Crying Wolf? -- Dealing with the Whistleblower

BY

David P. Whittlesey
Partner
Andrews Kurth
Austin, TX

Joe A. Garza, Jr.
Vice President-Associate General Counsel
Dex Media, Inc.
D/FW Airport, TX

Special Thanks to

Gavin Justiss
Associate
Andrews Kurth
Austin, TX
# Table of Contents

I. Introduction .......................................................................................................................................................... 1

II. The Role of OSHA ................................................................................................................................................ 1

III. Whistleblower Protections and Incentives under Federal Law ................................................................. 2
   A. The False Claims Act ...................................................................................................................................... 2
      1. Qui Tam Suits under the FCA ....................................................................................................... 2
      2. Anti-retaliation Provisions under the FCA .................................................................................... 3
   B. The Dodd–Frank Wall Street Reform and Consumer Protection Act .................................................... 3
      1. Securities and Exchange Commission Whistleblower Incentive Program .................................... 3
      2. The Commodity Futures Trading Commission Whistleblower Bounty Program ................. 5
      3. Anti-retaliation Under Dodd-Frank ............................................................................................... 6
      4. Reprisal Cause of Action for SEC Whistleblowers ........................................................................ 7
   C. The Sarbanes-Oxley Act of 2002 .................................................................................................................... 7
   D. The Patient Protection and Affordable Care Act of 2009 ................................................................................. 8
      1. Introduction to Section 1558 - Scope of Coverage and Protections for Whistleblowers .............. 8
      2. Procedure, Limitations, and Remedies .......................................................................................... 9
   E. Whistleblower Protection Enhancement Act of 2012 ..................................................................................... 9
   F. The American Recovery and Reinvestment Act of 2009 ............................................................................. 10
      1. Who is Covered and What is Protected ....................................................................................... 10
      2. The Administrative and Judicial Process ..................................................................................... 10
      3. Remedies ...................................................................................................................................... 11
      1. Who is Covered ............................................................................................................................ 11
      2. What is Protected ......................................................................................................................... 11
   H. IRS Whistleblower Protection Reward Program .......................................................................................... 12
      1. Filing an IRS Informant Reward Claim ....................................................................................... 12
      2. Appealing to the United States Tax Court ................................................................................... 13

IV. Key Considerations for Covered Employers .................................................................................................. 13
   A. Increasing Whistleblower Investigations and Awards .............................................................................. 13
   B. Defining “Whistleblowers” and Their Protected Activities .................................................................... 14
   C. Employer Protections from Whistleblower Reports ............................................................................... 14
   D. Safely Terminating Employees for Cause ............................................................................................ 18

V. Recent Whistleblower Case Law and Other Developments ......................................................................... 19

VI. Conclusion ........................................................................................................................................................... 20
Crying Wolf? -- Dealing with the Whistleblower

I. Introduction

Dating back to the Civil War and the passage of the False Claims Act (“FCA”), the federal government has relied — and continues to rely — on whistleblowers to aid in the government’s ability to enforce regulatory laws and protect various government programs. The federal government simply lacks the limitless legal and investigative resources needed to do it entirely on its own. To this end, Congress has passed numerous regulatory statutes containing specific incentives that reward and protect whistleblowers for coming forward, including bounty programs and private causes of action to combat employer retaliation. This paper focuses on giving insight to the in-house counsel about those whistleblower statutes and their key provisions.

II. The Role of OSHA

It is important to recognize the growing role of the Occupational Safety and Health Administration (“OSHA”) in enforcing federal whistleblower protections. OSHA is an agency within the United States Department of Labor. Congress established OSHA under the Occupational Safety and Health Act, signed into law by President Richard Nixon on December 29, 1970. OSHA’s mission is to “assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.” UNITED STATES DEP’T OF LABOR, Occupational Safety & Health Administration, About OSHA, available at https://www.osha.gov/about.html.

In addition to enforcing regulations issued under the Occupational Safety and Health Act, OSHA is responsible for enforcing the whistleblower provisions of over twenty different statutes. See UNITED STATES DEP’T OF LABOR, Occupational Safety & Health Administration, The Whistleblower Protection Programs, available at http://www.whistleblowers.gov/statutes_page.html. Most recently, Congress designated OSHA as the agency responsible for enforcing the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).

Under President Obama’s administration, OSHA’s role has expanded and whistleblower protections have been substantially strengthened. For example, in August 2011, OSHA announced a restructuring of its Whistleblower Protection Program, placing more emphasis on training for its investigators and support staff and streamlining its process for accepting whistleblower complaints. See UNITED STATES DEP’T OF LABOR, Occupational Safety & Health Administration, News Release, Aug. 1, 2011, available at https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=20394.

A major type of protection afforded to whistleblowers by OSHA comes in the form of anti-retaliation laws. Traditional retaliation claims under Section 11 of the Occupational Safety and Health Act tend to predominate the whistleblower claims received by OSHA, constituting nearly two-thirds of claims received. See Patrick J. Maher, Whistleblower Update, 22nd Annual Advanced Employment Law Course Chapter 7, at 2 (2014). OSHA is required to investigate retaliation claims when a prima facie case is made. To establish a prima facie case of retaliation, the employee must show that (1) the employee engaged in protected activity, (2) the employer knew of the activity, (3) the employee suffered an adverse personnel action, and (4) the circumstances are sufficient to raise an inference that the protected activity was a contributing factor to the adverse action. If such a case is made, the burden shifts to the employer who must prove by clear and convincing evidence that the same action would have occurred regardless of the protected activity. 29 C.F.R. § 1980.104. The remedies for prohibited retaliation include (1) reinstatement, (2) back pay, (3) interest, (4) compensatory damages, and (5) special damages including attorney’s fees and costs, expert witness fees, and all other relief necessary to make the employee whole. 18 U.S.C. § 1514.

On September 30, 2013, OSHA awarded more than $1.9 million to a former CFO based on its finding that the company violated Section 806 of the Sarbanes-Oxley Act (“SOX”) by discharging a CFO in retaliation for his warning the board of directors about financial concerns raised by a proposed merger. In what appears to be an alarming trend, OSHA issued another hefty award on November 13, 2013, in a matter arising under the whistleblower protection provision in a similar whistleblower law, the Surface Transportation Assistance Act. In that case, OSHA ordered a company to pay a total of $1,070,123 to four whistleblowers to aid in the government’s ability to investigate retaliation claims when a prima facie case is made. See Steven Pearlman & Harrison Mufson, Top 10 Whistleblower and Retaliation Developments of 2013, LAW360, available at http://www.law360.com/articles/497425/top-10-whistleblower-and-retaliation-developments-of-2013.

With these recent developments, employers should especially be aware of whistleblowers, the expanded availability of protected activity, and the protections afforded to them. The sizeable impact and
Crying Wolf? – Dealing with the Whistleblower

effect of anti-retaliation whistleblowers laws is apparent.

III. Whistleblower Protections and Incentives under Federal Law

Three major types of incentives and protections afforded to whistleblowers are qui tam suits, bounties, and anti-retaliation laws. This section will provide individual attention to some of the more prominent whistleblower statutes and legislation, in addition to offering insight on recent legal developments pertaining to those laws and areas.

A. The False Claims Act

Regarded as the grandfather of federal whistleblower statutes, the FCA was enacted by Congress in the wake of widespread fraud on government contracts during the Civil War. The purpose of the FCA was to prohibit persons from submitting false claims for payment on such contracts. The FCA has proven to be the Government’s most powerful and effective fraud-fighting tool. It has been hugely successful, recovering over $25 billion for the Government since 1986 (when major amendments were made to the Act). See Dan Hargrove, Update on Whistleblowers in the Age of Stimulus, 21st Annual Advanced Employment Law Course Chapter 11, at 2 (2013). Some of the recoveries have been astronomical. On September 2, 2009, the Department of Justice announced that Pfizer agreed to settle a qui tam case for $2.3 billion, from which six whistleblowers were awarded payments of more than $102 million. Id. In October 2010, GlaxoSmithKline settled with the Department of Justice for $750 million in a qui tam case, from which the whistleblower will receive $96 million. Id.

1. Qui Tam Suits under the FCA

Notably, the FCA was amended in 1986 to authorize qui tam lawsuits by individual citizens, where an individual called a relator sues a party for damages and penalties caused by alleged fraud in connection with a government contract. À qui tam suit is essentially when the government teams up with a non-government plaintiff to jointly prosecute the same entity or individual. Any damages obtained are divided between the government and the plaintiff. Generally in a qui tam suit, the government will step in because the defendant did something illegal in addition to causing injury to the plaintiff.

Qui tam damages can be substantial. The FCA has been so successful that it has encouraged Congress to place additional reliance on whistleblowers to ensure compliance with other laws. A number of statutes have recently been enacted to allow the government to pay a “bounty” to a whistleblower. For example, under the FCA, a successful qui tam relator is entitled to a bounty equal to 15% to 30% of the ultimate recovery. 31 U.S.C. § 3730(d)(2); see Maher, Whistleblower Update, at 3. Depending on the company and the fraud, the awarded amount could be tantamount to winning the lottery, although the process is admittedly much more arduous than buying a ticket. See Monte Hurst & Virginia Simms, Protected Whistleblower or Ungrateful Whiner: What’s the Law, How to Manage?, CORPORATE COUNSEL REVIEW, vol. XXXII, no. 2, at 66 (2013). In December 2013, the United States Department of Justice reported that FCA whistleblowers provided the government with tips leading to $3.8 billion in settlements and judgments in fiscal year 2013 alone. U.S. DEP’T OF JUSTICE, Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013, http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html (last visited May 12, 2014); see generally Debra S. Katz & David J. Marshall, Whistleblower Litigation, SV037 ALI-ABA 1407, 1480 (2014).

The FCA provides that those who knowingly submit, or cause another person or entity to submit, false claims for payment of government funds can be held liable for the government’s damages plus civil penalties. The qui tam provisions allow persons with evidence of fraud against government contracts and programs to sue on behalf of and in the name of the government in order to recover for the government, a portion of which recovery may be awarded to the whistleblower. There is no limitation on the type of person or entity that may be liable under the FCA; individuals, business entities and nonprofit entities that make false claims for government funds are all potential targets for liability. See generally Jan Soifer, Qui Tam and Whistleblower Litigation and Protections From Retaliation, 34th Annual Advanced Civil Trial Course Chapter 21, at 2 (2011).

The government has the right to intervene in qui tam cases. If the government intervenes, it serves as the lead plaintiff; the relator remains a party plaintiff. If the government declines to intervene, the relator may litigate the case on behalf of the government, but the government remains the real party in interest. If the claim is successful, the government is entitled to recover treble actual damages plus civil penalties of $5,500 to $11,000 for each false claim, of which the relator is entitled to a share paid from the government’s recovery. See 31 U.S.C. §§ 3729, et. seq. The relator’s share of the recovery is greater if the
Crying Wolf? -- Dealing with the Whistleblower

government elects not to intervene. See id.; Soifer, Qui Tam and Whistleblower Litigation, at 2.

2. Anti-retaliation Provisions under the FCA

With the potential for employers to suffer significant financial consequences as the result of an employee whistleblower claim, it might seem tempting for them to adopt policies that dissuade or threaten their employees to keep quiet by holding their jobs hostage. The FCA accounts for this possibility and guards it against it by specifically prohibiting employers from retaliating against individuals for lawful acts taken in furtherance of efforts to stop FCA violations. 31 U.S.C. § 3730(h)(1). Illegal retaliation is not limited to termination; it may include demotion, suspension, threats, harassment, or a negative impact on any term or condition of employment. Id.

The FCA prohibits retaliation against an employee for actions taken in furtherance of stopping FCA violations, and it authorizes the action to be brought directly in federal district court. 31 U.S.C. § 3730(h). Remedies for retaliation under the FCA include reinstatement, two times the amount of back pay, interest, special damages, attorney’s fees, and costs. 31 U.S.C. § 3730(h)(2).

As a practical suggestion, employers can and should encourage their employees to self-report anonymously to avoid this result. One method to accomplish this would be for employers to implement a monitored hot line, run by a third party. Any claims reported to that hot line should then be investigated by legal and compliance teams. If an investigation yields a favorable result, that militates against the employer knowingly having engaged in alleged prohibited conduct.

B. The Dodd–Frank Wall Street Reform and Consumer Protection Act

Signed into law on July 21, 2010, Dodd-Frank goes a step further, financially incentivizing employees to come directly to the Securities and Exchange Commission (“SEC”) with information regarding shareholder fraud.

Dodd-Frank is massive in scope and significantly changes the law as it relates to rewarding and protecting whistleblowers. It strengthens existing whistleblower protections and attempts to close “loopholes” for employees in the financial services industry. Of significance is the creation of bounty programs, new anti-reprisal causes of action that can be filed against employers that retaliate against employers, and a new administrative process for the adjudication of some of those bounty and reprisal claims. The bounty provisions are not specifically qui tam actions, but do allow the Government to pay an award to an informer who presents information that leads to a financial recovery by the Government. See generally Hargrove, Whistleblowers in the Age of Stimulus, at 5.

Dodd-Frank whistleblower programs intend to shed light on company violations by providing incentives for employees to report those violations. Significantly, these programs do not require most employees to first use or to exhaust internal compliance reporting processes to receive a bounty award or protection from reprisal.

1. Securities and Exchange Commission Whistleblower Incentive Program


Section 922 of Dodd-Frank establishes these incentives for whistleblowers to report fraud to the SEC, somewhat similar to the qui tam provisions under the FCA. Section 922 provides that whistleblowers who voluntarily provide “original information” to the SEC relating to the violation of securities laws may receive 10% to 30% of an obtained recovery, if the information ultimately results in the imposition of more than $1 million in monetary sanctions in an administrative or judicial enforcement action. A whistleblower may file a claim anonymously only if represented by counsel. Before an award is made, however, counsel will be required to disclose the identity and other requested information sought by the SEC. Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1843 (codified at 15 U.S.C. § 78u-6(d)(2)).
A “whistleblower” who voluntarily provides original information may file an SEC bounty claim. See 15 U.S.C. § 78u-6(a)(6) (stating “whistleblower” means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to [the] Commission, in a manner established by rule or regulation by the Commission.”); see also 17 C.F.R. §240.21F-2(a) (stating “[a] company or another entity is not eligible to be a whistleblower.”). A whistleblower must “voluntarily” submit original information. 17 C.F.R. §240.21F-4(a) provides that the whistleblower must submit information before a request for information to the whistleblower (or whistleblower’s representative) is made by the SEC, Congress or other authorized authority. Likewise, a whistleblower who has a legal duty to report original information to the SEC, Congress, or other authorized authority does not “voluntarily” submit original information. Id. at §240.21F-4(a)(3). The definition of “original information” is important because it weeds out whistleblowers who do not base their bounty claim on first-hand or original source information. See Hargrove, Whistleblowers in the Age of Stimulus, at 6.

To be eligible for an award, the whistleblower’s “original information” concerning a violation of securities laws must be (i) derived from the whistleblower’s independent knowledge or analysis; (ii) not known to the SEC from another source; and (iii) not exclusively derived from an allegation made in an administrative or judicial proceeding, government report, hearing audit or investigation, or from news media, unless the whistleblower was the source of that information. 15 U.S.C. § 78u-6(a)(3). This definition includes information derived from the whistleblower’s independent analysis — meaning that awards may be permitted to whistleblowers who provide an analysis of misconduct, rather than requiring them to provide evidence of the misconduct itself.

A whistleblower can file a claim pro se or with counsel; however, a whistleblower may file a bounty claim anonymously only if represented by counsel. 17 C.F.R. § 240.21F-7(b)(1). Before an award is paid, the whistleblower’s identity shall be revealed to the SEC and the SEC shall be provided any requested information about the whistleblower. Id. at §240.21F-79(b)(3). Failure to do so authorizes the SEC to not pay the claim. As a practical matter and in order to be successful, most whistleblowers will want to reveal their identity in order to work hand-in-hand with the SEC. See Hargrove, Whistleblowers in the Age of Stimulus, at 7.

The bounty amount to be awarded is at the discretion of the SEC and should not be influenced by the balance in the Investor Protection Fund. However, the SEC is required to consider the following four factors that would increase the amount to be awarded to an SEC whistleblower:

1) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;
2) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action;
3) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and
4) such additional relevant factors as the Commission may establish by rule or regulation.

Hargrove, Whistleblowers in the Age of Stimulus, at 8. Additionally, 17 C.F.R. §240.21F-6 adds relevant factors to the consideration of award amount. Section 240.21F-6(a) restates and further explains the criteria in the statute but also adds “participation by whistleblower in internal compliance systems” to the list. A whistleblower award may be reduced, on the other hand, if the following factors are indicated:

1) Culpability of the whistleblower;
2) Unreasonable reporting delay by the whistleblower; and
3) Interference with internal compliance and reporting systems by the whistleblower.

17 C.F.R. §240.21F-6(b)(1)-(3).

While not explicitly stated in Dodd-Frank or its implementing regulations, the SEC is very much interested in deterring future violations. Small recoveries paid by offenders may not sufficiently deter future wrongdoing. If offenders merely get a “slap on the wrist”, then they may not be deterred from committing future bad acts.

So long as “original information” is voluntarily provided, any natural person may file an SEC bounty claim. However, Congress restricts the SEC from
paying an award to certain people. 15 U.S.C. § 78u-6(c)(2). The SEC is not authorized to pay a claim to any whistleblower who:

(A) is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a self-regulatory organization;

(iv) the Public Company Accounting Oversight Board;

(v) a law enforcement organization;

(B) is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award;

(C) gains the information through the performance of an audit of financial statements required under the securities laws and for whom such submission would be contrary to the requirements of section 10A of the Securities Exchange Act of 1934 (15 U.S.C. 78j–78j-3);

(D) fails to submit information to the Commission in such form as the Commission requires.

Id. The SEC is also precluded from paying an award to a whistleblower who “knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or . . . uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.” 15 U.S.C. § 78u-6(i).

2. The Commodity Futures Trading Commission Whistleblower Bounty Program

Dodd-Frank also creates a bounty program for whistleblower reports to the Commodity Futures Trading Commission ("CFTC"), which regulates commodity futures and option markets, which include agricultural products to a much broader bundle of commodities, including energy, metals, and financial industries. Hargrove, Whistleblowers in the Age of Stimulus, at 10. Similar to the SEC bounty program, the CFTC bounty program provides for an individual to share in a 10% to 30% share of the recovery ultimately obtained in a qui tam action brought by the whistleblower. Pub. L. No. 111-203, § 748, 125 Stat. 1476, 1740-41 (codified at 7 U.S.C. § 26(b)). A key difference between the SEC and CFTC bounty programs is that, under the CFTC’s Final Rules, information will not be considered “voluntarily provided” if the Commissions or other select authorities have first made a request or demand of the whistleblower, or if the individual falls within the scope of a Commission’s request or demand made of the individual’s employer. 17 C.F.R. § 165.2(o)(1). The SEC does not maintain a similar provision in its Final Rules. See 76 Fed. Reg. at 34,309 (“[W]e have decided not to adopt a rule that would treat a request to an employer as directed as well to all employees whose documents or information fall within the scope of the request.”). This can make it more difficult for a whistleblower to benefit from the bounty program when reporting misconduct to the CFTC.

a. Who May File a CFTC Bounty Claim

A “whistleblower”, who voluntarily provides “original information,” may file a bounty claim. See Dodd-Frank at § 748, amending § 26(a)(7) of the Commodity Exchange Act (defining ‘Whistleblower.—The term ‘whistleblower’ means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of this Act to the Commission, in a manner established by rule or regulation by the Commission.”). The limitation of the “original information” standard is important, and the term is defined by the Commodity Exchange Act at Section 26(a)(4) as information that:

(A) is derived from the independent knowledge or analysis of a whistleblower;

(B) is not known to the CFTC from any other source, unless the whistleblower is the original source of the information; and

(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

See Hargrove, Whistleblowers in the Age of Stimulus, at 11-12. 17 C.F.R.§165.2(o)(1) provides that original information is voluntary if made prior to any request from the CFTC, Congress or any other authorized authority. Likewise, information cannot be voluntary if the whistleblower is under a pre-existing legal or contractual duty to report the violations that
are the subject of whistleblower’s information. *Id.* at §165.2(o)(2).

As with the SEC whistleblower incentive program, a whistleblower can file a claim pro se or with counsel. 7 U.S.C. § 26(d)(1). Further, the Act permits a whistleblower to file a bounty claim anonymously, but only if represented by counsel. 7 U.S.C. § 26(d)(2)(A). Before an award is paid, however, the whistleblower’s identity and any other requested information shall be revealed to the CFTC. 7 U.S.C. § 26(d)(2)(B).

b. Who Must Not be Paid a CFTC Bounty Award

Although anyone can file a bounty claim, Congress restricts the CFTC from paying an award to certain people. *See* 7 U.S.C. § 26(c)(2). No award under subsection (b) shall be made to any whistleblower who:

(A) is, or was at the time the whistleblower acquired the original information submitted to the CFTC, a member, officer, or employee of—

(i) an appropriate regulatory agency;

(ii) the Department of Justice;

(iii) a registered entity;

(iv) a registered futures association;

(v) a self-regulatory organization as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)); or

(vi) a law enforcement organization;

(B) is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section;

(C) submits information to the CFTC that is based on the facts underlying the covered action submitted previously by another whistleblower; or

(D) fails to submit information to the CFTC in such manner deemed appropriate or required by the CFTC.


Similar to the SEC rules, the CFTC rules clarify that the Commodity Whistleblower Incentives and Protections Program does “not provide individuals who provide information to the Commission with immunity from prosecution.” 17 C.F.R. § 165.16. Thus, a whistleblower who provides false information to the CFTC may expose himself to criminal prosecution. 7 U.S.C. § 26(m). Nevertheless, whistleblowers who engage in culpable conduct are not restricted from obtaining an award. *See* Hargrove, *Whistleblowers in the Age of Stimulus*, at 12.

c. The CFTC Claim Procedures and Administrative Process

To submit original information to the CFTC, a whistleblower must complete a “Form TCR” and submit it online, or by fax or mail. 17 C.F.R. § 165.3(a)(1)-(2). Once there is a (final) judicial or administrative action resulting in sanctions more than $1,000,000 the CFTC publishes a “Notice of Covered Action” on its website. 17 C.F.R. § 165.7(a).

The CFTC clarifies that it “will not contact claimants directly”; thus, claimants must monitor the CFTC’s website to see if they are eligible for an award. *Id.* To claim an award the whistleblower must file Form WB-APP with the CFTC within 90 days. *Id.*

In the process of evaluating whistleblower claims and bounty amounts, the CFTC may ask for additional information from the whistleblower. Following its evaluation, the Commission sends a Final Order to the whistleblower setting forth whether claim is allowed and the award percentage. This Final Order is judicially appealable. 17 C.F.R. § 165.7(d).

The CFTC has the sole discretion to determine “whether, to whom, or in what amount to make awards.” 7 U.S.C. § 26(f)(1). But the whistleblower may appeal that decision “to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Commission.” *Id.* at § 26(f)(2). The right to appeal is in direct contrast with the SEC Whistleblower program, which does not permit whistleblower appeals as to amounts. *See* 15 U.S.C. § 78u-6(f); Hargrove, *Whistleblowers in the Age of Stimulus*, at 13.

3. Anti-retaliation Under Dodd-Frank

Dodd-Frank also creates new anti-retaliation provisions for individuals who provide assistance or information to the SEC and the CFTC. These provisions prohibit harassment and any other act of reprisal. They have no administrative pre-suit filing
requirement and invalidate mandatory arbitration agreements relating to Dodd-Frank claims. Further, Dodd-Frank makes clear that its anti-retaliation provisions do not require the complaining party to actually prevail on an underlying bounty claim. The remedies for retaliation under Dodd-Frank include reinstatement, back pay with interest, and compensation for any special damages resulting from the retaliation, including litigation cost, expert fees, and attorney’s fees. See 15 U.S.C. § 78u-6(h).

Whistleblower and retaliation lawsuits have become more commonplace in recent months, as the SEC has continued following through on a growing number of whistleblower tips. Following an outcry over the SEC’s failure to follow up on whistleblower tips that could have exposed Bernard L. Madoff’s mammoth $65 billion Ponzi scheme, Dodd-Frank called for the SEC to establish the Office of the Whistleblower to take in, evaluate and, if worthy, pursue such complaints. Whistleblower and plaintiff law firms have started aggressive campaigns to get more tipsters from within financial companies and banks to provide evidence of wrongdoing to the SEC’s Office of the Whistleblower. See Evan Weinberger, Banks Face Increased Whistleblower Risk in 2014, LAW360, at http://www.law360.com/articles/503101/banks-face-increased-whistleblower-risk-in-2014. Those campaigns include cold-calling employees at large financial firms, including banks, broker-dealers and other companies engaged in high-risk activities. Id. Thus, to protect themselves from whistleblower and retaliation claims, it has become more important now than ever for banks and other companies to have appropriate internal mechanisms for employees to report what they feel is improper conduct, and to take each internal complaint seriously.

4. Reprisal Cause of Action for SEC Whistleblowers

Congress has also created an anti-reprisal cause of action to protect whistleblowers who provide information to or assist the SEC in an investigation or judicial or administrative action that is based upon the whistleblower’s bounty claim and other protected disclosures (e.g., reports of violations of law that the SEC enforces). See 15 U.S.C. § 78u-6(h)(1). The coverage of the action is broad. This provision applies to all employers, prohibits “harassment” and other acts of reprisal, permits a non-Governmental employee to file in U.S. District Court, requires no administrative pre-suit filing, and voids arbitration agreements. Id.; see Hargrove, Whistleblowers in the Age of Stimulus, at 9.

The anti-reprisal protections apply to whistleblowers whether or not they qualify for an award. 17 C.F.R. § 240.21F-2(b)(ii). However, a whistleblower must have a “reasonable belief” that the information he or she provides relates to a possible securities violation to qualify for anti-reprisal protections. 17 C.F.R. § 240.21F-2(b)(i). The SEC included this “reasonable belief” standard to alleviate concerns that employees could submit bad faith or frivolous claims merely to obtain protection from termination. Employers may not require employees to waive or limit their anti-retaliation rights under Section 21F of Dodd-Frank. See Hargrove, Whistleblowers in the Age of Stimulus, at 9.


The statute of limitations for whistleblowers who allege reprisal is long. A whistleblower may bring the action up to six years after the violation of the law, or three years after the date when “facts material to the right of action are known or reasonably should have been known” by the whistleblower. However, no action may be brought more than ten years after the date of the violation. Id. at §21F(h)(1)(B)(iii)(II). The recoverable remedies include reinstatement with seniority, back pay with interest, and compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney fees. 15 U.S.C. § 78u-6(h)(1)(C); see generally Hargrove, Whistleblowers in the Age of Stimulus, at 10.

C. The Sarbanes-Oxley Act of 2002

Just over a decade ago, Congress passed SOX in response to the breakdown in internal corporate controls demonstrated most dramatically in the Enron prosecution. Perhaps most dramatically, SOX created a criminal penalty of up to 10 years for illegal retaliation under the statute. 18 U.S.C. § 1513. SOX covers not only publicly traded companies and subsidiaries of publicly traded companies, but also “any officer, employee, contractor, subcontractor or agent” of a covered company. 18 U.S.C. § 1514A(a).
Thus, private companies that are not publicly traded, as well as other entities or individuals, that serve as “agents” or “contractors” of the publicly traded employer or its subsidiaries, may be subject to the whistleblower provisions.

Although SOX contains no qui tam provisions, it includes two significant anti-retaliation provisions. The first concerns Securities Act violation reports under Section 806 of SOX. Section 806 protects employees of publicly traded companies from retaliation for reporting reasonably suspected violations of certain federal laws and regulations. These include alleged violations of (1) the Federal Securities Act and related laws contained in 18 U.S.C. §§ 1341, 1343, 1344, or 1348 (securities fraud, mail fraud, bank fraud, wire, radio, or television fraud); (2) SEC rules and regulations; or (3) any other federal law against shareholder fraud. Section 806 protects the filing of reports, testimony, participation, or assistance given to (1) a federal law enforcement or regulatory agency, (2) members of Congress, or (3) a person with supervisory authority over the employee. Pub. L. No. 107-204, § 806, 116 Stat. 745, 802-04 (codified at 18 U.S.C. § 1514A). Section 929A of Dodd-Frank amended SOX’s anti-retaliation provisions by expanding their coverage to include privately-held subsidiaries of public companies and employees of recognized statistical ratings organizations. 18 U.S.C. 1514A. Additionally, a recent Supreme Court case expanded the scope of the protection afforded under Section 806 in a significant way, holding that SOX additionally protects the employees of the private contractors of publicly traded companies. See Lawson v. FMR LLC, 571 U.S. --- (Mar. 4, 2014).

The second major anti-retaliation provision under SOX concerns law enforcement reports under Section 1107 of SOX. Section 1107 protects employees from retaliation for making truthful reports to law enforcement officers of suspect violations of federal law. It applies to both public and private companies and is not limited to fraud/securities act violations. See Pub. L. No. 107-204, § 1107, 116 Stat. 745, 810 (codified at 18 U.S.C. § 1530).

SOX is just one of the many statutes whose whistleblower and anti-retaliation provisions are enforced by OSHA. Covered employers can reduce their exposure to liability for such claims by enacting strong, internal anti-retaliation policies and taking whistleblower complaints very seriously, treating them with the utmost importance.

D. The Patient Protection and Affordable Care Act of 2009

The Patient Protection and Affordable Care Act of 2009 (“PPACA”), more colloquially known as “Obamacare,” is a massive piece of legislation. See Pub. L. No. 111-148, 124 Stat. 119 (Mar. 21, 2010). In enacting the PPACA, Congress continued its recent trend of relying upon whistleblowers to enforce compliance of the laws it passes. Section 1558, by amending the Fair Labor Standards Act of 1938, creates a robust whistleblower cause of action that protects employees against reprisal by employers. Section 6703 is interesting in that it makes whistle blowing mandatory for employees to report crimes committed against residents of federally funded long-term care facilities. Unlike Dodd-Frank or the IRS Whistleblower Program, however, Congress did not create a new bounty program for whistleblowers in the health care arena—more than likely because the qui tam provisions of the FCA have proven to be extremely effective in combating health care fraud. Hargrove, Whistleblowers in the Age of Stimulus, at 16.

1. Introduction to Section 1558 - Scope of Coverage and Protections for Whistleblowers

Section 1558 prohibits an employer from retaliating against an employee who reports violations of Title I of the PPACA, which is expansive in coverage and ranges from denial of health care insurance due to pre-existing conditions to failure to rebate excess premiums. Id. An employer may not “discharge or in any manner discriminate against any employee with respect to his or her compensation, terms, conditions, or other privileges of employment because the employee . . . [makes a protected report].” 29 USC § 218c(a)(2). Protected reports include internal reports to an employer, the Federal Government, or a state attorney general about “any violation of, or any act or omission the employee reasonably believes to be a violation of [Title I of the Act].” Id.

In addition to these internal and external reports, the Act protects an employee who “testified or is about to testify in a proceeding” related to violations of Title I of the PPACA. 29 USC § 218c(a)(3). The PPACA also protects an employee who participates or assists another in a proceeding related to violations of Title I. 29 USC § 218c (a)(4). Finally, the PPACA protects an employee who objects or refuses to participate in “any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of [the PPACA] or any order, rule, regulation, standard, or ban under [the PPACA].” 29 USC § 218c(a)(5). As it relates to this last protected activity, an employee need only show that he had a
reasonable belief, even if mistaken, that a violation of Title I of the PPACA and its subsequent regulations and policies occurred.

2. Procedure, Limitations, and Remedies

Section 1558 simply incorporates the procedures, burden-shifting framework, remedies and statute of limitations set forth in the Consumer Product Safety Improvement Act of 2008. See Pub. L. No. 110-314 (Aug. 14, 2008), codified at 15 U.S.C. §2087(b). An employee must first exhaust his administrative remedies by filing a complaint with OSHA within 180 days of the employee becoming aware of the employer’s act of reprisal. Id.; see Hargrove, Whistleblowers in the Age of Stimulus, at 16. OSHA is required to investigate the complaint and has authority to order preliminary relief, including reinstatement. Either party can appeal OSHA’s determination to the Department of Labor for a de novo review by a Department of Labor administrative law judge. A Department of Labor judge does not have the authority, however, to stay an OSHA order of reinstatement. Either side can appeal the Department of Labor judge’s decision to the Department of Labor Administrative Review Board, and either party can appeal that decision to the circuit court of appeals in which the adverse action took place. In the alternative, if the Department of Labor fails to issue a final decision within 120 days of the filing of the employee’s complaint, or within 90 days of receiving a written determination from OSHA, the employee can remove the claim to U.S. district court for a de novo review, and either party can request trial by jury. 15 U.S.C. § 2087(b)(4).

An employer can be ordered to reinstate the employee and possibly be required to pay back pay with interest, “special damages,” attorney fees, litigation costs, and expert witness fees. Advance pay can be awarded where reinstatement is not feasible. PPACA at §1558, incorporating 15 U.S.C. §2087(b)(4).

E. Whistleblower Protection Enhancement Act of 2012

In November 2012, the President signed into law the Whistleblower Protection Enhancement Act of 2012 (“WPEA”), which removes judicially-created loopholes that had previously narrowed the scope of protected whistleblowing under the Whistleblower Protection Act and enhances the remedies available to whistleblowers who have suffered retaliation. See Samuel Rubenfeld, Obama Signs Whistleblower Protection Bill into Law, WALL STREET JOURNAL, Nov. 27, 2012, available at http://blogs.wsj.com/corruption-currents/2012/11/27/obama-signs-whistleblower-protection-bill-into-law/. Buoyed by overwhelming bipartisan support, WPEA “amends whistleblower protections for Federal employees by: clarifying the scope of protected disclosures; tightening requirements for non-disclosure agreements; expanding the penalties imposed for violating whistleblower protections; and establishing a Whistleblower Protection Ombudsman in certain agencies.” See Hargrove, Whistleblowers in the Age of Stimulus, at 2-3.

According to the Government Accountability Project, a proponent behind the enacting of the bill and passage of the law, WPEA expands protection for disclosures of government wrongdoing and does the following:

- Closes judicially-created loopholes that had removed protection for the most common whistleblowing scenarios and left only token rights (e.g. only providing rights when whistleblowers are the first to report misconduct, and only if it is unconnected to their job duties). (Sec. 101, 102)
- Clarifies that whistleblowers are protected for challenging the consequences of government policy decisions. (Sec. 101, 102)
- Cancels the 1999 precedent that translates "reasonable belief" to require irrefragable proof ("undeniable, uncontestable, or incontrovertible proof") before they are eligible for protection. (Sec. 103)
- Protects government scientists who challenge censorship. (Sec. 110)
- Codifies and provides a remedy for the “Anti-Gag” Statute – a rider in the Appropriations bill for the past 24 years – that requires a statement notifying employees that agency restrictions on disclosures are superseded by statutory rights to communicate with Congress, whistleblower rights, and other statutory rights and obligations. (Sec. 104(a), (b) and 115)
- Clarifies that protection of critical infrastructure information does not override WPA protection. (Sec. 111)

Crying Wolf? -- Dealing with the Whistleblower

- Suspending the Federal Circuit Court of Appeals’ sole jurisdiction on appellate review of the WPA in light of its consistent track record of narrowing the law's protections. (The Court has a 3-226 record from October 1994 – May 2012 against whistleblowers for decisions on the merits), restoring all-Circuit review for a two-year experiment as mandated in the original 1978 Civil Service Reform Act and the Administrative Procedures Act. (Sec. 108)

- Establishing explicit whistleblower protections for Transportation Security Administration employees. (Sec. 109)

- Overturning an unusual Merit Systems Protection Board practice that allows agencies in some cases to present their defense first and allows the Merit Systems Protection Board to rule on the case prior to the whistleblowers’ presenting their evidence of retaliation. (Sec. 114)

- Requiring that the President’s exercise of his discretionary power to impose national security exemptions that deprive employees of Title 5 whistleblower rights must be done prior to the challenged personnel action. (Sec. 105)

- Providing compensatory damages for prevailing whistleblowers under WPA cases that prevail after an administrative hearing, (Sec. 107(b)), including retaliatory investigations (Sec. 104(c)).

See id.


The American Recovery and Reinvestment Act (“ARRA”) is a unique piece of legislation for many reasons. See Hargrove, Whistleblowers in the Age of Stimulus, at 17; Pub. L. 111-5, 123 Stat. 115 (Feb. 17, 2009). In addition to the hundreds of billions of dollars in appropriations, Congress also created perhaps the most robust whistleblower protections ever. Section 1553 of the ARRA, called the “McCaskill Amendment,” covers all persons or entities (including state and local governments) that receive funds under the ARRA, protects employee internal disclosures, has a burden-shifting mechanism favorable for employees, and allows for significant remedies that can be prosecuted in federal court. But the McCaskill Amendment has a limited shelf life because the ARRA was a one-time appropriation. It should be noted that the ARRA has no qui tam or bounty provision; such an incentive was unnecessary because the qui tam provisions of the FCA filled that niche as it might relate to funds under the ARRA See Hargrove, Whistleblowers in the Age of Stimulus, at 17.

1. Who is Covered and What is Protected

The McCaskill Amendment applies to any non-federal employer who receives funds under the ARRA. See ARRA § 1553(g)(4), Pub. L. 111-5, 123 Stat. at 302. Covered employers include contractors, subcontractors, grantees, state and local governments, and basically all other non-Federal employers who receive a contract, grant, or other payment appropriated or made available by the Recovery Act. A covered employee is “an individual performing services on behalf of the employer” but does not include any federal employee or military service member. Id.

Protected conduct includes a disclosure to a person with supervisory authority over the employee (i.e., internal disclosures), a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a federal agency, or an inspector general about information that the employee reasonably believes evidences:

- Gross mismanagement of an agency contract or grant relating to stimulus funds;
- A gross waste of stimulus funds;
- A substantial and specific danger to public health or safety related to the implementation or use of stimulus funds;
- An abuse of authority related to the implementation or use of stimulus funds; or
- A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

ARRA § 1553(a), Pub. L. 111-5, 123 Stat. at 297. The McCaskill Amendment specifically protects so-called “duty speech” whistleblowing such as disclosures made by employees in the ordinary course of performing their job duties. Hargrove, Whistleblowers in the Age of Stimulus, at 18.

2. The Administrative and Judicial Process

The employee who believes he has been improperly retaliated against must file a complaint with the inspector general for the agency that is administering the stimulus funds. ARRA at § 1553(b)(1), Pub. L. 111-5, 123 Stat. at 297. For example, if the Department of Transportation is
administrating the funds, then the employee would file his complaint with that Department’s inspector general. Unless the inspector general determines the action is frivolous, does not relate to covered funds, or has been resolved in another Federal or State administrative proceeding, the inspector general must conduct an investigation and make a determination on the merits of the whistleblower retaliation claim no later than 180 days after receipt of the complaint. ARRA at § 1553(b)(1)-(2), Pub. L 111-5, 123 Stat. at 297. Within 30 days of receiving an inspector general’s investigative findings, the head of the appropriate agency shall determine whether there has been a violation, in which event the agency head can award the employee certain remedies. See generally Hargrove, *Whistleblowers in the Age of Stimulus*, at 18.

If an agency head has denied relief in whole or in part or has failed to issue a decision within 210 days of the filing of a complaint, the employee can bring a de novo action in federal court, which shall be tried by a jury at the request of either party. ARRA at § 1553(c)(3), Pub. L 111-5, 123 Stat. at 300.

To prevail in a whistleblower action under the McCaskill Amendment, an employee need not show that the protected conduct was a significant or motivating factor in the reprisal, but instead must merely prove that the protected conduct was a “contributing factor” to the reprisal. ARRA at § 1553(c)(1), Pub. L 111-5, 123 Stat. at 299. An employee need not present direct evidence of retaliatory motive by the employer, but instead can establish the “contributing factor” element through temporal proximity or by demonstrating that the decision maker knew of the protected disclosure. ARRA at § 1553(c)(1)(A)(i)-(ii), Pub. L 111-5, 123 Stat. at 299. An employer can avoid liability by demonstrating the high evidentiary burden of “clear and convincing evidence,” that the same action would have been taken in the absence of the employee engaging in protected conduct.

3. Remedies

At the administrative level, the agency head has authority to order the employer to make the employee whole. Such an order can include: (1) reinstatement; (2) back pay; (3) compensatory damages; and (4) attorney fees and litigation costs. ARRA at § 1553(c)(2), Pub. L 111-5, 123 Stat. at 300. If the employee’s action is prosecuted in federal court, then he can be awarded the same remedies. ARRA at § 1553(c)(3), Pub. L 111-5, 123 Stat. at 300. Where an agency files an action in federal court to enforce an order of relief for a prevailing employee, the court may also award exemplary or punitive damages. ARRA at § 1553(c)(4), Pub. L 111-5, 123 Stat. at 300.


1. Who is Covered

The CPSC regulates about 15,000 types of consumer products used in the home, schools and recreation. See generally Hargrove, *Whistleblowers in the Age of Stimulus*, at 19. The CPSCA covers employees of consumer product manufacturers, importers, private labelers (owners of a brand or trademark on the private label of a consumer product), distributors, and retailers. 15 U.S.C. § 2087(a). A “consumer product,” as defined under the CPSCA, generally means any article, or component part thereof, produced or distributed: (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. 15 U.S.C. § 2052(5).

2. What is Protected

An employer may not discharge or in any other manner retaliate against an employee who provided, caused to be provided or was about to provide or cause to be provided to the employer, the federal government, or the attorney general of a state information relating to any violation of, or any act or omission that the employee reasonably believed to be a violation of, the CPSCA or any other Act enforced by the CPSC, or any order, rule, regulation, standard or ban under any such Acts. 15 U.S.C. § 2087(a)(1).

In addition, an employer may not discharge or in any manner retaliate against an employee for
testifying, participating, or assisting in a proceeding under the laws, orders, rules, regulations, standards or bans enforced by the CPSC. Also, an employer may not discharge or in any manner retaliate against an employee who objected to or refused to participate in, any activity, policy, practice, or assigned task that he reasonably believed to be in violation of any provision of the CPSCA or any other Act enforced by the CPSC, or any order, rule, regulation, standard or ban under any such Acts. 15 U.S.C. §2087(a)(2-4).

H. IRS Whistleblower Protection Reward Program

The Tax Relief and Health Care Act of 2006 (“TRHCA”), signed into law on December 20, 2006, amended the Internal Revenue Code to provide rewards for turning in tax cheats. 26 U.S.C. § 7623. According to the IRS, the “primary purpose behind the TRHCA was to provide incentives for people with knowledge of significant tax noncompliance to provide that information to the IRS.” Hargrove, Whistleblowers in the Age of Stimulus, at 22 (quoting IRS Whistleblower Office, Annual Report to Congress on the Use of Section 7623 (2009)). The new program generally requires the IRS to pay rewards to whistleblowers if the information presented substantially contributes to the collection of money by the IRS. The law created the IRS Whistleblower Office to receive, evaluate, and to determine whether to pay the whistleblower an award. It is interesting to note that the IRS has possessed the authority to pay awards to tax whistleblowers for almost a century and a half. What is now Section 7623(a) of Title 26 had its origins in an 1867 law. See generally Hargrove, Whistleblowers in the Age of Stimulus, at 22. The original law allowed the Treasury Secretary “to pay such sums as he deems necessary for detecting and bringing to trial and punishment [a] person guilty of violating the internal revenue laws or conniving at the same.” When the law was enacted, such awards were discretionary; now such rewards are required to be paid. Id.

The IRS has funded a robust IRS Whistleblower Program. The new program focuses on cases that involve over $2 million of taxes, penalties, and interest. If the case involves an individual taxpayer, he or she must have $200,000+ of taxable income in any year at issue in the claim. The reward is from fifteen to thirty percent of the amount collected. Informants have the right to petition the Tax Court within 30 days of receiving the IRS’s reward determination. Unlike the FCA, however, the whistleblower is not authorized to prosecute a claim in court if the federal government chooses to not do so. See id.

1. Filing an IRS Informant Reward Claim

A whistleblower, with or without counsel, must submit his claim on an IRS Form 211. The IRS then makes a determination whether the claim meets the criteria of a Section 7623(b) whistleblower claim or, if not, if the claim meets the criteria of a Section 7623(a) detection of underpayment or fraud claim. 7623(a) claims are sent to Ogden, Utah, for determination. I.R.C. 7623(b) claims are determined at the IRS Whistleblower Office in Washington, D.C. See generally Hargrove, Whistleblowers in the Age of Stimulus, at 23.

a. Actions Under Section 7623 Generally

Former federal employees, are eligible to file a claim for reward. See 26 C.F.R. §301.7623-1(b)(1)-(2). Those former and current employees that are barred from filing a claim include an “officer or employee of the Department of the Treasury at the time the individual came into possession of information relating to violations of the internal revenue laws, or at the time the individual divulged such information.” Id. However, “any other current or former federal employee is eligible to file a claim for reward if the information provided came to the individual’s knowledge other than in the course of the individual’s official duties.” Id. Finally, the claim survives the death of the whistleblower. 26 C.F.R. §301.7623-1(b)(3). By regulation, the IRS is not allowed to reveal of the identity of the whistleblower. 26 C.F.R. §301.7623-1(c).

To properly obtain a reward under the TRHCA, full disclosure of all information available to the whistleblower is required. If available information is withheld, the whistleblower bears the risk such information may not be considered by the Whistleblower Office in making any award determination. If documents or supporting evidence are known to the whistleblower but are not in his possession, the whistleblower must describe the documents and identify their location to the best of his ability. The IRS also instructs whistleblowers to provide substantiating documentation. See generally Hargrove, Whistleblowers in the Age of Stimulus, at 23.
To qualify for a whistleblower award under section 7623(b), the information must:

- Relate to a tax noncompliance matter in which the tax, penalties, interest, additions to tax and additional amounts in dispute exceed $2,000,000; and
- Relate to a taxpayer, and in the case of an individual taxpayer, one whose gross income exceeds $200,000 for at least one of the tax years in question.

26 U.S.C. § 7623(b)(5). If the information meets the above criteria and substantially contributes to a decision by the IRS to take administrative or judicial action that results in the collection of tax, penalties, interest, additions to tax and additional amounts, then the IRS will pay an award of at least fifteen percent, but not more than thirty percent of what the IRS collects. 26 U.S.C. § 7623(b)(1). Similar to the original source doctrine of the FCA, however, the IRS has authority to reduce the award to ten percent if the claim is based upon specific allegations disclosed in certain public information (e.g., government audit reports). 26 U.S.C. § 7623(b)(2); Hargrove, Whistleblowers in the Age of Stimulus, at 23. The IRS also has the authority to reduce the award or not give an award if the whistleblower planned and initiated the actions that led to the tax underpayment. 26 U.S.C. § 7623(b)(3).

c. 7623(a) Claims

If the whistleblower’s information submitted under the IRS Form 211 does not meet the criteria of Section 7623(b), the IRS Whistleblower Office will send the claim to Ogden, Utah, for processing as a potential Section 7623(a) claim, which relates to detection of underpayment of taxes and fraud. Hargrove, Whistleblowers in the Age of Stimulus, at 23.

2. Appealing to the United States Tax Court

The TRHCA authorized the whistleblower to appeal the IRS Whistleblower Program’s determination regarding an award to Tax Court. 26 U.S.C. § 7623(b)(4). Such appeals must be filed within 30 days of the IRS Whistleblower Program’s determination. Id. In mid-2010, the Tax Court held that it had jurisdiction to review a Tax Whistleblower Office decision to decline to pursue a whistleblower’s claim for a reward. See Cooper v. Commissioner, 135 T.C. No. 4 (July 9, 2010); Hargrove, Whistleblowers in the Age of Stimulus, at 23.

IV. Key Considerations for Covered Employers

With the existence of such strong protections and incentives for whistleblowers provided by the statutes discussed above and elsewhere, there are several key considerations that employers should keep in mind when faced with potential whistleblower claims. These issues and considerations are the subject of this section. Whistleblower claims are more prevalent and potentially devastating than ever. Even correctly identifying whistleblowers and what constitutes protected whistleblower activities can be troublesome. Employers can protect themselves, however, by implementing internal policies and exercising other cautions, as discussed below.

A. Increasing Whistleblower Investigations and Awards

Employers are now experiencing an increasing number of SEC and Department of Labor investigations, in part because the bounty system does not discourage reporting of questionable claims of wrongdoing. The 2013 annual report issued by the Office of the Whistleblower reveals the following statistics. 3,238 tips, complaints, and referrals were received by the SEC in fiscal year 2013; those came from whistleblowers located in all 50 states, the District of Columbia, the United States territories of Puerto Rico, Guam, and the Virgin Islands, as well as 55 foreign countries. The most common complaint categories involved corporate disclosures and financials (17.2%), fraud (17.1%), and manipulation (16.2%). Of the whistleblower tips, complaints, and referrals submitted in fiscal year 2013, 118 of those resulted in enforcement judgments and orders that potentially qualify the whistleblower to receive funds under the bounty program. The SEC announced its largest whistleblower award to date on October 1, 2013, awarding over $14 million to a whistleblower whose information led to an SEC enforcement action that recovered substantial investor funds. During fiscal year 2013, four whistleblowers received awards totaling a combined sum of $14,831,965.64. In each instance, the whistleblower provided high-quality original information that allowed the SEC to more quickly unearth and investigate the securities law violation, curb further financial injury to investors, and conserve limited agency resources. See generally, U.S.
Crying Wolf? -- Dealing with the Whistleblower


This year is also off to a roaring start for the whistleblower program. In April, the Eighth Circuit affirmed an $8.1 million award to two whistleblowers who helped bring a defective pricing and kickback suit against Cisco Systems Inc. and one of its distributors, saying the relators were entitled to a “finder’s fee” for being original sources of information. See Stephanie Russell-Kraft, 8th Circ. Affirms Cisco Whistleblowers’ $8.1M Award, LAW360, available at http://www.law360.com/articles/527112/8th-circ-affirms-cisco-whistleblowers-8-1m-award.

B. Defining “Whistleblowers” and Their Protected Activities

Identifying protected whistleblowing activity can be difficult. Although the literal definition of “protected activity” in Section 806 of SOX encompasses complaints regarding any conduct that the employee reasonably believes constitutes a violation of federal mail or wire fraud statutes, an employee is not required to cite to the specific code or provision that he believes was violated; however, he must identify with specificity the conduct that he reasonably believes constitutes a violation of federal law. See Grant v. Dominion E. Ohio Gas, 2004-SOX-63 (ALJ Mar. 10, 2005) (“A whistleblower must state particular concerns which, at the very least, reasonably identify a respondent’s conduct that the complainant believes to be illegal.”); see also Bostelman, Buckholz, & Trevino, PUBLIC COMPANY DESKBOOK, vol. 2 § 26:5, 26-24. The critical focus is on whether the employee reports conduct that he reasonably believes constitutes a violation of federal law. Sylvester v. Parexel, ARB No. 07-123, at 18-20 (ARB May 25, 2011). In 2013, the Third Circuit gave deference to this approach and found that an employee making an internal complaint is required to show that, when the complaint was made, the employee had a subjectively and objectively reasonable belief that his employer’s conduct constituted a violation of one of the provisions noted in Section 806. Wiest v. Lynch, 710 F.3d 121, 131 (3d Cir. 2013).

An employer’s treatment of an employee after the latter engages in protected activity can have a notable effect as to proving or disproving retaliation. Generally, courts will regard an employer’s positive treatment of an employee subsequent to the latter’s engaging in a protected activity as potent proof of non-retaliation. See Mark Oberti, 15 Things You Need to Know About the New Wave of Retaliation, Dodd-Frank, and SOX Whistleblower Claims, STATE BAR OF TEXAS, at 9. The most difficult retaliation cases to defend are typically ones where a long-term employee had a spotless record and positive performance review for years, engaged in protected activity, and then promptly began being written up and having performance reviews plummet. See, e.g., Shirley v. Chrysler First, Inc., 970 F.2d 39, 43 (5th Cir. 1992) (affirming a jury verdict in a retaliation case involving a long-term employee, and stating “[w]e find it surprising that suddenly, after Shirley filed her EEOC complaint, problems with her wok surfaced.”). On the other hand, where employers take favorable action towards an employee after the latter engages in protected activity, courts often regard that evidence as powerful proof of non-retaliation. See, e.g., Brady v. Houston-Indep. Sch. Dist., 113 F.3d 1419, 1424 (5th Cir. 1997) (“During the eighteen month period between Brady’s protected statements and the Appellants’ alleged retaliation, Mahaffey and Cortese gave Brady positive evaluations and twice recommended that she be promoted. This fact is utterly inconsistent with an inference of retaliation.”); see also Oberti, 15 Things You Need to Know, at 10.

Although SEC regulations and the opinions of several district courts are broad in their interpretations of who qualifies as a “whistleblower” entitled to Dodd-Frank whistleblower protections, the Fifth Circuit placed significant limits on the SEC whistleblower program last year. While the former encouraged and allowed internal complaints to the employer to qualify as “information” triggering whistleblower protection, the Fifth Circuit in July 2013 held firmly that to be a “whistleblower” under the SEC whistleblower program, an employee must provide information directly to the SEC. Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620, 623 (5th Cir. 2013).

C. Employer Protections from Whistleblower Reports

The following discussion is borrowed heavily from Mark Oberti’s article, “15 Things You Need to Know About the New Wave of Retaliation, Dodd-Frank, and SOX Whistleblower Claims.” Employers can protect themselves and minimize exposure to retaliation claims by stepping up use of their internal ethics and compliance reporting procedures. Prompt and efficient corporate responses to internal complaints are rewarded by the SEC, the Department of Justice prosecution principles, and the Federal Sentencing Guidelines. Well-documented Human Resources responses to employee complaints are another great
tool to insulate an employer from employee attempts to use the Dodd-Frank whistleblower provisions as a shield against performance management and legitimate employer discipline. See generally Oberti, 15 Things You Need to Know, at 40-41.

Many employers in the United States already have policies describing the procedures employees may use to bring complaints of co-worker misconduct, such as harassment. Those policies typically provide a recommended channel for complaints, as well as a statement that employees bringing complaints in good faith will not be subject to adverse employment action by virtue of their complaint. Employers may well want to review such policies, and consider revising them to explicitly confirm that complaints or concerns about matters addressed in SOX and Dodd-Frank will be treated similarly. See John Hostelman, Robert Buckholz, Jr. & Marc Trevino, PUBLIC COMPANY DESKBOOK: SARBANES-OXLEY AND FEDERAL GOVERNMENT REQUIREMENTS, vol. 2 § 26:8, 26-32 (2d ed. 2013).

While certain judicial interpretations of a “whistleblower” make it more onerous for an individual employee to obtain whistleblower protection, such as Asadi in the Fifth Circuit, employers should exercise caution, particularly when drafting employee contracts. Contracts offering incentives for employees to keep alleged securities fraud whistleblower complaints in-house can be problematic. The SEC has stated that employers who adopt such an approach may be disciplined for doing so. See Brian Mahoney, SEC Warns In-House Attys Against Whistleblower Contracts, LAW360, available at http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts. The SEC’s whistleblower chief Sean McKessy has expressly stated that he is keeping an eye out for creatively drafted contracts, confidentiality agreements, separation agreements, and employee agreements that incentivize company whistleblowers from bringing alleged wrongdoing to the SEC’s attention. Id. “If we find that kind of language, not only are we going to go to the companies, we are going to go after the lawyers who drafted it,” McKessy said. “We have powers to eliminate the ability of lawyers to practice before the commission. That’s not an authority we invoke lightly, but we are actively looking for examples of that.” Id.

There are other methods that employers can use in an effort to shield themselves from whistleblower and retaliation claims. For example, encouraging an employee to reapply after termination can undermine a potential retaliation claim. See Oberti, 15 Things You Need to Know, at 1. In appropriate circumstances, employers should consider extending offers to reapply to employees when they are terminated. Id. The best place to do this is in the termination letter. Id. So long as the offer is bona fide, the employer can argue that it significantly undermines a retaliation claim – an argument that some courts have agreed with. See, e.g., Cooper v. Wyndham Vacation Resorts, Inc., 570 F. Supp. 2d 981, 988 (M.D. Tenn. 2008) (fact that the employer suggested that the sales representative, who was fired for excessive absenteeism after she filed a workers’ compensation claim, could later reapply for a job under her claim of retaliation); Oguezuonu v. Genesis Health Ventures, Inc., 415 F. Supp. 2d 577, 588 (D. Md. 2005) (granting summary judgment against retaliation claim and relying on the fact that plaintiff’s “termination letter invites her to reapply when she is able to return to work”); Greene v. Dialysis Clinic, Inc., 159 F. Supp. 2d 228, 240 (M.D.N.C. 2001) (granting summary judgment for the defendant on a retaliatory discharge claim in part because the defendant invited the plaintiff to reapply for a position when one became available).

Seemingly “no brainer” termination decisions can become close calls when the employee has been participating in protected activities. Oberti, 15 Things You Need to Know, at 5. Case law has long held that the rights afforded to employees by anti-retaliation provisions are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors. Florida Steel Corp., v. NLRB, 529 F.2d 1225, 1234 (5th Cir. 1976) (citing Corriveau & Routhier Cement Block, Inc. v. NLRB, 410 F.2d 347, 350 (1st Cir. 1969)); cf. Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (noting that anti-retaliation laws “are a shield against employer retaliation, not a sword with which one may threaten or curse supervisors.”). In actual practice however, the line is not always so clear. See, e.g., Coleman v. Donahue 667 F.3d 835 (7th Cir. 2010) (employee’s claim for retaliation was supported where there was close timing between her protected activities and termination; she filed two EEOC complaints against her supervisor, communicated a desire to murder her supervisor, and was subsequently terminated for making threats of violence); Miller v. Illinois Dep’t of Transp., 643 F.3d 190 (7th Cir. 2011) (employee’s claim for retaliation was supported where a reasonable jury could call into question the employer’s honesty, and there was close timing between the employee’s protected activities and termination; the employee requested an accommodation under the ADA which was denied, then expressed a desire to knock a Human Resource manager’s teeth out, and was subsequently terminated ostensibly as a result of his statement).
These examples reiterate how carefully employees who engage in protected activity should be treated by their employer.

Additionally, employers must be careful with how their severance and release agreements are drafted, both to ensure they are effective, and that they do not stimulate retaliation claims. See generally Oberti, 15 Things You Need to Know, at 15-18. An extreme example is EEOC v. Lockheed Martin, 444 F. Supp. 2d 414 (D. Md. 2006). In that case, Denise Isaac was let go as part of a mass layoff when Comcast merged with Lockheed Martin. 444 F. Supp. 2d 414, 415-16. Isaac, along with other laid-off employees, was offered a separation package in exchange for her signed agreement to release the company of all claims. Id. In relevant part, the release stated:

Claims Released. Subject only to
the exclusions noted in the previous paragraph, I agree to waive and fully release any and all claims of any nature whatsoever (known and unknown), promises, causes of action or similar rights of any type (“Claims”) that I may now have or have had with respect to any of the Released Parties listed below. These Claims released include … claims for other personal remedies or damages sought in any legal proceeding or charge filed with any court, federal, state, or local agency either by me or by a person claiming to act on my behalf or in my interest.

Id. at 416. Isaac refused to sign the release agreement but demanded severance pay, and filed a charge with the EEOC alleging that she was terminated due to her age, race and gender. Id. The employer responded that no severance would be paid without Isaac’s signature of the release and withdrawal of her EEOC charge. Id. Isaac refused to do either; the company consequently refused to pay her severance. Id.

In a lawsuit initiated by the EEOC, the court found: (1) that Lockheed Martin had retaliated against Isaac by conditioning her severance benefits on her signature of the company’s release clause and withdrawal of charge; and (2) that the release clause itself was facially retaliatory. Id. at 422. First, the court determined that even though employers indeed did not have to provide departing employees severance, those that decided to do so could not provide the benefit in a discriminatory fashion. Id. at 419. Specifically, the district court held that “Lockheed might well have been free to offer severance benefits to no one, but it cannot provide them only to employees who refrain from participating in protected activity.” Id. In Isaac’s case, the court found that the severance was withheld in retaliation of her filing and refusal to withdraw her EEOC charge. See id. Second, the court held that Lockheed Martin’s release clause was facially retaliatory, meaning that Isaac would not even have to make a prima facie case of retaliation in order to win. Id. at 420-21.

The court took particular issue with the release’s general broadness (“I agree to waive and fully release any and all claims of any nature whatsoever”) and specific language barring “any charge.” Id. at 421. The court found that such language unlawfully interfered with the EEOC’s investigatory and enforcement functions and ran afoul of federal anti-discrimination laws. Id.

One of the biggest issues for the court in deciding Lockheed Martin, however, appeared to be that the employer conditioned receipt of severance benefits on the plaintiff’s withdrawal of a charge she had already filed with the EEOC. Id. at 421-22. Another district court in a 2014 opinion analyzed this issue in Lockheed Martin by remarking, “[u]nhke the receipt of severance benefits, which is a privilege rather than a right, the opportunity to file a charge of discrimination with the EEOC is a statutory right that is not subject to waiver.” Romero v. Allstate Ins. Co., --- F. Supp. 2d ----, 2014 WL 981520, at *9, n.7 (Mar. 13, 2014).

The Sixth Circuit Court of Appeals issued a more employer-favorable decision on the issue in EEOC v. Sundance Rehab. Corp., 466 F.3d 490 (6th Cir. 2006). Similar to the Lockheed Martin case, the Sundance case involved a mass lay-off and a separation agreement that offered severance pay in exchange for the employees’ signed promise not to sue or file any administrative charges against the company. See 466 F.3d 490, 492. Although an Ohio district court concluded that the release clause was facially discriminatory, the Sixth Circuit disagreed. Id. at 502-503. It held that although the company’s release clause contained an unenforceable provision prohibiting employees from pursuing administrative charges, it was nevertheless facially permissible. See id. The court reasoned that a severance agreement containing a release clause cannot in and of itself be retaliatory because it constitutes merely an offer for benefits – benefits employees are not entitled to receive in the first place and are free to accept or reject. Id. at 500-01. Thus, the Sixth Circuit held, the EEOC failed to establish that the employer took any actual “adverse employment action” against the employees, a required
element of any retaliation claim. *Id.* at 501. It is worth noting that *Lockheed Martin* was decided before the *Sundance* opinion; significantly, the *Lockheed Martin* court’s analysis was based exclusively on the lower court’s decision in *Sundance*, which the appellate court reversed.

Other cases also tend to indicate the *Lockheed Martin* case is an outlier, both in terms of the factual scenario, and the legal positions the court took. For example, in *EEOC v. Nucletron Corp.*, 563 F. Supp. 2d 592 (D. Md. 2008), Peter Dove, upon his termination, was offered a severance payment conditioned on his agreement not to file a discrimination suit or charge. 563 F. Supp. 2d 592, 595. The severance agreement also contained a confidentiality provision. *Id.* Because Dove refused to sign the severance agreement, he did not receive the severance benefits, and he was not bound by any proposed restrictions. *Id.* at 596. The EEOC sued, asserting that the mere offer of such a severance agreement constituted “facial retaliation” because several portions of it (i.e., the portion that required an employee to waive his right to file or participate in an EEOC discrimination charge) were unenforceable. *Id.* at 597. The district court in Maryland, however, determined that “[t]he mere offer of the severance package . . . does not fit the definition of retaliation under Title VII,” because the employer had not actually taken a “sufficiently adverse employment action.” *Id.* at 599.

In another case out of Maryland, *Prelich v. Medical Resources, Inc.*, 813 F. Supp. 2d 654, (D. Md. 2011), the defendant terminated plaintiff’s employment, stating that her position “was being eliminated due to a reduction in force.” *Id.* at 658. In conjunction with the termination, defendant offered plaintiff a severance payment in exchange for her signature on a release, by which she would relinquish the right to institute “any action or complaint of any type in any administrative forum or court of law . . . in order to receive the proposed severance.” *Id.* The release also required plaintiff to “maintain the confidentiality of the fact and terms of the release or risk repayment of the proposed severance.” *Id.* The plaintiff refused to sign the release. *Id.* Instead, she sued, claiming the release was facially retaliatory under Title VII.

The court dismissed the case, stating “[i]f the mere offer of the Nucletron Corp. severance agreement was not an actionable, adverse employment action, the mere offer of the Release here is not an adverse employment action.” *Id.* at 668. *See also Gerner v. County of Chesterfield, Va.*, 765 F. Supp. 2d 770 (E.D. Va. 2011) (rejecting retaliation claim because, “[u]nlike the immediate case, the employee in Lockheed Martin was negotiating the terms of her release from employment under a contract providing for severance benefits. Plaintiff here was negotiating a waiver of any cause of action against the County in exchange for severance benefits”); *Perez v. Faurecia Interior Systems, Inc.*, C.A. No. 6:08-4046-HMH-WMC, 2009 WL 2227510, at *5 (D.S.C. July 22, 2009) (Based on the facts of this case, “[t]he mere offer of the severance agreement is insufficient to constitute discrimination in the retaliation context.”).

In *Mitchell v. MG Industries, Inc.*, 822 F. Supp. 2d 490, (E.D. Pa. 2011), the court followed *Sundance*, and rejected *Lockheed Martin*. In April through May 2004, MG offered eligible employees a severance package in the event of a Change in Control. 822 F. Supp. 2d 490, 503. The plan was tailored according to the employees’ salary and length of service with MG. *Id.* In exchange for the benefits, MG required its eligible employees to sign a General Release and Waiver of Claims, which was set forth in the severance package materials. *Id.* Shortly thereafter, on May 12, 2004, one of the plaintiffs, Muller, filed his claim with the EEOC. *Id.* On October 29, 2004, Muller was terminated. *Id.* On that date, Muller was notified he was eligible for the severance package provided he signed the General Release and Waiver of Claims. *Id.* Rather than signing the Release as it was, Muller edited the agreement so that it carved out his ADEA claims. *Id.* Despite requests urging Muller to sign the Release as written, Muller did not. *Id.* As a result, MG did not provide him with any severance benefits. *Id.*

Muller sued, claiming that the refusal to pay him severance was retaliation for his refusal not to dismiss his EEOC charge. In rejecting his claim, the court held that, “[i]n these circumstances, Muller’s retaliation claim fails because MG denied him severance benefits only after he refused to sign the same general Release and Waiver required of all MG employees seeking similar benefits, and Muller therefore cannot show benefits were denied because of his EEOC charge rather than his failure to sign the release.” *Id.* at 503 (citations omitted).

Finally, in rejecting the plaintiff’s reliance on the *Lockheed Martin* decision, the court stated:

Muller argues *EEOC v. Lockheed Martin*, 444 F. Supp. 2d 414 (D. Md. 2006), is controlling on the issue of his retaliation claim. *Lockheed Martin* relies on *Hishon* in finding severance pay to be a benefit that is “part and
Crying Wolf? -- Dealing with the Whistleblower

The “part and parcel” of employment relationships. Here, again, this is not the case. Muller was informed of the severance package only months before his termination. His severance package cannot therefore be considered “part and parcel” of his employment relationship with MG. See EEOC v. Sundance Rehab. Corp., 466 F.3d 490 (6th Cir. 2006). Moreover, there is no argument concerning whether the release in Lockheed Martin was a uniform general release that was offered to all eligible employees across the board, as the Release was in this case. Finally, the doctrine of stare decisis does not compel one district court judge to follow the decision of another. Where a second judge believes that a different result may obtain, independent analysis is appropriate.

Id. at 504, n.10 (citations omitted).

While there is support that Lockheed Martin is an outlier as far as retaliation issues arising out of severance agreements are concerned, the case should nevertheless highlight the importance of careful attention being given to severance agreements. A good practice for such releases may be to include a specific carve out to explicitly insulate the employer against potential retaliation claims. For example, this type of carve out might state that the employee affirms that he has not put anyone on notice of any allegedly illegal act conducted by the employer and that the severance is a result of a lay off and not retaliation for anything the employee did. The mere offer of such a separation agreement does not amount to retaliation, and it will likely be enforceable if it does not outright prevent participation in EEOC proceedings. See Sundance Rehab. Corp., 466 F.3d at 500-01.

With whistleblower claims being more prevalent and potentially devastating than ever, employers should take a long look at their internal employee and human resources policies, making strategic modifications and improvements where necessary, in an effort to help insulate themselves from potential liability. Even correctly identifying whistleblowers and what constitutes protected whistleblower activities can be troublesome, but undertaking a commitment to employee satisfaction and maintaining robust internal complaint mechanisms can dramatically curb the amount of SOX and Dodd-Frank whistleblower suits in the future.

D. Safely Terminating Employees for Cause

Whistleblower protections and anti-retaliation laws may give employers some pause when terminating employees for cause. One of the most reliable ways for an employer to protect its organization from potential liability, however, is establishing a progressive discipline system enforced by supervisors. Such a policy increases the severity of a penalty each time an employee breaks a rule, generally progressing from oral warnings to written warnings, suspensions, and then termination. Of course, the policy should include language that allows the employer to skip progressive discipline and fire employees right away when justified by particularly flagrant behavior. But the existence of the policy and its progressive documentation will eliminate a lot of an employee’s “surprise” at a termination. In addition, this can cut the legs out from beneath a potential retaliation claim before it gets off the ground.

The situation grows more complicated when a whistleblower claim is involved. It is important to note, however, that whistleblowers are not immune to discipline. But for the employer to protect itself, any discipline administered must be carefully considered and documented. The employer should tread lightly in this area and take action only where it is clearly demonstrated that the employee’s wrongful conduct was flagrant and intentional. If there are any arguable grounds where, say, the employee’s conduct was brought about by a matter of confusion, it would not be appropriate to take disciplinary action. The employer must carefully document a non-discriminatory basis for the discipline and take steps to prevent the fact that the employee was disciplined (and the reason for the discipline) from becoming public knowledge. This is to prevent a chilling effect that such knowledge might have on other employees from engaging in whistleblowing.

Going forward, new whistleblower developments we should expect to see are sizeable SEC bounties engendering an influx of tips to the SEC, an uptick in government investigations connected to whistleblower tips, and larger OSHA awards. These revelations will require employers to rethink their approaches to minimizing risks attendant to employee whistleblowing. See generally Pearlman & Mufson, Top 10 Whistleblower and Retaliation Developments of 2013, LAW360, available at http://www.law360.com/articles/497425/top-10-whistleblower-and-retaliation-developments-of-2013.

Specifically, employers should start by developing synergies between their legal, human resources, and
compliance functions. They should focus on developing methods to encourage whistleblowers to lodge complaints internally, conduct swift investigations, and develop processes to ensure that whistleblowers receive objectively fair and reasonable treatment. Most importantly, employers should change their perspective on whistleblowers, and begin to view them as assets who can facilitate the processes of ferreting out fraud. See id.

V. Recent Whistleblower Case Law and Other Developments

The case law concerning employee claims for whistleblowing and retaliation is always evolving. This section takes a look into some of those recent developments.

The first judicial opinion interpreting the whistleblower provisions of Dodd-Frank was Kramer v. Trans-Lux Corp., decided in the District of Connecticut. No. 3:11-cv-01424, 2012 WL 4444820, *1 (D. Conn. Sept. 25, 2012). In that case, the district court denied a motion to dismiss and rejected a narrow interpretation of the whistleblower protection provision of Dodd-Frank and held that Dodd-Frank protects an individual who makes disclosures required or protected under SOX, as well as to those who provide information to the SEC. Id.

Mr. Kramer served as Trans-Lux Corporation’s vice president of Human Resources and as a member of its pension plan committee. Id. at *2. The committee was comprised of only Kramer and a second employee, who was Trans-Lux’s CFO. Id. Kramer repeatedly told the CFO that the plan committee was required to have at least three members, but he was ignored. Id. Between 2008 and 2011, Trans-Lux failed to abide by the terms of the pension plan and amended its pension plan four times. Id. On two of those occasions, the two-person committee approved the amendments even though the plan required approval by a three-person committee.

Further, the CFO failed to bring the 2009 amendments to the board of directors for approval as required by the plan and failed to file the 2009 amendments with the SEC. Id. at *3. In 2011, the CFO ordered Kramer not to file a Form 10 with the Pension Benefit Guaranty Corporation notifying it of a missed contribution to the plan. Id. This notification would have resulted in an immediate penalty to Trans-Lux. Kramer notified Trans-Lux executives of his concerns about Trans-Lux’s failure to adhere to the pension plan and failure to submit the required documents to the SEC. Id. Kramer also contacted the board of directors’ audit committee and sent a letter to the SEC. Id. Shortly thereafter, Trans-Lux reprimanded Kramer, subjected him to an internal investigation, removed his responsibilities, and finally terminated his employment. Id. Kramer filed suit alleging that Trans-Lux violated Dodd-Frank’s anti-retaliation provision. Id.

In its motion to dismiss, Trans-Lux argued that Kramer did not report Trans-Lux’s alleged violations in the manner required by the SEC and, therefore, did not meet the statutory definition of “whistleblower” under Dodd-Frank. Id. at *4. In response, Kramer argued for a broader definition of “whistleblower”, which would cover any individual who makes a disclosure required or protected under SOX. Id. at *5. Relying on a final rule promulgated by the SEC on August 12, 2011, the Court agreed with Kramer. Id. at *7.

The Court explained that applying a narrow reading of Dodd-Frank’s anti-retaliation provision would eviscerate the protections available to potential whistleblowers. Such a reading would be inconsistent with the stated goal of Dodd-Frank, which is “to improve the accountability and transparency of the financial system” and “create new incentives and protections for whistleblowers.” Id. at *4.

The court concluded that Kramer’s disclosures were protected under SOX because they related to violations of federal securities laws. Id. at *7. Thus, Kramer was protected from retaliation under Dodd-Frank regardless of the manner in which he submitted his concerns to the SEC. The Court also rejected Trans-Lux’s argument that the SEC’s final rule on which the court based its decision was impermissibly broad in that it allowed potential plaintiffs to pursue under Dodd-Frank retaliation claims that would otherwise be barred by SOX’s shorter 180-day statute of limitations. Id. The court determined that because Dodd-Frank was intended to expand the protections found in SOX, the SEC’s final rule was consistent with the stated purpose of Dodd-Frank and not impermissibly broad. Id. at *8; see generally discussion in Maher, Whistleblower Update, at 4-5.

Since Kramer, there have been several new cases fleshing out some of the nuances of the whistleblower and anti-retaliation provisions of Dodd-Frank and SOX. For example, in September 2013, the Northern District of Texas ruled in Candler v. URS Corp. that a plaintiff had the right to a de novo review of her SOX whistleblower claims in federal district court even though she had already participated in two levels of review before the United States Department of Labor.
This decision raises the stakes and costs for employers by requiring them to submit to duplicative discovery and dispositive motion practice and potentially yet another full-scale evidentiary hearing. It also underscores the importance of appreciating from the outset that SOX whistleblower litigation can require a lengthy adjudicative process, and employers should develop long-term strategies and perspectives accordingly. Pearlman & Mufson, Top 10 Whistleblower and Retaliation Developments of 2013, LAW360, available at http://www.law360.com/articles/497425/top-10-whistleblower-and-retaliation-developments-of-2013.

In November 2013, in a case of first impression, the Eastern District of Virginia ruled in Jones v. Southpeak Interactive Corp. of Delaware that a jury may award front pay (in lieu of reinstatement) to a SOX whistleblower. Notably, that court undertook a strict approach in assessing the plaintiff’s claim for front pay and ultimately concluded that front pay was not warranted under the facts of the case. Id.

Also in November 2013, the Northern District of Georgia ruled in Pruett v. BlueLinx Holdings Inc. that Dodd-Frank whistleblowers are not entitled to a jury trial or punitive damages. This first-impression decision is likely to have a meaningful impact in favor of employers in terms of valuing Dodd-Frank whistleblower claims; indeed, employers can expect traction in relying on this decision in negotiating settlements. Id.

Such issues are not without conflicting views at the district court and administrative level, however. In May 2011, in Sylvester v. Parexel International LLC, the Administrative Review Board concluded that a whistleblower’s complaint need not “definitely and specifically” relate to one of the categories of misconduct in Section 806 of SOX. Embracing that decision, the Third Circuit on March 19, 2013, in Wiest v. Lynch gave Chevron deference to the Administrative Review Board’s expansive interpretation of “protected activity,” repudiating the “definitely and specifically” standard. Courts of appeal for a range of other circuits — including the First, Fifth, Sixth, and Ninth Circuits — take the opposite approach. See Pearlman & Mufson, Top 10 Whistleblower and Retaliation Developments of 2013, LAW360, available at http://www.law360.com/articles/497425/top-10-whistleblower-and-retaliation-developments-of-2013.

In July 2013, the Fifth Circuit ruled in Asadi v. G.E. Energy (USA), LLC that an individual must complaint to the SEC to be protected under Dodd-Frank’s whistleblower retaliation provision. This was the first circuit court of appeals to address the issue, and its decision directly conflicts with the SEC’s regulations interpreting Dodd-Frank. A substantial number of district courts in other jurisdictions have reached a contrary conclusion to the Fifth Circuit as well. It is thus likely that this issue will be considered soon by other courts of appeal, perhaps even make its way before the United States Supreme Court. Notably, the SEC recently weighed in with an amicus brief on a whistleblower case pending in the Second Circuit, urging the court in Liu v. Siemens, A.G. to adopt the SEC’s interpretation of Dodd-Frank’s anti-retaliation provision, inviting a circuit split if the Second Circuit agrees. Leo Moniz & Jill Rosenberg, Where the Whistle Blows: SEC Invites Circuit Split Over Reach of Dodd-Frank Anti-Retaliation Provision, ORRICK LITIGATION BLOG, available at http://blogs.orrick.com/employment/2014/03/04/where-the-whistle-blows-sec-invites-circuit-split-over-reach-of-dodd-frank-anti-retaliation-provision/.

With the malleable state of whistleblower and anti-retaliation law ever shifting, we should expect to see conflicting federal circuit court decisions on the horizon regarding the scope of protected activity in the SOX and Dodd-Frank contexts. These conflicts will likely end up before the United States Supreme Court in the not too distant future to finally settle these issues.

VI. Conclusion

Sensational instances in which whistleblowers have uncovered substantial acts of corruption has led Congress to pass expansive legislation to protect and incentivize individuals who hope to do the same in the future. Those individuals who can successfully establish themselves as whistleblowers have numerous mechanisms offered by federal agencies, such as OSHA, that afford them protection and potentially reward them greatly for their efforts. Qui tam suits and anti-retaliation laws are examples of such mechanisms that shield whistleblowers and subject covered employers to increased liability. In addition to those protections, bounties provide lucrative monetary incentives for whistleblowers to come forward.

Both the number of investigations instigated by whistleblower submissions and the amount of the rewards whistleblowers are compensated are increasing at staggering rates. However, employers have various steps they can take to minimize their exposure to damages and liability resulting from whistleblowers, which include gaining the proper awareness of whistleblower protections and laws and utilizing preventive internal policies and employee guidelines.
Crying Wolf? -- Dealing with the Whistleblower

This paper’s discussion has delved extensively into discussion of these issues to provide employers with new ideas and approaches to successfully navigate the sea of whistleblower legislation without sinking.