. 18 U.S.C. § 1512(b)(1). This amorphous standard is repeated in Section 1512(c), which makes it a crime to “harass” another person, thereby hindering or dissuading any person from testifying or providing information to federal law enforcement officials or from causing a criminal prosecution to be sought or instituted.

For purposes of Section 1512, the official proceeding need not be pending or even about to be instituted at the time of the offense, and the testimony or documents need not be admissible in evidence or free of a claim of privilege.

¹⁶ The term “misleading conduct” is defined as:

1. Knowingly making a false statement;
2. Intentionally omitting information from a statement, causing a portion of it to be misleading, or intentionally concealing a material fact, creating a false impression;
3. With intent to mislead, knowingly submitting or inviting reliance on a writing or recording which is false, forged, altered, or otherwise lacking in authenticity;
4. With intent to mislead, knowingly submitting or inviting reliance on any object which is misleading in a material respect; or
5. Knowingly using a trick, scheme, or device with intent to mislead.

Similarly, under the new criminal liability provisions of Sarbanes-Oxley, if an employee has provided truthful information to a law enforcement officer, no person or entity may retaliate against the employee or take any action harmful to that person including interfering with his employment. Thus, when conducting an investigation an employer should be certain not to run afoul of this provision of the Act as it may result in both individual and corporate liability.