Employee Whistleblower Claims – A Legal Overview

Heidi Goldstein Shepherd
James W. Nagle, P.C.
Goodwin Procter LLP
Exchange Place
Boston, MA 02109
(617) 570-1000

© 2004 Goodwin Procter LLP. All rights reserved. The authors gratefully express their appreciation to Rachel Valente and Jeffrey S. Siegel for their contributions to these materials.
# Table of Contents

I. Introduction: The New Generation of Whistleblowing Claims Will Bring Additional Complexity and Uncertainty to the Employment Relationship .................1

II. The Sarbanes-Oxley Act...........................................................3
   A. Civil Whistleblower Protections, Generally ............................................................3
   B. Parties.......................................................................................................................4
      1. Responding Entities and Individuals ...........................................................4
      2. Employees....................................................................................................5
   C. Protected Activity ....................................................................................................6
   D. Unfavorable Personnel Action.................................................................................7
   E. Procedure .................................................................................................................8
      1. Filing with the DOL.....................................................................................8
      2. Statute of Limitations...................................................................................8
      3. DOL Investigation .....................................................................................10
      4. Hearing Before an Administrative Law Judge...........................................11
      5. Review by the Administrative Review Board and Appeal to the Appropriate Circuit Court ..........................................................................12
      6. Enforcement of Settlement Agreement or Administrative Order..............12
      7. Right to File in Federal District Court .......................................................13
      8. Effect of Arbitration Agreement................................................................13
   F. Burden of Proof......................................................................................................14
   G. Remedies................................................................................................................17
   H. Criminal Liability...............................................................................................17

III. Other Federal Whistleblower Protection Statutes........................................................18
   A. Federal Deposit Insurance Corporation Improvement Act....................................18
      1. Protected Activity ......................................................................................18
      2. Affirmative Defense...................................................................................18
      3. Burdens of Proof........................................................................................19
   B. Federal Credit Union Act.......................................................................................19
      1. Protected Activity ......................................................................................19
      2. Affirmative Defense...................................................................................19
      3. Defining an Adverse Action ......................................................................20
      4. Burdens of Proof........................................................................................21
   C. The USA Patriot Act..............................................................................................21
   D. False Claims Act (Qui Tam)..................................................................................22
      1. Purpose.......................................................................................................22
      2. Protected Activity ......................................................................................22
      3. Burden of Proof..........................................................................................22
   E. Environmental and Health Statutes........................................................................23
   F. Uniformed Services Employment and Reemployment Rights Act (“USERRA”)..........................................................................................................23

IV. State Statutory and Common Law Whistleblower Protections.............................24
   A. Massachusetts Whistleblower Statutes .................................................................24
      1. Public Employees.......................................................................................24
2. Health Care Employees.................................................................24
3. Employees of Public Charities......................................................25
B. Massachusetts False Claims Act......................................................25
C. Boston Smoking Ordinance ..........................................................25
D. Common Law Retaliatory Discharge Claims Under the Public Policy
   Exception to At-Will Employment ..................................................26
   1. Massachusetts – Public Policy Doctrine........................................26

V. Employment Statutes Compared on Burden of Proof Issues ..................28
   A. Mixed Motive Cases -- Direct Evidence of Discrimination ..............28
   B. The McDonnell Douglas Burden Shifting Method of Proof ...............29
      1. The Prima Facie Case of Retaliation .......................................29
      2. The Employer’s Legitimate, Nonretaliatory Reason for Its Actions ....30
      3. Plaintiff Must Prove Pretext for Retaliation ............................31

VI. Policies and Procedures for Addressing Internal Complaints/Codes of
    Conduct ..........................................................................................31
   A. Sexual and Other Forms of Harassment ......................................31
   B. Sarbanes-Oxley ..........................................................................31
      1. Sections 301 and 406 ...............................................................31
      2. SEC, NASDAQ, NYSE, and AMEX Rules ............................32
      3. Codes of Conduct May Create Contractual Rights ....................34
Employee Whistleblower Claims – A Legal Overview


In the summer of 2002, Congress passed the Sarbanes-Oxley Act (“SOX”), which includes protections for whistleblowers who make either internal or external charges of fraud against their employers. Although SOX’s coverage is limited to public companies, it is a harbinger of the next generation of whistleblower claims.

In SOX’s wake, a number of states are passing whistleblower statutes with far broader coverage. For example, in September 2003, California enacted a whistleblower statute that protects employees of any private corporation in the state who report a violation of state or federal statute or noncompliance with a state or federal rule or regulation to a government or law enforcement agency. Cal. Labor Code § 1102.5(b) (2004). California’s attorney general’s office has established a “whistleblower hotline” and all employers are required to post the telephone number of the hotline and alert all employees as to their rights under the statute. Illinois recently passed a similar statute. 740 Ill. Comp. Stat. 174/1, et seq. (2004). There is currently legislation pending in Massachusetts to apply SOX-type protections to employees of public charities. In addition, Massachusetts already has in place a common law cause of action for all employees who complain, either internally or externally, that their employer is violating the law.

SOX, and a number of other whistleblower statutes cited in these materials, turn traditional burden of proof standards for employment cases on their head. Under SOX, once an employee has established a prima facie case of retaliation by submitting evidence that retaliation was a contributing factor to the adverse employment action, a presumption of retaliation is created. In order to defeat this presumption, the employer must establish, by clear and convincing evidence, that it would have taken the same action with respect to the employee, regardless of the alleged protected activity. See, e.g., SOX, 18 U.S.C. § 1541A(b)(2)(A), (c); Clean Air Act, 42 U.S.C. § 7622; Whistleblower Protection Act, 5 U.S.C. § 1221(e); FDIA, 12 U.S.C. § 1831j(f); Cal. Labor Code § 1102.6.1 Applying this burden of proof framework may effectively require employers not merely to have good reasons for their employment actions, but instead to establish the equivalent of just cause.

1 It is important to carefully analyze any burdens of proof set forth in the whistleblower statute at issue in any given case. A number of courts continue to apply the McDonnell Douglas burdens to whistleblower statutes where those statutes are silent on the burden of proof issue. See Doyle v. United States Secretary of Labor, 285 F.3d 243, 250 (3rd Cir. 2002) (applying McDonnell-Douglas burdens of proof to claim brought under the Energy Reorganization Act of 1974, 42 U.S.C. § 5851); Passaic Valley Sewerage Comm’rs v. Dep’t of Labor, 992 F.2d 474 (3d Cir 1993) (applying version of McDonnell Douglas standard to Clean Water Act); Mann v. Osten Certified Healthcare Corp., 49 F. Supp. 2d 1307, 1317 (M.D. Ala. 1999) (applying McDonnell Douglas Standard to False Claims Act).
The earliest SOX cases are highlighting the perils and the burdens of defending against SOX claims:

- In *Welch v. Cardinal Bankshares, Inc.*, a Department of Labor Administrative Law Judge (“ALJ”) held that a bank holding company in Virginia violated SOX when it terminated its Chief Financial Officer. Welch, the CFO, made various internal complaints about alleged accounting improprieties at the company to the company’s Chief Executive Officer and its audit committee. When the company asked Welch to meet with its lawyers and accountants in order to permit it to investigate his claims, Welch refused to do so unless his personal attorney could also be present. The company denied Welch’s request and terminated him for refusing to cooperate with its investigation into his allegations. The ALJ did not consider the company’s reason for terminating Welch to be valid and instead found that the true reason was retaliation against Welch for making his complaints. The ALJ ordered the company to reinstate Welch to his CFO position and pay his back pay and attorneys’ fees. The case is currently under appeal.

- In *Getman v. Southwest Securities, Inc.*, an ALJ held that an employee’s disagreement with her supervisor about the appropriate rating to be issued by her employer for a company’s stock could serve as protected conduct for purposes of SOX – even where her employer never pressured her to change her recommended rating.

- In March 2003, Coca-Cola terminated the employment of Mark Whitley, its finance director for supply management, as part of a restructuring. Whitley brought a SOX complaint, alleging that his discharge was really the result of his whistleblowing activities and seeking $44.4 million in damages. Whitley contended that between 1998 and 2001, the company overstated net revenue and gross profit by recording marketing allowances to some customers as expenses rather than as rebates. The lawsuit also charged the company with falsifying certain market research in order to convince Burger King to sell a Frozen Coke product. In October 2003, Coca-Cola settled its dispute with Whitley for $540,000. Both the Department of Justice and the Securities and Exchange Commission are investigating the company with respect to Whitley’s allegations.

Thus, the stakes in SOX and other whistleblowing claims are high. These statutes have broad-reaching ramifications for both public and private companies. To assist clients in recognizing and responding to claims brought under SOX and other whistleblower statutes, these materials review SOX’s whistleblower provisions in detail, in terms of both procedure and interpretation. The materials then provide information with respect to a number of other federal and state whistleblowing statutes that clients routinely encounter and also discuss the Massachusetts common law cause of action for discharge in violation of public policy. Next, the materials provide a discussion of the burdens of proof available under *McDonnell Douglas*, which remains applicable to a number of whistleblower statutes. Finally, these materials address codes of conduct and the requirements for such documents set forth by various stock exchanges.
II. The Sarbanes-Oxley Act

The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 ("SOX") was Congress’s reaction to the recent corporate accounting scandals like those at Enron and WorldCom which received widespread press coverage. SOX’s principle focus is corporate financial accountability, including reforming the oversight of accounting practices.\(^2\) The statute also contains both civil and criminal protections for whistleblowers. These materials focus primarily on the civil protections.

A. Civil Whistleblower Protections, Generally

SOX’s civil whistleblower protections are contained in Section 806, codified as 18 U.S.C. § 1514A ("Civil action to protect against retaliation in fraud cases"):  

(a) No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against any employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341 [frauds and swindles], 1343 [fraud by wire, radio, or television], 1344 [bank fraud], or 1348 [securities fraud], any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the

\(^2\) For more information on the corporate financial accountability provisions of the Sarbanes-Oxley Act, please refer to the extensive materials prepared by Goodwin Procter, LLP, which are available at http://www.goodwinprocter.com/sarbanoxindex.asp
authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.”


According to the Associate Solicitor of the Fair Labor Standards Division, as of December 2003, the DOL had received 169 charges claiming whistleblower retaliation in violation of SOX since the statute’s enactment. Of the 79 investigations by the DOL, only two had resulted in a finding that the employee’s claims had merit. Whistleblowers, Sarbanes Oxley Cases are Core of Nontraditional DOL Cases, IER Newsletter, Vol. 173, No. 17 (BNA Dec. 22, 2003). Only seven of the cases filed with the DOL had been voluntarily dismissed by complainants and then filed in federal court. Id. As more people become aware of the statute, with its broad protections for individuals who blow the whistle on alleged corporate malfeasance, the number of claims is expected to grow rapidly.

B. Parties

1. Responding Entities and Individuals

The threshold question is whether the person or entity that allegedly retaliated against an employee in violation of SOX is either (1) a company with “a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d))” or (2) any “officer, employee, contractor, subcontractor, or agent of such company.” 18 U.S.C. § 1514A. The former is defined by the DOL regulations simply as a “company,” and the latter as a “company representative.” 29 C.F.R. § 1980.101.

---

3 The regulations were promulgated by the DOL’s Occupational Safety and Health Administration (“OSHA”).

4 As a point of comparison, the Equal Employment Opportunity Commission (“EEOC”) received almost 85,000 new charges in FY 2002, alone.
a. Companies

Because the DOL is tasked with the power to adjudicate whistleblower claims, it is the DOL, and not the SEC, that must interpret securities law to determine whether a respondent is a “company” for purposes of the statute. Such was the case in *Flake v. New World Pasta*, a case in which a DOL Administrative Law Judge (“ALJ”) granted the respondent’s motion for summary judgment after concluding that the respondent, the complainant’s employer, was not a “company” for SOX purposes. 2003-SOX-18, at 3-4 (ALJ July 7, 2003) (holding that respondent was not required to file reports under section 15(d) because its securities were held by fewer than 300 persons at the start of the fiscal year and it had never registered a class of securities under Section 12), aff’d, No. 03-126 (ARB Feb. 25, 2004) at 6.

It is likely that subsidiaries of covered entities also will be considered to be “companies” for purposes of the statute. In *Morefield v. Exelon Services, Inc.*, 2004-SOX-00002, at 4 (ALJ Jan. 28, 2004), the ALJ held that non-public subsidiaries of publicly traded companies are liable for their retaliation against their own employee whistleblowers, stating “[n]othing in the Act persuades me that Congress intended to wall off from the whistleblower protection [sic] Sarbanes-Oxley vast segments of corporate America that reside under the umbrella of publicly traded companies.” See also *Platone v. Atlantic Coast Airlines*, 2003-SOX-27 at 18 (finding non-public subsidiary to be covered entity where its holding company was public, the two entities did not maintain clearly separate identities with respect to extending employee benefits and other terms of employment and there was significant commonality in the senior management of the two entities) (ALJ April 30, 2004). *But see Powers v. Pinnacle Airlines*, Inc., 2003-AIR-12 (ALJ Mar. 5, 2003) (non-public subsidiary of publicly traded company was not covered entity for SOX purposes where the complainant only named the subsidiary, and not the public parent company, as the respondent). Alternatively, a complainant could argue that a subsidiary constitutes a “company representative,” as discussed below.

b. Company Representatives

Unlike most federal whistleblowing statutes, SOX provides for individual liability. Specifically, Section 806 prohibits retaliation by a “company representative,” defined as an officer, employee, contractor, subcontractor, or an agent of a company. To date no company representative has been held liable under the statute.

2. Employees

Section 806 does not define or at all modify the term “employee.” The DOL regulations define an “employee” as “an individual presently or formerly working for a company or company representative, an individual applying to work for a company or company representative, or an individual whose employment could be affected by a company or company representative.”

---

5 All ALJ cases cited in this article can be found at the Office of the Administrative Law Judge website at [http://www.oalj.dol.gov/public/wblower/refnc/sosx1list.htm](http://www.oalj.dol.gov/public/wblower/refnc/sosx1list.htm)
29 C.F.R. § 1980.101. This broad definition widens the category of potential claimants to include individuals not traditionally thought of as employees. For example, the DOL has taken the position that an individual who works for an entity that is not considered a “company” for purposes of the statute but which is a contractor of a covered company (i.e., an accounting firm) would have a claim against the covered entity if he were retaliated against for reporting financial irregularities at the covered entity. DOL Whistleblowers Investigation Manual at 14-1. Note that DOL regulations do not purport to substantively interpret Section 806. 68 Fed. Reg. 31,860, 31,863 (May 28, 2003). Therefore, the broad definition of “employee” in the DOL regulations, which is not supported by the text of Section 806, will be open to challenge.

C. Protected Activity

Two categories of whistleblowing are protected: (1) an employee’s report of conduct that the employee reasonably believes is federal fraud, and (2) an employee’s participation in proceedings relating to federal fraud.

To be a protected report of federal criminal fraud, the employee must “reasonably believe” that the reported conduct is a violation of any Securities Exchange Commission (“SEC”) rule or regulation, or a violation of 18 U.S.C. § 1341 (frauds and swindles), 18 U.S.C. § 1343 (fraud by wire, radio, or television), 18 U.S.C. § 1344 (bank fraud), 18 U.S.C. § 1348 (securities fraud), or any federal law relating to fraud against shareholders (collectively, “federal fraud laws”). 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1). A whistleblower need not demonstrate that the reported conduct actually violates any such federal law or regulation, only that he reasonably believed that such a violation occurred. Indeed, the belief can be considered “reasonable” even where a subsequent investigation establishes that the employee was “entirely wrong.” Halloum v. Intel Corp., 2003-SOX-7 at 10 (ALJ March 4, 2004). In determining whether the employee’s belief was reasonable, the ALJ or court will apply an objective standard. Welch v. Cardinal Bankshares Corp., 2003-SOX-15 at 37 (ALJ Jan. 28, 2004) (“Welch II”). Further, the report must be made to, or an investigation must be conducted by one of the following: “(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).” 18 U.S.C. § 1514A(a)(1); 29 C.F.R. § 1980.102(b)(1).

To be protected participation, the employee must “file, cause to be filed, testify, participate in, or otherwise assist in a proceeding” relating to federal fraud laws. 18 U.S.C. § 1514A(a)(2); 29 C.F.R. § 1980.102(b)(2).

Some of the initial DOL cases applying SOX have resulted in broad definitions of “protected activity.” In Getman v. Southwest Securities, Inc., 2003-SOX-8 (ALJ Feb. 2, 2004), for example, the ALJ determined that the complainant had engaged in protected activity where her supervisors questioned a stock rating that she had issued, but did not advise her to change that rating. Specifically, Getman was employed as a research analyst by Southwest Securities, Inc. She alleged that her employment was terminated in July 2002 as a result of a presentation she made in November 2001 with respect to a company called Cholestech Corporation – a company
about which she had been informed by two of the respondent’s bankers. Getman was led to understand that Cholestech was interested in raising capital and that if respondent issued a report on the company, respondent could be included in a deal to raise capital. She gave the stock an “accumulate” rating, which was not a strong rating, because the stock had increased in value appreciably since she started her research, and she thought that it would not continue to appreciate. The purpose of the November 2001 meeting was to question her determination. She was questioned strongly and did not like the demeanor of the questioner who wanted to know why she had not issued a “strong buy” rating. At no time, however, was she ever instructed to change her rating. Beginning in January 2002, Getman felt that her relationship with her manager changed and she began to receive criticism about her performance and hours. Ultimately, the respondent terminated the complainant alleging performance reasons; Getman contended that it was as a result of her recommendations with respect to Cholestech and the ALJ agreed that this internal disagreement with her supervisors in the context of a discussion meeting could constitute “protected activity” because if the respondent had issued an incorrect rating, this would have constituted a fraud on Cholestech’s shareholders.

In Platone v. Atlantic Coast Airlines, 2003-SOX-27, the ALJ determined that the complainant had engaged in protected activity where she complained to her employer about fraud that was being committed against a separate entity. Platone worked as the Manager of Labor Relations for the respondent airlines. In the course of her work, she conducted an investigation and determined that members of the union for which she served as the airline’s liaison – the Airline Pilots Association – were defrauding the union by improperly charging the union for days off. Platone alerted her supervisor about the fraud and drafted a letter to the union advising them of the issue, but was advised to drop the issue because it was a matter internal to the union. Platone was terminated shortly thereafter. The airline claimed that her termination was based on the fact that the company discovered that Platone was engaged in an intimate relationship with a senior member of the union. The employer regarded the relationship as a conflict of interest. The ALJ determined that the complainant had engaged in protected activity because it was possible that members of the airline’s management were improperly channeling money to union members in order to convince these union members to make contract concessions that would favorably affect the airline’s bottom line. Platone, 2003-SOX-27 at 22. The ALJ did not believe the employer’s argument that it would have terminated her for the conflict of interest issue, regardless of her protected activity and found in favor of Platone.

D. Unfavorable Personnel Action

A private cause of action lies only if the employee is discharged, demoted, suspended, threatened, harassed, or discriminated against in any other manner (collectively, “unfavorable personnel actions”) in the terms and conditions of employment. 18 U.S.C. § 1514A(a). The DOL regulations state that no such actions may be taken “with respect to the employee’s compensation, terms, conditions, or privileges of employment.” 29 C.F.R. § 1980.102(a); Welch II, 2003-SOX-15 at 61-62 (CFO who was suspended, and then terminated, experienced unfavorable personnel actions). The DOL regulations further provide that a violation exists where a company or company representative “intimidates, threatens, restrains, coerces, [or] blacklists or in any other manner discriminates against an employee in the terms and conditions
of employment.” 29 C.F.R. § 1980.102(b). Thus the statute, in addition to the DOL regulations, casts a wide net on the kinds of adverse actions that are cognizable. See Halloum, 2003-SOX-7 at 10 (“[a]n employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures”). But see Dolan v. EMC Corp., 2004-SOX-1 (ALJ March 24, 2004) (“[u]nfavorable performance evaluations, absent tangible job consequences, do not constitute an adverse employment action”).

E. Procedure

1. Filing with the DOL

Section 806 provides that a “person who alleges discharge or other discrimination by any person in violation of [SOX] may seek relief…by … filing a complaint with the Secretary of Labor.” 18 U.S.C. 1514A(b)(1). SOX expressly incorporates a subsection of Aviation Investment and Reform Act (“AIR”) 6 that establishes the procedure the DOL must follow to adjudicate the complaint. 18 U.S.C. § 1514A(b)(2). The DOL also has issued interpretive regulations to guide the processing of SOX complaints. These are codified at 29 C.F.R. part 1980.

An aggrieved employee must file a complaint with the DOL no later than 90 days after the violation occurs. 18 U.S.C. § 1514A(b)(2)(D); 29 U.S.C. § 1980.103(d). The regulations require that a complaint be written, and “should include a full statement of the acts and omissions, with pertinent dates.” 29 C.F.R. § 1980.103(b). A complainant may not file a complaint by telephone. Foss v. Celestica, 2004-SOX-4 at 3 (ALJ Jan. 8, 2004) (dismissing claim as time barred where complainant’s written complaint, filed eight days after his phone call to DOL, fell outside of the limitations period); Cf. Walker v. Aramark Corp., 2003-SOX-22 at 3, (ALJ Aug. 26, 2003) (counting from complainant’s termination date until his “first contact” with DOL, which was by phone, in determining that the claim was time barred).

2. Statute of Limitations

The 90-day filing period runs from the date on which the discriminatory decision has been both made and communicated to the employee. 29 C.F.R. § 1980.103(d). See also 68 Fed. Reg. 31,861 (citing Delaware State College v. Ricks, 449 U.S. 250, 258 (1980) for the proposition that the statute of limitations begins to run when the employee either knows or reasonably should be aware of the adverse action); See Foss, 2004-SOX-4 at 2 (violation date is

---

6 AIR contains a provision that protects airline employees from retaliation by their employers where the employee provided information to the employer or the federal government relating to an alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any law relating to air carrier safety. 49 U.S.C. § 42121(a)(1). Airline employees who participate in proceedings relating to any such violation also are protected from retaliation by virtue of their participation. Id. at 42121(a)(2). AIR’s provisions on the burden of proof, statute of limitations, and filing procedures were the model for SOX’s whistleblower protections, and thus the two statutes are procedurally quite similar. DOL regulations implementing the provisions of AIR can be found at 29 C.F.R. part 1979.
the date the employee received written notice of termination by Federal Express, giving the complainant the benefit of the doubt that he did not know he was being terminated on an earlier date when he refused respondent’s attempt to give him termination paperwork).

Many of the published ALJ decisions to date concern the statute of limitations, and whether such limitations period is subject to equitable tolling or equitable estoppel. A number of cases have been dismissed on statute of limitations grounds. A plaintiff’s complaint survived a statute of limitations defense where the plaintiff claimed to have sent a complaint by Federal Express to the DOL, even though the DOL never acted on the complaint. *Murray v. TXU Corp.*, 279 F. Supp. 2d 799, 802 (N.D. Tex. 2003) (evidence included plaintiff’s counsel’s sworn affidavit that he sent the complaint to the proper address, an airbill indicating that the mailing concerned the plaintiff, and documents showing that someone signed for the mailing). That the Secretary did not issue the statutorily-required notice, investigate, or issue written findings did not cause the court to infer nonreceipt. *Id.* at 804. The fact that the plaintiff failed to file his complaint with the appropriate DOL area director as required by DOL regulations, and failed to contact the DOL after not receiving the DOL report required by statute after 60 days, was not by itself a bad faith delay on the part of plaintiff. *Id.*

Several administrative decisions have considered whether the doctrines of equitable estoppel or equitable tolling may apply to allow an otherwise time-barred action to proceed. Equitable tolling did not apply where (1) the complainant, represented by counsel, claimed his and his counsel’s ignorance of SOX’s protections; and (2) contacted both the SEC and his state’s department of fair employment and housing within the limitations period but did not prove that he alleged to those agencies facts that would amount to a SOX violation. *See Moldauer v. Canandaigua Wine Co.*, 2003-SOX-00026 at 2-3 (ALJ Nov. 14, 2003) (dismissing claim as time barred). Nor did equitable estoppel apply where no evidence existed that the respondent prevented the complainant from pursuing his rights as a whistleblower. An ALJ also refused to toll the statute of limitations where the complainant asserted that his travel outside of the country delayed his ability to file a complaint with the DOL because his trip was not at the respondent’s request. *Flood v. Cedant Corp.*, 2004-SOX-16 at 2 (ALJ Feb. 23, 2004).

3. **DOL Investigation**

After receiving the complaint, DOL must notify the “named person(s)” of the complaint, its allegations, and the evidence supporting the complaint. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.104(a); see also 18 U.S.C. § 1514A(b)(2)(B). The regulations contemplate that the information relating to the identity of confidential informants will be redacted. 29 C.F.R. § 1980.104(a). The statute requires that both the “person named in the complaint” and the employer receive such notice. 18 U.S.C. § 1514A(b)(2)(B). The notice must also disclose the standards for determining (1) whether an investigation is warranted; and (2) whether reasonable cause exists to believe that a SOX violation has occurred. 29 C.F.R. § 1980.104(a). It must also notify the named person that, if the Administrative Review Board (the “Board”) ultimately determines that a complaint was frivolous or made in bad faith, the named person may be entitled to a reasonable attorneys’ fee not exceeding $1000. 29 C.F.R. §§ 1980.104(a), 1980.110(e). Further, a copy of this notice must be sent by DOL to the SEC. 29 C.F.R. § 1980.104(a).

Within 20 days of the filing of the complaint, the named person has the right to submit a written position statement and any supporting materials, and request a meeting with the DOL officer in charge of investigating. 29 C.F.R. § 1980.104(c); see 49 U.S.C. § 42121(b)(2)(A). DOL will investigate only if the complainant makes a prima facie showing that Section 806 has been violated. 29 C.F.R. § 1980.104(b)(2). (see, infra, Section II.F. for discussion of prima facie elements). If this showing is not made, DOL will dismiss the complaint. If the named person demonstrates by “clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant’s protected behavior or conduct,” the DOL will not investigate. 29 C.F.R. § 1980.104(c); see 49 U.S.C. § 42121(b)(2)(B). This may be demonstrated by the position statement(s), supporting affidavits, and, if so requested, witness statements in a meeting with the DOL. 29 C.F.R. § 1980.104(c). If the named person fails to convince DOL it would have made the same decision absent the protected activity, the DOL will conduct an investigation. Procedures to protect the confidentiality of the information provided by non-complainants may be followed.

No later than 60 days after the receipt of the complaint, the DOL should issue written findings stating whether or not there is reasonable cause to believe that a violation of Section 806 has occurred. 49 U.S.C. § 42121(b)(2); 29 C.F.R. § 1980.105. If such reasonable cause exists, the

---

7 The regulations define “named person” to include “the employer and/or the company or company representative named in the complaint who is alleged to have violated the Act.” 29 C.F.R. § 1980.101. “Person” is defined to mean “one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any group of persons.” 29 C.F.R. § 1980.101.

8 According to the DOL Whistleblower investigation manual, copies of the investigation report and any orders associated with the hearing or appeal must also be provided to the SEC. The SEC must certify that the documents will not be disseminated outside the SEC without DOL approval. Manual 14-4, 14-5.

9 If the DOL officer investigating the complaint finds reasonable cause to believe that discrimination has occurred, the employee may be entitled to reinstatement pending the outcome of the case. 29 C.F.R. §§ 1980.104(e), 1980.105(a). Any such preliminary order requiring reinstatement is effective immediately,
DOL shall issue findings and a preliminary order providing relief. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.105(a)(1). The findings and preliminary order will inform the parties of their rights to file objections and request a hearing, and is effective 30 days after receipt by the named person. 29 C.F.R. §§ 1980.105(b), 1980.105(c).

4. **Hearing Before an Administrative Law Judge**

The DOL’s decision to investigate or refrain from investigating a complaint is not reviewable by the ALJ and a complaint may not be remanded for a completion of an investigation or for additional findings. 29 C.F.R. § 1980.109(a).

After the DOL issues its findings and preliminary order, either party may file objections and request a hearing on the record by filing such with the Chief ALJ within 30 days. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.106(a). The objections must be in writing and explain whether the objections are to the findings, the preliminary order, or both, and state whether there should be an award of attorneys’ fees. 29 C.F.R. § 1980.106(a). If no hearing is requested or if no objections are received within 30 days after the date of notification of the findings and preliminary order, such order is the final order, not subject to judicial review. 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.106(b)(2).

The Chief ALJ will assign the case to an ALJ who will notify the parties of the hearing date, time, and place which “shall be conducted expeditiously.” 29 C.F.R. § 1980.107(b); 49 U.S.C. § 42121(b)(2)(A); 29 C.F.R. § 1980.107(b). The ALJ has “broad discretion to limit discovery in order to expedite the hearing.” 29 C.F.R. § 1980.107(b); *Welch v. Cardinal Bankshares Corp.*, 2003-SOX-15 at 6 (ALJ Aug. 15, 2003) (“*Welch I*”) (exercising such power to limit additional discovery where the discovery was filed two days before the deadline set by the ALJ). The rules of practice and procedure for the Office of the Administrative Law Judges (OALJ), codified at 29 C.F.R. § 18.1, et seq., govern such hearings. 29 C.F.R. § 1980.107(a); see *Flake*, 2003-SOX-00018 at 2 (applying 29 C.F.R. § 18.40 summary judgment standard). No formal evidentiary rules are applicable, but ALJs must employ rules designed to “assure production of the most probative evidence” and may exclude “inmaterial, irrelevant, or unduly repetitious” evidence. 29 C.F.R. § 1980.107(d); *Welch I*, 2003-SOX-15 at 2-3 (allowing relevant expert opinion of law on whether the attorney-client privilege at a company meeting would be vitiated if the complainant were allowed to have his private attorney present). The ALJ is required to issue a

and may not be stayed by virtue of the respondent filing an appeal. 29 C.F.R. § 1980.105(c); 49 U.S.C. § 42121(b)(2)(A). However, “where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant’s discharge), a preliminary order [by a DOL investigating officer] of reinstatement would not be appropriate.” 29 C.F.R. § 1980.105(a)(1). AIR is silent as to whether the filing of objections automatically stays any other relief, but the regulations provide that all other provisions of the preliminary order will be stayed upon timely objection. 29 C.F.R. § 1980.106(b)(1).

10 The ALJ in *Lerbs v. Buca Di Beppo, Inc.*, 2003-SOX-8 at 3 (Dec. 30, 2003) held that any defect in filing for a review of a DOL investigatory report may be subject to equitable tolling because the rules governing the procedure to object and request a review of a preliminary order are procedural only, not jurisdictional.
5. **Review by the Administrative Review Board and Appeal to the Appropriate Circuit Court**

A party seeking review by the Board must file a written petition within ten business days of the ALJ’s decision. 29 C.F.R. § 1980.110(a). The Board’s review is discretionary, and is conducted under the “substantial evidence standard.” 29 C.F.R. § 1980.110(b); *Walker v. Aramark Corp.*, 2003-SOX-15 at 3 (ARB Nov. 13, 2003) (declining to accept the case for review, without explanation).

If the Board does not accept the case for review, the ALJ’s decision becomes final 30 days from the request for review. 29 C.F.R. § 1980.110(b). If the Board accepts the case for review, the ALJ decision is “inoperative” unless the Board issues an order adopting the decision. 29 C.F.R. § 1980.110(b). However, any preliminary reinstatement order will stand pending Board decision. 29 C.F.R. § 1980.110(b).

A final Board decision will be issued within 120 days from the close of the hearing. 29 C.F.R. § 1980.110(c). Any final order is appealable to the United States Court of Appeals “for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation” by filing within 60 days after the issuance of certain final orders. 29 C.F.R. § 1980.112; see 49 U.S.C. § 42121(b)(4)(A). Such appeal will not stay operation of the final order. 49 U.S.C. § 42121(b)(4)(A).

The appeals court may only overturn the Board’s decision if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). The court may, however, set aside the Board’s factual determinations if they are unsupported by substantial evidence. 5 U.S.C. § 706 (2)(E). The court’s review in this regard is plenary. See, e.g., *Doyle v. U.S. Secretary of Labor*, 285 F.3d 243, 249 (3d Cir. 2002) (administrative review of DOL’s decision under whistleblower provision of Energy Reform Act).

6. **Enforcement of Settlement Agreement or Administrative Order**

The parties may end the proceedings at any point before a final order is issued by entering into a settlement agreement that is approved by the DOL. 49 U.S.C. § 42121(b)(3); 29 C.F.R. §§ 1980.111(a), 1980.111(d). *Harrison v. Gold Banc Corp. Inc.* 2003-SOX-17 (ALJ July 9, 2003) (approving settlement “for good cause shown,” citing Fed. R. Civ. P. 41(a) and 29 C.F.R. § 18.9(c)(2)); *Plants v. J.P. Morgan Securities, Inc.*, 2003-SOX-19 (ALJ Aug. 7, 2003) (approving settlement agreement as fair and reasonable). An approved settlement becomes the final order of the DOL investigator, the ALJ, or the Board, depending on which entity approves the settlement, and may be enforced by the DOL. 29 C.F.R. §§ 1980.111(d)(e), 1980.113. If a party fails to comply with a DOL order or the terms of a settlement agreement, the DOL may file an enforcement action in the federal district court. 29 C.F.R. § 1980.113.
7. **Right to File in Federal District Court**

SOX provides that “if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, [the claimant may bring] an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.” 18 U.S.C. § 1514A(b)(1)(B); see 29 C.F.R. § 1980.114. A DOL official has acknowledged that “the 180-day time limit is ‘almost impossible’ for DOL to meet, but that people [remain] in the DOL process despite the timing because of the sense that the review system was fair and successful.” *Whistleblowers, Sarbanes Oxley Cases are Core of Nontraditional DOL Cases*, IER Newsletter, Vol. 173, No. 17 (BNA Dec. 22, 2003). The statute does not contain a jury trial right.

The aggrieved employee must file notice with the ALJ or the Board (depending on where the case is then pending) of his or her intent to file a complaint with the District Court and serve notice on all parties and on the Assistant Secretary of OSHA and the Associate Solicitor of the Division of Fair Labor Standards. 29 C.F.R. § 1980.114(b).

It is unclear whether an employee who invokes this qualified right to file in federal court after 180 days automatically divests the DOL of jurisdiction by doing so. At least one ALJ did not agree that that his office was divested of jurisdiction after the complainant filed in federal district court until the district court granted the complainant a stay of the DOL proceedings. *Stone v. Duke Energy Corp.* 3:03-CV-256 (W.D.N.C. June, 10, 2003) (“[T]he Administrative Law Judge issued a ruling stating that he would retain jurisdiction over the case, and the pending summary judgment motion filed by [respondent], until such time as the motion is decided or until ‘a Judge in the District Court agrees with Claimant and asserts that he or she has jurisdiction’”); *Stone v. Duke Energy Corp.*, 2003-SOX-12 (June 19, 2003). Other ALJs have granted motions to dismiss upon complainant’s showing that he or she filed in district court after 180 days have elapsed, and absent any showing that the delay was due to complainant’s bad faith. *Willy v. Ameriton Properties, 2003-SOX-9* (ALJ June 19, 2003); *Williams v. Bordon Chemical, Inc., 2003-SOX-10* (ALJ Oct. 14, 2003); *Livingston v. Wyeth Pharmaceuticals, 2003-SOX-25* (ALJ Oct. 6, 2003); *Frazer v. Fiduciary Trust Co. Int’l, 2003-SOX-28* (ALJ Dec. 30, 2003); *Carnero v. Boston Scientific Corp., 2004-SOX-22* (Jan. 22, 2004)

8. **Effect of Arbitration Agreement**

The only federal court to have addressed the issue in a published decision has ruled that an agreement providing for mandatory arbitration of all employment disputes is enforceable with respect to a claim brought under SOX. Thus, in *Boss v. Salomon Smith Barney Inc.*, the court granted the employer’s motion to stay the district court action and compel arbitration before the National Association of Securities Dealers where the employer’s policies provided that arbitration was “the required, and exclusive, forum for the resolution of all employment disputes based on legally protected rights . . . including without limitation claims demands or actions under . . . any . . . federal, state or local statute, regulation or common law doctrine, regarding . . . termination of employment.” 263 F. Supp. 2d 684, 685 (S.D.N.Y. 2003). The court rejected the
plaintiff’s assertion that SOX claims were exempt from mandatory arbitration provisions, stating that “[t]here is nothing in the text of the statute or the legislative history of the Sarbanes-Oxley act evincing intent to preempt arbitration of claims under the act[; n]or is there an inherent conflict between arbitration and the statute’s purposes.” Id.

F. Burden of Proof

To prevail on a retaliation claim under Sarbanes-Oxley, either at the administrative or court level, an aggrieved employee must demonstrate that his or her protected activity was a contributing factor in the respondent’s decision to take the unfavorable personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii). The complainant must make this showing by a preponderance of the evidence. Welch II, 2003-SOX-15 at 35. Thus, the complainant must establish that:

(1) he engaged in protected activity;

(2) his employer was aware of the protected activity. At least one case indicates that the ultimate decisionmaker does not have to have actual knowledge of the protected activity where an individual with knowledge contributes information that forms the basis of the decision. See Platone, 2003-SOX-27 at 24. Thus, in Platone, the complainant’s supervisor had knowledge of her protected activity. He suggested that the complainant should be terminated for a separate reason. In discussions regarding the complainant’s termination, the supervisor did not reference the protected activity. Nevertheless, the ALJ determined that the supervisor instigated the termination based on the protected activity and that his knowledge could therefore be imputed to the decisionmakers.

(3) he suffered an unfavorable personnel action; and

(4) circumstances exist which are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable personnel action. Welch II, 2003-SOX-15 at 35. The words “contributing factor . . . ‘mean any factor which, alone or in connection with other factors tends to affect in any way the outcome of the decision.’” Id. at 36. (quoting Marano v. Department of Justice, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). Temporal proximity alone will likely be considered sufficient to raise an inference of causation. 29 C.F.R. § 1980.104(a); 29 C.F.R. § 1980.104(b)(2).

Once the complainant meets this burden, an inference of unlawful retaliation is created. Id. The respondent may, however, avoid liability by establishing by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2) (B)(iv). Thus, the respondent is required to meet a high evidentiary standard in putting forth a legitimate, non-retaliatory reason for its actions and, importantly, the burden never shifts back to the complainant to establish pretext.
To date, only a handful of Section 806 cases have been decided on the merits. A few of these cases warrant detailed discussion because they indicate that the DOL’s initial application of the statute and the employee-favorable burden of proof are creating negative precedents for employers.

In *Welch II*, 2003-SOX-15, the aggrieved employee, the company’s CFO, claimed that he was terminated because he reported a number of financial problems to the CEO, including accounting errors in the company’s past financial statements and the company’s noncompliance with then-recently enacted SOX with respect to required certifications and disclosures. Further, the CFO told the CEO that he would not sign the company’s certification, required by SOX, that the company’s third quarter report “does not contain any untrue statement of a material fact, or omit to state a material fact…[and is] not misleading.” *Welch II*, 2003-SOX-15 at 5-11. The respondent asserted that Welch was actually terminated because he refused to meet with the company’s attorney and independent auditors, who had been asked by the respondent’s Audit Committee to investigate Welch’s claims, unless he (Welch) could have his personal attorney present.

The ALJ held that the complainant proved that his whistleblowing activities were a contributing factor in the company’s decision to terminate him. The unfavorable personnel action occurred only six to seven weeks after he reported his concerns to the company’s external auditors and to the CEO. Further, the ALJ concluded that the respondent’s alleged reason for Welch’s termination—his refusal to meet with the company’s attorney and independent auditor without his personal attorney—was not believable. The ALJ determined that, after reviewing Welch’s reports of improper accounting practices, the company took substantial steps to terminate Welch before he ever refused to attend an investigatory meeting without his attorney. For example, upon first learning of Welch’s allegations, the Company’s Audit Committee held a meeting in which the Committee focused on the complainant’s alleged poor performance before requesting an investigation of his allegations. In addition, the resulting investigation report to the board was replete with criticisms of Welch’s performance. Further, the committee never adopted a formal resolution prohibiting the employee from having his personal attorney in attendance at the meeting. Therefore, the ALJ concluded that the complainant’s refusal to meet with the investigation team without his attorney was not the real reason for his discharge.

The respondent viewed the CFO as a discontented employee whose allegations of wrongdoing—with which it mostly disagreed—were part of his plan to leave his employment and exact a severance package on the way out the door. The respondent argued that Welch was terminated solely based on his refusal to meet with its investigators without his personal attorney. The Bank maintained that the presence of Welch’s attorney would have destroyed the attorney-client privilege and would have turned the fact-finding investigation into an adversarial process. The Bank further argued that Welch had no right to representation at the investigation, citing “general employment law principles [that allow the company to terminate the employee] for even consulting with [personal] counsel on a matter related to his duties” at the company. *Welch II*, 2003-SOX-15 at 44. The ALJ rejected this argument, finding that the investigation’s purpose was to manufacture “a situation whereby [the employee] would not attend the meeting so they could use that act as a justification for terminating his employment.” *Id.*
The ALJ further rejected the respondent’s argument that allowing the employee’s attorney to be present at the meeting would have destroyed the attorney-client privilege because: (1) the sole purpose of the meeting was to elicit information from the employee and thus all information disclosed in the meeting would already have been known by Welch; (2) the confidential information discussed at the meeting could not have been disclosed because the employee was a fiduciary of the company and his personal attorney would be under a duty to maintain the confidentiality of such information; (3) SOX requires that the type of information that the complainant raised be disclosed to the government and does not support the company’s assertion that it had a right to maintain the confidentiality of that information; and (4) board minutes reflected that a third party with whom the employer was attempting to merge was going to be apprised of the employee’s allegations, which would effect a waiver of the privilege in any event. *Welch II*, 2003-SOX-15 at 45-46. Also, the ALJ asserted that the privilege does not apply in instances where the employee later becomes adverse to the employer and certain other conditions are met. *Id.* at 46. Finally as an officer of the corporation acting in furtherance of his fiduciary duty to disclose wrongdoing, the complainant had the power to waive the attorney-client privilege that might have attached to the meeting. *Id.* at 47. Therefore, the ALJ concluded that the respondent could not assert that its reason for excluding the CFO’s attorney was to preserve the privileged nature of the communications.

The ALJ’s decision is currently on appeal to the Board. See Molly McDonough, *Fired CFO Wins Early Sarbanes Claim*, 3 ABA Journal eReport 6 (Feb 15, 2004), at [http://www.abanet.org/journal/ereport/f13sarbanes.html](http://www.abanet.org/journal/ereport/f13sarbanes.html).

The *Platone* and *Getman* cases also are notable for their negative precedent for employers. These cases are discussed in detail in Sections II.C, *supra*.

There has been one decision in which the ALJ found in favor of the employer on a substantive issue. In *Halloum*, the employee had a series of documented performance problems for which he had been poorly reviewed and had been placed on a corrective action plan (“CAP”). While he was out on a medical leave, the employee alerted the SEC and Intel’s CEO that he believed that his supervisor was improperly deferring payment on invoices in order to boost profits. An internal investigation revealed that Halloum’s allegations were completely unfounded. During Halloum’s absence on medical leave, the employer also learned that Halloum had improperly pressured his subordinates to provide favorable reviews of his performance and that he had secretly taped conversations with his subordinates, supervisors and others. When Halloum returned from his medical leave, his supervisor placed him on a revised CAP. The ALJ determined that the revised CAP set requirements that Halloum could not possibly meet and thus was retaliatory, in part, for his complaint about his supervisor’s accounting practices. The ALJ determined, however, that Intel established by clear and convincing evidence that it would have placed Halloum on the revised CAP regardless of his protected activity in light of his performance failures and misconduct. The ALJ appeared heavily swayed by the fact that Halloum’s various performance problems had been well documented before the company ever became aware of his complaint of fraudulent accounting practices.
G. Remedies

SOX provides that the employee should be entitled to all relief necessary to make the employee whole, including reinstatement, back pay and attorneys’ fees and costs. 18 U.S.C. § 1514A(c), (d). See also 29 C.F.R. § 1980.105(a)(1). In Welch II, for example, the ALJ reinstated the employee to his former position as CFO. He also awarded back pay with interest and “all costs and expenses, including attorneys fees, reasonably incurred.” Welch II at 48.

In addition to reinstatement with the same seniority status, a court may grant other equitable remedies, including writs of mandamus and stays with respect to proceedings before the DOL. SOX “does not specifically limit the remedies available to the Court once it exercises jurisdiction.” Stone v. Duke Energy Corp., 3:03-CV-256 (W.D.N.C. June 10, 2003) (declining to issue a writ of mandamus compelling the DOL to complete the administrative proceeding where the DOL “does not appear ready to [issue a final order] anytime in the immediate future” and granting a stay of the DOL proceeding); Corrada v. McDonald’s Corp., No. 04-1029 (JAG) (D.P.R. June 22, 2004) (staying DOL proceedings); see also 68 Fed. Reg. at 31,863 (May 28, 2003) (“Where an administrative hearing has been completed and a matter is pending before an administrative law judge or the Board for a decision, a Federal court also might treat a complaint as a petition for mandamus and order the Department to issue a decision under appropriate time frames”).

SOX also permits an award of a reasonable attorney’s fee to respondent not to exceed $1000 to the employer for frivolous or bad faith complaints. 49 U.S.C. § 42121(b)(3)(C). A named person who believes that the complaint is frivolous or made in bad faith may seek this award by filing such a request within 30 days of receipt of the DOL’s findings and preliminary award. 29 C.F.R. § 1980.106(a).

SOX does not include a provision allowing for punitive damages

H. Criminal Liability

Section 1107 of SOX amends the obstruction of justice statute to make it a criminal violation to retaliate against employee whistleblowers: “Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.” 18 U.S.C. § 1513(e). Note that this provision appears to cover disclosures for any violation of federal law – not just those dealing with securities and other corporate fraud, but only deals with truthful reports to a law enforcement officer and thus, does not cover internal whistleblowing. Violation of this provision is punishable by fines of up to $250,000 for individuals or $500,000 for companies, 10 years’ imprisonment, or both. Id. This provision of the statute has extraterritorial effect. By comparison, the civil liability provision of SOX does not explicitly extend to employment outside the United States and we are aware of a preliminary finding by the DOL that declined to give extraterritorial effect to Section 806 of SOX. We also are aware that this
issue is the subject of a pending motion to dismiss a pending SOX claim in the U.S. District Court.

III. Other Federal Whistleblower Protection Statutes

The following statutes are not meant in any way to represent the universe of employee whistleblower statutes. The statutes discussed below represent some of the more commonly seen statutes and serve to provide context for interpretation of some of the terms in SOX.

A. Federal Deposit Insurance Corporation Improvement Act

The Federal Deposit Insurance Corporation Improvement Act of 1991 ("FDICIA") contains the whistleblower provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1999 ("FIRREA"). It provides protection for employees of depository institutions and federal banks from discrimination for reporting certain conduct to a regulatory agency, bank, or the Attorney General. 12 U.S.C. § 1831j.

1. Protected Activity

Employees of depository institutions may not be discriminated against because “the employee (or any person acting pursuant to the request of the employee) provided information” about the depository institution or its directors, officers, or employees to any Federal banking agency or to the Attorney General regarding: (A) a possible violation of any law or regulation; or (B) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 12 U.S.C. § 1831j(a)(1).

In addition, no “Federal banking agency, Federal home loan bank, Federal reserve bank, or any person who is performing, directly or indirectly, any function or service on behalf of the Corporation” may discriminate against any employee “because the employee (or any person acting pursuant to the request of the employee) provided information to any such agency or bank or to the Attorney General regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety by (A) any depository institution or any such bank or agency; (B) any director, officer, or employee of any depository institution or any such bank; (C) any officer or employee of the agency which employs such employee; or (D) the person, or any officer or employee of the person, who employs such employee.” 12 U.S.C. § 1831j(a)(2).

2. Affirmative Defense

The protections of the FDICIA do not apply to an employee who (1) deliberately causes or participates in the alleged violation of law, or (2) knowingly or recklessly provides substantially false information to the agency or Attorney General. 18 U.S.C. § 1831j(d).
3. Burdens of Proof

Like a claim under SOX, an employee pursuing an FDIC retaliation claim need only demonstrate that the disclosure “was a contributing factor” in the personnel action. 12 U.S.C. § 1831j(f) (citing to 5 U.S.C. §§ 1221-1222). This may be accomplished by showing that the official taking the personnel action knew of the disclosure and the personnel action occurred within a short period of time after the disclosure. Id. See e.g., Frobose v. Am. Sav. & Loan Assoc., 152 F.3d 602 (7th Cir. 1998) (period of time of seven months was “soon enough”). Compare Cosgrove v. Fed. Home Loan Bank of New York, 1999 U.S.Dist. LEXIS 7420 (S.D.N.Y. March 23, 1999) (sixteen months does not give rise to inference of causation); Rouse v. Farmers State Bank of Jewell, Iowa, 866 F. Supp. 1191 (N.D. Iowa 1994) (plaintiff failed to demonstrate that his protected disclosures were a contributing factor where he could show no evidence that the bank officials knew of his disclosure). The burden then shifts to the respondent to establish by clear and convincing evidence that it would have taken the same actions, regardless of the protected activity. 12 U.S.C. § 1831(f) (incorporating 5 U.S.C. § 1221(e)(2)).

B. Federal Credit Union Act

1. Protected Activity

The Federal Credit Union Act (“FCUA”) makes it unlawful for an “insured credit union” to discharge or otherwise discriminate against any employee in the terms and conditions of employment because “the employee (or any person acting pursuant to a request of the employee) provided information to a government body regarding any possible violation of any law or regulation by the credit union or any director, officer, or employee of the credit union.” 12 U.S.C. § 1790b(a)(1). See Garrett v. Langley Fed. Credit Union, 121 F. Supp. 2d 887 (E.D. Va. 2000) (precluding summary judgment for credit union where jury could have reasonably determined that credit union retaliated against the plaintiffs for reporting their concerns about defendant’s business practices to credit union examiner). Note that, unlike SOX and the FDICIA, for example, an internal complaint of wrongdoing, standing alone, will not constitute protected activity under the FCUA.

2. Affirmative Defense

The protections of the FCUA do not apply to an employee who (1) deliberately causes or participates in the alleged violation of law, or (2) knowingly or recklessly provides substantially false information to the agency or Attorney General. 12 U.S.C. § 1790b(a)(1). cf. Garrett, 121 F. Supp. 2d 887 (plaintiffs’ report of a rumor that the bank president had paid off the credit card debt of another employee, without investigating the truth of that rumor, did not entitle the defendant to the defense of knowing or reckless provision of false information.)
3. Defining an Adverse Action

In *Simas v. First Citizens’ Federal Credit Union*, 170 F.3d 37 (1st Cir. 1999), the First Circuit considered whether certain employment actions constituted “adverse actions” for purposes of the FCUA. The plaintiff, Simas, was a vice president of a credit union responsible for delinquent loan collections. In September 1993, he became concerned that a commercial loan with a large outstanding balance was about to default. Simas also was concerned about the circumstances surrounding the loan’s initiation in light of the fact that the loan holder was a member of the credit union’s board of directors who was very friendly with the credit union’s president. The loan was a very large undertaking for the credit union and there was a question as to whether the collateral was overvalued in connection with the loan application. Plaintiff advised the credit union’s internal auditor to investigate the circumstances behind the loan. When she refused, he indicated that he might need to report the matter to the National Credit Union Administration (“NCUA”) or the press. Shortly thereafter, Simas received a memorandum from the credit union’s president, asserting that his concerns were unwarranted and instructing him to stop his “irrational” and “aggressive” harangues of the internal auditor. The memorandum further suggested that Simas was making trouble because he was unhappy with his working conditions and warned that he would be terminated immediately if the “verbal harassments or unwarranted threats” occurred again. *Simas*, 170 F.3d at 42. The loan defaulted. Simas reported the matter to the NCUA and an investigation commenced. The credit union removed plaintiff from responsibility for the loan in question. Thereafter, his car loan application was denied and plaintiff was stripped of his ability to: (1) attend board meetings; (2) supervise employees in the credit department; and (3) approve credit-card applications. The credit union also instituted a new policy requiring all employees who wanted to access files from the central vault to go through a file clerk.

The trial court found these actions to be too trifling to constitute adverse employment actions, but the First Circuit disagreed. First, the appeals court held that the president’s memorandum, which contained a threat to terminate plaintiff’s employment if he persisted in making “unsubstantiated charges” constituted direct evidence of retaliatory animus by the president. *Simas*, 170 F.3d at 48. The appeals court further observed that the memorandum constituted an “unwarranted negative job evaluation” and thus constituted an adverse employment action in and of itself. *Id.* (citing *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (1st Cir. 1998) (“adverse employment actions [may include] . . . unwarranted negative job evaluations”)). The First Circuit also found that the various other actions taken with respect to Simas, “in aggregate could be considered materially adverse.” *Id.* at 50. Thus, the removal of Simas, the credit union’s chief loan and collection officer from any responsibility whatever for its largest outstanding loan represented a “very substantial divestment of responsibility” that a jury could find to be an adverse employment action. *Id.* As for the new vault-access policy, the Court stated that, although the policy applied to all employees, its timing was “suspect” because it interposed a clerk between plaintiff and important bank documents at precisely the time the President wanted to terminate the plaintiff’s investigation. Thus, even though plaintiff was not discharged or demoted and did not experience any reduction in his salary or other benefits, the court determined that Simas had experienced an adverse employment action for purposes of the FCUA. *Simas*, 170 F.3d at 50.
4. **Burdens of Proof**

Unlike the whistleblower statutes discussed above, the FCUA does not delineate the burden of proof to be applied to claims brought under the statute. Courts have decided, however, to apply the more “plaintiff-friendly” burden of proof found in FIRREA. See, e.g., *Simas*, 170 F.3d at 44 (noting that the defendant had conceded to this standard of proof). Thus, the plaintiff must prove that plaintiff’s protected activity was a contributing factor in the adverse employment decision. The burden of persuasion then shifts to the defendant to show by clear and convincing evidence that it would have made the same decision in the absence of the protected activity. *Garrett v. Langley Federal Credit Union*, 121 F. Supp. 2d 887, 900-901 (E.D. Va. 2000); *Simas*, 170 F.3d at 44. In *Simas*, for example, the First Circuit concluded that the president’s memorandum alone provided evidence that a retaliatory motive was “at least one ‘contributing factor’ in her campaign to oust or silence Simas.” 170 F.3d at 49. The court observed that the defendant credit union was therefore required to prove by clear and convincing evidence “that they would have engaged in the same litany of alleged employment actions even if Simas had not contacted the NCUA.” Id.

C. **The USA Patriot Act**

The USA Patriot Act, 31 U.S.C. § 5328, makes it unlawful for a financial institution or nonfinancial trade or business to “discharge or otherwise discriminate against any employee” who “provided information to the Secretary of the Treasury, the Attorney General, or any Federal supervisory agency regarding a possible violation of this subchapter or Section 1956, 1957, or 1960 of title 18, or any regulation under any such provision, by the financial institution or any director, officer, or employee of the financial institution.” The statutes referenced in § 5328 are the following:

- 18 U.S.C. § 1956, concerning the laundering of monetary instruments;
- 18 U.S.C. § 1957, making it unlawful to knowingly engage or attempt to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity; and

The statute’s protections do not apply to any employee who: (1) deliberately causes or participates in the alleged violation of law or regulation; or (2) knowingly or recklessly provides substantially false information to the Secretary, the Attorney General, or any Federal supervisory agency. 31 U.S.C. § 5328(d).

The statute does not establish the burden of proof a party must carry to prove a violation and we are not aware of any published cases discussing the burden of proof. In the past, where whistleblowing statutes have been silent with respect to the burden of proof to be applied, courts often have used the three-stage *McDonnell Douglas* burden of proof. See, e.g., *Doyle*, 285 F.3d at 250 (addressing burden of proof applied to Energy Reform Act cases before the statute was amended to adopt the two-stage burden currently applied in SOX cases); *Frobose*, 152 F.3d at
611 (observing that McDonnell Douglas standard of proof applied to whistleblower claims brought under the FDIA before the statute was amended to adopt two-stage burden of proof).

D. False Claims Act (Qui Tam)

1. Purpose

The federal False Claims Act, 31 U.S.C. §§ 3729-3733 (“FCA”) and the qui tam doctrine permit an individual to bring a cause of action on behalf of the federal government – “in the name of the king” – against one who has staked a false claim against the federal government. The FCA attempts to discourage fraud against the government and the whistleblower protection encourages whistleblowers to report such fraud. Robertson v. Bell Helicopter Textron, 32 F.3d 948 (5th Cir. 1994).

2. Protected Activity

The FCA protects employees who report their employers to the federal government for “knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval.” 31 U.S.C. § 3729(a)(1). See also, United States v. O’Connell, 890 F.2d 563, 569 (1st Cir. 1989). The False Claims Act further provides that: “[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.” 31 U.S.C. § 3730(h). Damages may include reinstatement with the same seniority status, three times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney’s fees. Id. In addition, where applicable, the person who brings the qui tam action may be entitled to a portion of any settlement or judgment reached between the government and the responding party. The percent of the award or settlement ranges, depending on the level of the person’s involvement, and may be as high as 30 percent. 31 U.S.C. § 3730(d).

3. Burden of Proof

Courts have expressed differences of opinion regarding the burden of proof for a retaliation claim under the False Claims Act. One court held that to establish causation, an employee must show that “(a) the employer had knowledge that the employee was engaged in protected activity; and (b) the retaliation was motivated, at least in part, by the employee’s engaging in that protected activity.” Yesudian v. Howard Univ., 153 F.3d 731, 736 (D.C. Cir. 1998) (internal quotations removed). Once causation is proved, “the burden of proof shifts to the employer to prove affirmatively that the same decision would have been made even if the employee had not

E. Environmental and Health Statutes

A number of environmental and health statutes also protect individuals who report violations of federal law, including the Surface Transportation Assistance Act, the Asbestos Hazard Emergency Response Act, the Clean Air Act, the Safe Drinking Water Act, the Federal Water Pollution Control Act, the Toxic Substances Control Act, the Solid Waste Disposal Act, and the Comprehensive Environmental Response Compensation and Liability Act. The retaliation provisions of these, and additional environmental and health services laws are administered by OSHA.

F. Uniformed Services Employment and Reemployment Rights Act ("USERRA")

USERRA prohibits discrimination against persons because of their service in the Armed Forces Reserve, the National Guard, or other uniformed services. It also prohibits an employer from denying any benefit of employment on the basis of an individual’s membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services and protects the right of veterans and other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training. USERRA provides that “[a]n employer may not discriminate in employment against or take any adverse employment action against any person because such person has taken an action to enforce a protection afforded any person under this chapter, has testified or otherwise made a statement in or in connection with any proceeding under this chapter, has assisted or otherwise participated in an investigation under this chapter, or has exercised a right provided for in this chapter.” 38 U.S.C. § 4311(c)(1). An employee making a USERRA claim of discrimination bears the initial burden of showing, by a preponderance of the evidence, that the employee's military service was “a substantial or motivating factor” in the adverse employment action. If this requirement is met, the employer then has the opportunity to come forward with evidence to show, by a preponderance of the evidence, that the employer would have taken the adverse action anyway, for a valid reason. Sheehan v. Department of the Navy, 240 F.3d 1009, 1013 (Fed. Cir. 2001) (and cases cited therein)
IV. State Statutory and Common Law Whistleblower Protections

A. Massachusetts Whistleblower Statutes

1. Public Employees

Although Massachusetts does not have a comprehensive whistleblower statute, Massachusetts law provides limited statutory protection against “retaliatory action” for any public employee who (1) discloses or threatens to disclose to a supervisor or to a public body a practice which “the employee reasonably believes poses a risk to public health, safety or the environment”; (2) provides information to or testifies before a public body conducting an investigation into any violation of law or risk to public health, safety or the environment; or (3) objects to or refuses to participate in any activity which the employee reasonably believes is in violation of law or poses a risk to public health, safety or the environment. Mass. Gen. Laws ch. 149, § 185. The statute defines “retaliatory action” as “the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.” Id., § 185(a)(5). The whistleblower statute protects only against retaliation by an employer, and does not provide a cause of action against individuals. Bennett v. City of Holyoke, 230 F. Supp. 2d 207, 221 (D. Mass. 2002).

To establish causation, the employee must prove that the employee’s protected activity was a substantial or motivating factor in the adverse employment action. Larch v. Mansfield Municipal Elec. Dep’t., 272 F.3d 63, 70 (1st Cir. 2001).

Prior to making a disclosure to a public body, the public employee must first report the issue in writing to a supervisor and provide the employer a reasonable opportunity to correct the matter. Written disclosure may not be required, however, where the disclosure is made by testifying in a court proceeding. Doherty v. Hyde, No. 02-10204-NG (D. Mass. March 11, 2003) (protecting from subsequent retaliation an employee who testified about police department misconduct in federal court). Reporting is not required where the employee believes the employer is aware of the issue and it is an emergency situation, the employee fears physical harm, or the employee makes the disclosure to the public body “for the purpose of providing evidence of what the employee reasonably believes to be a crime.” Mass. Gen. Laws ch. 149, § 185(c)(1)-(2). See also Mass. Practice Vol. 45 at §3.9; Dirrane v. Brookline Police Dept., 315 F.3d 65, 72-73 (1st Cir. 2002) (describing the statute as “unclear” and concluding that a police chief’s oral disclosure to a supervisor was protected outright against retaliation while the requirement of written notice and an opportunity to correct is imposed where the disclosure is to an outside body).

2. Health Care Employees

Massachusetts also has special protections for employees who work for a “health care facility.” Section 187 of Chapter 149 of Massachusetts General Laws provides that a health care facility shall not “take any retaliatory action against a health care provider” because the health care
provider threatens to report, reports, opposes, or participates in a proceeding investigating certain activities the employee reasonably believes violate the law or certain other standards and which the employee reasonably believes poses a risk to public health. *Joyce v. GF/Pilgrim, Inc.*, No. 0205178, 2003 WL 22481100 (Mass. Super. Sept. 20, 2003) (health care whistleblower law does not preempt all common law claims). Further, a health care provider is protected from retaliatory action where he “participates in any committee or peer review process, files a report of a complaint, or an incident report discussing allegations of unsafe, dangerous or potentially dangerous care.” M.G.L. c.149, § 187(b)(4). If the health care provider’s report is to a public body, it must first generally be made to her employer by written notice, and the employer is given a reasonable opportunity to correct the matter. M.G.L. c.149, § 187(c)(1). Advance notice to the employer is not required in certain emergency situations. *Id.* The attorney general has enforcement power; an aggrieved employee also has a private right of action to enforce this law. § 187(d).

3. **Employees of Public Charities**

Recently proposed legislation would import SOX-type whistleblower protections into the realm of public charities and would protect employees, officers, directors and trustees of such charities from removal and other discriminatory acts because they submitted “a concern or a complaint” based on a good faith reasonable belief that the charity had engaged or was engaging in “illegal or improper conducts” to the charity’s audit committee or to the attorney general. An Act to Promote the Financial Integrity of Public Charities § 3.

B. **Massachusetts False Claims Act**

Massachusetts is one of several states to pass *qui tam* legislation. The Massachusetts False Claims Act (“MFCA”) is modeled after federal law. *See* Mass. Gen. Laws ch. 12, § 5C. The MFCA, like the FCA prohibits an employer from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in the terms or conditions of employment because of lawful acts done by the employee in furtherance of a false claims action. *See* 31 U.S.C. § 3730(h); Mass. Gen. Laws ch. 12, § 5J. The MFCA prohibits an employer from denying a promotion on this basis. Mass. Gen. Laws ch. 12, § 5J(2). In addition, the MFCA prohibits an employer from making, adopting, or enforcing “any rule, regulation, or policy [that] prevent[s] an employee from disclosing information” to the government or that limits an employee’s right to file a false claims action. *Id.* at § 5J(1). The statute does not specify a burden of proof; nor could a case be found in which the burden of proof is discussed.

C. **Boston Smoking Ordinance**

In addition, both private and public employers in Boston should note that the recently enacted Boston Public Health Commission “Clean Air Works Workplace Smoking Restrictions” Regulation prohibits smoking in the workplace as well as retaliation. It provides that “[n]o person or employer shall discharge, refuse to hire, refuse to serve or in any manner retaliate or
take any adverse personnel action against any employee, applicant, customer or person because such employee, applicant, customer or person takes any action” in support of the smoking ban or right to work in a smoke-free environment. No case could be found interpreting the whistleblower protections of these regulations.

D. Common Law Retaliatory Discharge Claims Under the Public Policy Exception to At-Will Employment

1. Massachusetts – Public Policy Doctrine

The general rule in Massachusetts is that an at-will employee may be terminated at any time for any reason or for no reason at all, unless otherwise prohibited by a specific statute. See, e.g., Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388, 394 (1994). Employees who do not engage in activity that is protected by the particular statutes discussed above may nevertheless have a common law cause of action for wrongful discharge if their employers have retaliated against them for engaging in some other legally protected conduct. Such actions may be brought by “employees who are terminated for asserting a legally guaranteed right (e.g., filing workers’ compensation claim), for doing what the law requires (e.g., serving on a jury), or for refusing to do that which the law forbids (e.g., committing perjury).” Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145, 150-51 (1989). The performance of an “important public deed” is also protected. Flesner v. Technical Communications, 410 Mass. 805, 811 (1991) (cooperation with investigation by custom’s officials).

Several limitations are notable. First, the public policy claimed by the plaintiff may not concern the employer’s internal policy decisions. Smith-Pfeffer v. Superintendent of the Walter E. Fernald State School, 404 Mass. 145, 151 (1989). Moreover, the public policy must be “well-established” or “well-defined;” generally, this means that a statute undergirds the policy in question. King v. Driscoll, 418 Mass. 576 (1994); Folmsbee v. Tech Tool Grinding & Supply, Inc., 417 Mass. 388, 394 (1994) (no well-defined public policy precluding discharge for failure to submit to employer mandated drug testing of employees); Flynn v. City of Boston, 59 Mass. App. Ct. 490 (2003) (no well-defined public policy established by the Massachusetts campaign finance law that would preclude discharge for objecting to a political appointment). The right conferred by statute “must relate to or arise from the employee’s status as an employee, not as a shareholder”. King v. Driscoll, 418 Mass. 576, 584 (1994) (participation in a derivative lawsuit over the price to be paid under a stock buy back plan was an internal company matter).

a. Complaints Regarding Criminal Activity vs. Internal Company Matters

A company may not retaliate against an employee who complains, even internally, regarding an alleged violation of a criminal law. Shea v. Emmanuel College, 425 Mass. 761, 762-63 (1997) (employee’s report of office theft to her supervisor was protected as an internal complaint of an
alleged violation of the criminal law). See also Smith v. Mitre Corp., 949 F. Supp. 943, 951-52 (D. Mass. 1997) (employee who made internal complaints about alleged fraud and false claims by her employer, a federal contractor, stated a claim for wrongful discharge in violation of public policy); DiGaetano v. Lawrence Firefighters Federal Credit Union, 15 Mass. L. Rptr. 394 (Mass. Superior Nov. 8, 2002) (employee who prepared a memorandum regarding possibly illegal loans for submission to the company’s board, and discussed his suspicions with both a subordinate and the credit union’s chief executive officer, whom he suspected was responsible for the illegal activity, stated a claim for retaliatory discharge in violation of public policy, relying, in part, on the whistleblower provision of the FCUA); Dorman v. Norton Co., 2003 WL 1962458, at 9 (Mass. Super. March 27, 2003) (employee’s report that co-workers stole scrap copper from the employer not protected by public policy exception where employee did not offer evidence that it was theft as distinguished from a mere violation of company policy).

However, an employee who makes an internal complaint about an alleged violation of company rules that does not constitute criminal behavior generally is not protected from retaliation under the public policy exception to employment-at-will. Shea v. Emmanuel College, 425 Mass. 761, 762-63 (1997). See Wright v. Shriners Hospital for Crippled Children, 412 Mass. 469, 474 (1992) (information provided by plaintiff detailing communication problems between the medical and nursing staffs and patient care problems were internal matters which could not form the basis of a public policy exception); Mistishen v. Falcone Piano Co., 36 Mass. App. Ct. 243, 245 (1994) (an employee who threatened to reveal her employer’s alleged violation of M.G.L. chapter 93A in selling “bargain-basement pianos” while professing they were of superior quality could not maintain a cause of action for wrongful discharge). Mello v. Stop & Shop Co., 402 Mass. 555, 561 (1988) (internal report that false claims were made against employer concerned internal matters and was not protected).

b. Exercise of Legally Protected Rights and Refusal to Engage in Illegal Conduct

The mere fact that an employee has rights granted by a statute is not necessarily enough to cause a Massachusetts court to recognize the right as a source of well-defined public policy sufficient to modify the general at-will employment rule. For example, an employee who asked to see data sheets on hazardous materials that the employer was required by federal law to have readily accessible and who then walked off the job when he did not receive them was not exercising a clearly-defined right that would protect him from termination. Mitchell v. TAC Technical Services, Inc., 50 Mass. App. Ct. 90, 95 (2000). Similarly, termination of an employee-shareholder who participated in a lawsuit against the employer did not violate public policy where the lawsuit was a derivative action regarding the price to be paid in a stock buy-back program; that participation in such a suit is a right conferred by statute does not necessarily grant such participation protection under the public policy doctrine, where the statutory rights were those of a private investor, and did not relate to the plaintiff’s status as an employee. King v. Driscoll, 418 Mass. 576, 583-84 (1994).

An employee who gave testimony at a criminal trial resulting from an F.B.I. investigation of the theft of $26,000 worth of stolen securities was engaged in activity that was protected by the
public policy doctrine. The jury could have found that, in violation of public policy, the
defendant fired the plaintiff for the plaintiff's failure to give the testimony that his supervisor
wanted him to give at the criminal trial of the co-worker charged with the theft. DeRose v.
Putnam Management Co., 398 Mass. 205, 210 (1986). In addition, as a statutory matter, an
employee may not be discharged because of his participation in jury duty. M.G.L. c. 268, § 14A.

c. Cooperation with Law Enforcement

The termination of an employee for cooperating with Customs officials in an investigation of his
employer was a violation of public policy, even though the employee was not required by law to
employee stated a claim under the public policy doctrine when she alleged that the employer
terminated her for strictly adhering to legal requirements regarding the supervision of cooking

d. Other Remedy Available by Statute

The Massachusetts courts have denied the availability of wrongful discharge actions where there
is a specific statutory remedy available. Mello v. Stop & Shop Cos., 402 Mass. 555, 557 (1988);
discrimination precluded claim for wrongful discharge).

V. Employment Statutes Compared on Burden of Proof Issues

The various employment laws governing discrimination on the basis of, for example, gender,
disability and age each contain a provision prohibiting retaliation against individuals who have
either participated in an investigation, proceeding or hearing under those statutes or opposed any
practice made an unlawful employment practice by those statutes. See, e.g., Title VII, 42 U.S.C.
§ 2000e-3(a); the Age Discrimination in Employment Act, 29 U.S.C. § 623(d); the Americans
with Disabilities Act, 42 U.S.C. § 12203(a); M.G.L. c. 151B, § 4(5). The burdens of proof
applied under those statutes is illustrative either as a comparison to the burdens currently
employed in SOX and other whistleblower statutes or as precedent for those whistleblowing
statutes that apply a similar burden of proof.

A. Mixed Motive Cases -- Direct Evidence of Discrimination

In the rare discrimination action where a plaintiff has direct evidence of discrimination and can
demonstrate that “an illegitimate factor played a substantial role in a particular employment
decision,” the court will apply a “mixed motive” analysis. Fernandes v. Costa Bros. Masonry,
Inc., 199 F.3d 572, 580 (1st Cir. 1999) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 241-
42 (1989)). Wynn & Wynn, P.C. v. Massachusetts Commission Against Discrimination, 431
Mass. 655, 666 (2000). Under the mixed-motive framework, the plaintiff must initially prove by
a preponderance of the evidence that retaliatory animus played a motivating part in the alleged
adverse employment action. The burden of persuasion then shifts to the employer who “may avoid a finding of liability only by proving that it would have made the same decision” in the absence of the protected conduct. *Price Waterhouse*, 490 U.S. at 244-245. *See also Wynn & Wynn*, 431 Mass. at 670. Thus, the burden of proof in a mixed-motive case is similar to that in a SOX whistleblower case, except that SOX requires the employer to meet a “clear and convincing evidence” burden of proof, as compared to the lesser “preponderance of the evidence” standard required in mixed-motive case.

**B. The McDonnell Douglas Burden Shifting Method of Proof**

To succeed on a retaliation claim where there is no direct evidence of retaliatory animus, a plaintiff must both establish a prima facie case and prove that the defendant’s stated business reasons for terminating the plaintiff are a pretext for unlawful retaliation. *McMillan*, 140 F.3d at 309. Thus, unlike in a SOX whistleblower claim or in a mixed-motive case, the burden of proof resides with the plaintiff at all times.

1. **The Prima Facie Case of Retaliation**

To prove a prima facie case of retaliation, a plaintiff must show: (1) protected activity of which the employer was aware; (2) an adverse employment action; and (3) a causal relationship between the protected activity and the adverse employment action. *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43 (1st Cir. 1998); *MacCormack v. Boston Edison Co.*, 423 Mass. 652, 662-63 (1996).

a. **Temporal Proximity**

Many plaintiffs seek to show causation by pointing to the proximity between their protected activity and the adverse employment action taken against them. As the Supreme Court has noted, however, “[t]he cases that accept mere temporal proximity between an employer’s knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be ‘very close.’” *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (per curium) (citing cases holding that a temporal proximity of three or four months was insufficient to show causation, and concluding that a gap of twenty months between the employer’s knowledge of the protected activity and the adverse employment action “suggests, by itself, no causality at all”). Even very close temporal proximity may not be sufficient to establish causation in some cases. Where the decision to take an adverse employment action was made before the employer knew of the protected activity, even very close temporal proximity is inadequate to show causation. *See, e.g., Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 536-37 (1st Cir. 1996) (affirming summary judgment for the employer where the employee was laid off just one month after complaining of sexual harassment, but the employer produced unrebutted evidence that the employee had been selected for layoff prior to the complaint); *Calero-Cerezo v. United States Department of Justice*, 355 F.3d 6, 16 (1st Cir. 2004) (holding that a one-month period between
learning about the complaint and suspending the plaintiff did not prove a causal connection between the protected activity and the adverse employment action).

b. **Other Factors Which May Give Rise to an Inference of Retaliation**

In addition to temporal proximity, other factors that may demonstrate a causal link between the protected activity and the adverse employment action include: (1) evidence of differential treatment in the workplace; (2) statistical evidence showing disparate treatment; and (3) comments by the decision maker which intimate a retaliatory mindset. *See Mesnick v. General Electric Co.*, 950 F.2d 816, 824 (1st Cir. 1991). The First Circuit determined that a jury verdict for an employee was supported by the evidence where an employer meted out harsher discipline, to the plaintiff than to other employees in the eleven months after he made a discrimination complaint. *Che v. Massachusetts Bay Transp. Auth.*, 342 F. 3d 31 (1st Cir. 2003). In comparison, courts have held that, where the employer has treated the employee in accordance with company policy, a causal link cannot be established. *Neal v. Infinity Broadcasting Corp. of Boston*, 57 Mass. App. Ct. 1110 (2003) (summary judgment proper on employee’s claim that employer retaliated against him by refusing to pay him severance pay where company policy required a departing employee to sign a release to obtain severance, and the employee refused).

c. **The Employer Must Have Knowledge of the Protected Activity**

To establish causation, a plaintiff must establish that the relevant decision maker, the person who decided to take the adverse employment action against the plaintiff, knew of the plaintiff’s protected activity. *See Lewis v. Gillette Co.*, 22 F.3d 22, 24 (1st Cir. 1994) (per curium) (interpreting Chapter 151B). Sometimes a fellow employee may have knowledge of the protected activity but someone else within the organization actually makes the decision to take the adverse employment action. In these cases, if the other employee had no input into the decision to take action against the plaintiff, the plaintiff cannot demonstrate causation. *See, e.g., Feltmann v. Sieben*, 108 F.3d 970, 976 (8th Cir. 1997); *Willis v. Marion County Auditor’s Office*, 118 F.3d 542, 546 (7th Cir. 1997) (‘‘Statements by subordinates normally are not probative of an intent to retaliate by the decision maker.’’).

2. **The Employer’s Legitimate, Nonretaliatory Reason for Its Actions**

Assuming the plaintiff has established a prima facie case of retaliation, the burden of production then shifts to the employer to proffer a legitimate, nonretaliatory reason for its actions. Common defenses to retaliation are that the decision to take the adverse employment action was made because of the employee’s (a) poor performance, (b) violation of workplace rules, or (c) insubordination. *See, e.g., Tate v. Dep’t of Mental Health*, 419 Mass. 356, 362-64 (1995) (insubordination). In addition, sometimes an employer can argue that its decision was compelled by the terms of a collective bargaining agreement or a change in the law. *See, e.g., Blackie*, 75 F.3d at 724.
3. **Plaintiff Must Prove Pretext for Retaliation**

The burden of production then returns to the plaintiff to establish, by a preponderance of the evidence, that the employer’s proffered reason is really a pretext and that the employer’s desire to retaliate against the plaintiff was a determinative factor in its decision to take the adverse action. *MacCormack*, 423 Mass. at 663; *Tate*, 419 Mass. at 364-65; *McMillan*, 140 F.3d at 309. Thus, as compared against a SOX whistleblower claim, for example, the plaintiff making a retaliation claim under an anti-discrimination statute must meet a much higher standard in order to successfully prove his or her claim.

VI. **Policies and Procedures for Addressing Internal Complaints/Codes of Conduct**

Employers can facilitate the opportunity for senior management to respond to possible whistleblower claims before any retaliatory action occur by adopting policies that encourage employees and other persons to report illegal corporate financial practices and by investigating such reports promptly and thoroughly. The mechanisms for receiving and investigating reports of specified wrongdoing may be similar to the mechanisms employers have in place for responding to complaints of sexual harassment. Many employers have elected to adopt codes of conduct and other similar policies that invite employees to come forward with reports of misconduct and that often assure employees that such a report will not subject them to any form of retaliation. Employers should consider carefully the scope of such policies so as to avoid creating unintended categories of protection from retaliation.

A. **Sexual and Other Forms of Harassment**

Section 3A of Chapter 151B of the Massachusetts General Laws requires every employer to adopt a sexual harassment policy and sets forth the minimum requirements for a sexual harassment policy, including a statement that it is unlawful to retaliate against an employee for filing a complaint of sexual harassment or for cooperating in an investigation of a complaint for sexual harassment. Mass. Gen. Laws ch. 151B, § 3A(b)(1). The processes for receiving, reviewing and addressing sexual harassment complaints and other forms of discriminatory harassment may serve as a model for developing other internal complaint policies. For additional information, see materials entitled “Law Breakfast Seminar: Investigating Sexual Harassment Claims”, available in the Labor & Employment Publications section of Goodwin Procter’s website, http://www.goodwinprocter.com/publications.asp.

B. **Sarbanes-Oxley**

1. **Sections 301 and 406**

Section 301 of SOX requires the audit committees of all covered public companies to establish procedures for
1. the receipt, retention, and treatment of complaints received by [the company] regarding accounting, internal accounting controls, or auditing matters; and

2. the confidential, anonymous submission by employees of [the company] of concerns regarding questionable accounting or auditing matters.


Section 406 of SOX requires that the SEC adopt regulations requiring companies “to disclose whether or not, and if not, the reason therefore, such [company] has adopted a code of ethics for senior financial officers, applicable to its principal financial officer and comptroller or principal accounting officer, or persons performing similar functions.” 15 U.S.C. §7264. Nothing in SOX requires that companies adopt codes of ethics, or that such codes of ethics be applicable to all employees. A code of ethics is defined by Section 406 as follows:

[T]he term "code of ethics" means such standards as are reasonably necessary to promote--

(1) honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) full, fair, accurate, timely, and understandable disclosure in the periodic reports required to be filed by the issuer; and

(3) compliance with applicable governmental rules and regulations.

2. SEC, NASDAQ, NYSE, and AMEX Rules

Securities and Exchange Commission (“SEC”) rules, proposed on February 18, 2003, detail an audit committee’s responsibility to adopt procedures for handling complaints regarding the company’s accounting practices.11 Section 240.10A-3(b)(3) requires that audit committees establish formal procedures for receiving complaints that could facilitate disclosure, encourage proper individual conduct, and alert the audit committee to possible misconduct before such misconduct results in serious consequences. The proposed rules do not mandate specific procedures that must be established, reflecting the SEC’s intention to provide companies the “flexibility to develop and utilize procedures appropriate for their circumstances.” SEC Proposed Rules, Standards Relating to Listed Company Audit Committees, (Feb. 18, 2003) available at www.sec.gov/rules/proposed/34-47137.htm. The regulations also direct national securities exchanges and national securities associations to prohibit the listing of any company not in compliance with the SEC regulations. § 240.10A-3(a).

As for codes of conduct, the SEC, consistent with its mandate under Section 406 of SOX, does not require that a company have a code of ethics—only that companies that do have such code of ethics, as defined by the SEC, comply with new SEC filing requirements of their codes and that companies without such a code file its reasons for not adopting one. SEC rules implementing Section 406 provide that a “code of ethics” means written standards that are reasonably designed to deter wrongdoing and to promote:

(1) Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;

(2) Full, fair, accurate, timely, and understandable disclosure in reports and documents that a [company] files with, or submits to, the Commission and in other public communications made by the [company];

(3) Compliance with applicable governmental laws, rules and regulations;

(4) The prompt internal reporting of violations of the code to an appropriate person or persons identified in the code; and

(5) Accountability for adherence to the code.

§§ 228.406, 229.406. The SEC explains, however, that “[w]e continue to believe that ethics codes do, and should, vary from company to company and that decisions as to the specific provisions of the code, compliance procedures and disciplinary measures for ethical breaches are best left to the company.” SEC Final Rule, Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002 (Jan. 24, 2003) available at www.sec.gov/rules/final/38.8177.htm.

Securities exchange companies have gone a step further and have required that companies listed with them affirmatively adopt codes of ethics. The New York Stock Exchange (the “NYSE”), the NASDAQ Stock Market (“NASDAQ”), and the American Stock Exchange (“AMEX”) have adopted standards that require listed companies to adopt corporate codes of conduct. Their rules have been approved by the SEC. The rules go further than that required by Sections 301 or 406 of SOX.

For example, the commentary to the NYSE’s rule 303A indicate that codes of ethics should address the following topics: conflicts of interest, corporate opportunities, confidentiality, fair dealing, protection and proper use of company assets, compliance with laws, rules and regulations (including insider trading laws), and encouraging and protecting the reporting of any illegal or unethical behavior (e.g., whistleblower protection). NYSE Corporate Governance Rules, available at www.nyse.com/pdfs/finalcorpgovrules.pdf. With respect to the concept of fair dealing, the NYSE rule states that the code of ethics should specify that each employee, officer and director should endeavor to deal fairly with the company’s customers, suppliers, competitors and employees and that no unfair advantage should be taken of anyone through
manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair-dealing practice. *Id.*

If adopted in a code of ethics, these nebulous prohibitions could open employers to complaints and retaliation claims involving garden variety disagreements over routine business and employment practices. Although many public companies subject to SOX are anxious to demonstrate their commitment to implementing the reform measures, they are approaching these ambiguous draft regulations cautiously because they wish to avoid undue administrative, legal and compliance burdens.

3. **Codes of Conduct May Create Contractual Rights**

Many employers, whether or not listed with one of the securities exchanges, have adopted codes of conduct not only to ensure compliance with the law but also to manage their workforces. To give meaning to codes, employers will often encourage employees to come forward with apparent violations of workplace rules or codes and offer protection for those who report such violations. When an employer makes a promise not to retaliate against a whistleblower but does so, the employee may be able to bring a contract claim, even if no statutory claim exists. This may be true even if an employee handbook contains a disclaimer in which the employer states that the handbook creates no contractual obligation. *See, e.g., Ferguson v. Host Int’l*, 53 Mass. App. Ct. 96 (2001) (despite disclaimer, progressive discipline policy contained in the handbook created the contractual obligation on employer to follow the procedures it set forth). *See also, Derrig v. Wal-Mart Stores, Inc.*, 942 F. Supp. 49 (D. Mass. 1996) (noting that “a boilerplate disclaimer with respect to the binding nature of the document” will not foreclose the possibility that a contract exists, especially if the disclaimer is contained in the beginning of the handbook and is followed by extensive language regarding mandatory conduct and promises of treatment).

To avoid unintended contractual retaliation claims, an employer should carefully consider the types of conduct about which it wants to encourage internal reporting. Promises to protect employees from retaliation for reporting unspecified unethical or dishonest or harassing behavior can open the door to complaints and protection for employees who have simple everyday disagreements with supervisors and managers. Although most companies may wish to affirm the value of honesty, integrity and fair business ethics, employers should try to focus employee protections against retaliation on good faith and reasonable complaints of conduct that is unlawful or violative of a well-defined policy or rule of conduct.
The Fair Labor Standards Act
White Collar Exemptions
Regulations

Wilfred J. Benoit, Jr., P.C.
Robert M. Hale
Goodwin Procter LLP
Labor & Employment Law Practice

May 2004
The White Collar Exemptions

- Executive Employees
- Administrative Employees
- Professional Employees
- Outside Sales Employees
- Computer Employees
Regulatory History

• Fair Labor Standards Act enacted 1938
• White Collar Exemptions Regulations issued 1940
• Job Duties Standards last updated 1949
• Salary Levels last updated 1975
Pressure for Change

• *Employees*:
  - Salary Levels Outdated

• *Employers*:
  - Job Duties Standards
  - Salary Basis (effect of deductions)
2003 Proposed Regulations

- Minimum Salary Level to $425/wk
- $65,000 “Highly Compensated” Test
- Job Duties Standards Modifications
Issuance of New Regulations

- Increased Minimum Salary Level to $455/wk
- $100,000 “Highly Compensated” Test
- Clarified Rather than Modified Job Duties Standards
- Effective Date: August 23, 2004
Possible Limitations on Effect of New Regulations

- Congressional Action
  - Harkin Amendment, passed Senate 5/4/04 (52-49)
    - Preserves nonexempt status for all previously nonexempt employees
  - Gregg Amendment, passed Senate 5/4/04 (99-0)
    - Preserves nonexempt status for 55 job classifications and occupations
- State Law
Standards Under The New Regulations
Minimum Salary Level

• Minimum salary level needed to qualify for the executive, administrative or professional exemptions is $455/wk ($23,660 per year).
The Highly Compensated Test

- Total Annual Compensation > $100,000
  - Includes salary, commissions, non-discretionary bonuses, but not board/lodging, fringe benefits
- Office or Non-Manual Work
- Customarily and Regularly Perform At Least One Exempt Duty
- Make-Up Payment & Pro-Rating Permitted
  - One lump sum payment to reach $100,000 level within one month
- Employer Right to Select Measuring Period; Calendar Year is Default
The Salary Basis Test

- General Rule:
  - Employee must receive full salary for any week in which the employee performs any work
  - Not reduced because of variations in time worked or quality of work (no pay docking)
  - Reducing vacation time or other paid leave is not a salary reduction, however, may not reduce below zero
Permissible Deductions

1. Absence for One or More Full Days
   - Personal Reasons
   - Sickness/Disability if bona fide plan for providing compensation exists
   - Unpaid Disciplinary Suspension (new)
     - Workplace conduct rule; written policy; good faith

2. Good Faith Penalty for Infractions of Safety Rules of Major Significance

3. Initial and Terminal Weeks of Employment

4. Unpaid FMLA Leave
Examples of Impermissible Deductions

• Employer Occasioned Absence/Business Operating Requirements
  • Partial week shutdown
  • Business closed for inclement weather
  • Test: Is the employee “ready, willing and able to work”?
• Jury Duty, Witness Court Appearance, Temporary Military Leave
  • Permissible to offset for payments received for service
Effect of Impermissible Deductions

• “Actual Practice” of improper deduction leads to loss of the exemption:
  – while impermissible deductions were made
  – for that employee and other employees in the same job class working for the same manager(s)

• Isolated or Inadvertent Impermissible Deductions:

  No Loss of Exemption if Employer Reimburses Employee
Safe Harbor

• No Loss of Exemption if:
  • Clearly Communicated Policy Prohibiting the Impermissible Deductions
  • Policy Includes Complaint Mechanism
  • Reimbursement to Employee
  • Good Faith Commitment to Comply

• *Unless* Willful Violation
  • Continuing After Employee Complaints
Effect of Extra Pay on Salary Basis

- Extra Pay Based on Time Worked
  - Reasonable relationship between salary guarantee and total earnings
- Extra Pay Based on Commissions
  - No reasonable relationship required
Fee Basis

Limited Exception to Salary Requirement:

• Administrative and professional employees

• Agreed amount for a single job; pay may not be based on time worked

• Not available for repeated tasks paid on an identical basis

• Must Meet the Minimum Salary Level
  – Rate Would Be At Least $455/wk if it took 40 Hours
Primary Duty

- Definition: “principal, main, major or most important duty that the employee performs”
- Emphasis on “character of the employee’s job as a whole”
  - Amount of time: “useful guide” but not “sole test”
  - Relative importance of exempt duties
  - Freedom from direct supervision
  - Relative pay levels of nonexempt employees performing the same nonexempt work
The Executive Employee Exemption

Elements

- **Primary Duty** is Management of at least a Department;

- Customarily and Regularly Directs the Work of Two or More Full-time Employees (or Equivalent); and

- Has **Authority to Hire or Fire** Other Employees or Recommendations are **Given Particular Weight**.
The Executive Employee Exemption

Primary Changes:

• Authority to hire/fire or recommendations on status changes are given “particular weight”
  – Occasional suggestions not enough

• Business Owner Exception
  – Bona fide 20% equity interest; and
  – Is actively engaged in management

• Concurrent Duties
  – Not automatically disqualified from exemption
  – Exempt employee decides when to perform non-exempt work
Administrative Employee Exemption

Elements:

• Primary Duty is the Performance of Office or Non-Manual Work Directly Related to the Management or General Business Operations of the Employer or the Employer’s Customers

• Primary Duty Includes the Exercise of Discretion and Independent Judgment with respect to Matters of Significance
Administrative Employee Exemption

Primary Changes:
• Production/Staff Dichotomy Deemphasized
  – Sales still generally treated as “production”
• Discretion and Independent Judgment in Matters of Significance
  – Level of importance and consequence of work
• Updated Examples
Administrative Employee Exemption

Examples:

- insurance claims adjusters
- financial services employees
  – except if primary duty is selling financial products
- team leads of major projects
  – even without supervisory responsibility
- executive assistants
  – with delegated authority on matters of significance
- human resource managers
Professional Employee Exemption: Learned Professional

Elements:

- Primary duty must be the performance of work requiring advanced knowledge
- In a field of science or learning
- Customarily acquired by a prolonged course of specialized intellectual instruction
Learned Professional Exemption

Primary Changes and Clarifications:

• Advanced Intellectual Knowledge
  – Customarily obtained through required specialized academic training; appropriate degree
  – Cannot be solely from general knowledge or on-the-job training

• Use of Manuals
  – Designed for specialists
  – Can be used to assist with difficult circumstances
Learned Professional Exemptions

Examples:
- Registered Nurses
  - Not licensed practical nurses
- Accountants (CPAs)
  - Not accounting clerks or bookkeepers
- Executive and Sous Chefs
  - With culinary degrees
  - Not cooks
- Athletic trainers
  - With four-year degrees and certifications
Creative Professional Exemption

Elements:

*Creative Professional:*

- Primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

*Example:*

- Journalists
- Columnists and broadcast performer
- Not reporters
Computer Employee Exemption

Elements:

• Salaried ($455/week) or Hourly ($27.63/hour); Highly Compensated Test Does Not Apply

• Systems analysts, programmers or similar jobs with a primary duty of:
  1. determining hardware, software or system or functional specifications;
  2. designing, analyzing or modifying computer systems or programs to satisfy design specifications;
  3. designing or modifying programs for machine operating systems; or
  4. a combination of those duties.
Computer Employee Exemption

Examples:
• Computer Systems Analysts
• Computer Programmers
• Software Engineers
• *Not* computer manufacturing or repair

Other Exemptions May Apply
Outside Sales Employee Exemption

Elements:

• Primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities, and

• Customarily and regularly works away from the employer’s place(s) of business.
Outside Sales Employee Exemption

Primary Changes:
- Elimination of the 20% Test
  - Replaced by “primary duty”

Other Issues
- Not applicable to inside sales
- Not applicable to telephone sales from home offices
- Promotion Work
  - Own sales – yes; others’ sales – no
- Drivers Who Sell
  - Is the primary duty sales or delivery?
Other Exemptions

• Retail or Service Commissioned Employees
  - Employed by retail or service establishment
  - Total pay is at least 1.5 times minimum wage
  - Over half of pay is commissions

• Motor Carrier Act
  - Based on authority of Department of Transportation
  - Can apply to those who drive personal automobiles in certain circumstances

• Various Other Exemptions
Steps to Take

• Review potentially affected jobs
  – Update job descriptions and classifications

• Policy changes
  – Safe harbor on improper deductions
  – Disciplinary policies
  – Selection of 52 week period for highly compensated employee measurement
Developing Whistleblower Standards Under the Sarbanes-Oxley Act

James W. Nagle, P.C.
Heidi Goldstein Shepherd
Goodwin Procter LLP
Labor & Employment Law Practice

May 2004
Sarbanes-Oxley ("SOX") Whistleblower Protections in a Nutshell

• Protects employees of public and certain private companies from unfavorable personnel action for engaging in protected activity by making a complaint about violations of federal securities or fraud laws either to a supervisor or to federal authorities.
SOX Burden of Proof – the Employee’s Case

Employee must establish the following to state a case:

• Protected activity of which Employer was aware
• Unfavorable Personnel Action
• Circumstances exist that are sufficient to raise an inference that the protected activity was likely a contributing factor in the unfavorable personnel action
• Temporal proximity alone likely sufficient

Assuming all factors are met, presumption of retaliation is created.
Interpretation of SOX’s Terms Regarding Employee’s Case

- unfavorable personnel action – may be deemed to include any action that adversely affects employees
- protected activity – may include internal disagreements that only indirectly suggest possible fraud
- “contributing factor” is any factor, which alone or in connection with other factors tends to affect in any way the outcome of the decision
SOX Burden of Proof – the Employer’s Case

• Assuming complainant states a case, the burden of proof shifts to respondent to establish by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity.

• SOX is much different than other retaliation statutes where employers only need to state a legitimate non-retaliatory motive and the burden of proof stays with the employee at all times.
SOX Remedies

• Reinstatement to same seniority
• Back pay
• Attorneys’ fees and costs
• No punitive damages
• $1,000 to respondent if determined that complaint was frivolous or made in bad faith
• No jury trial right
Lessons of SOX -- Employee Management

- Document and address employee performance problems
- Avoid creation of pretext
- Train managers – avoid retaliatory or threatening language
- Offer consistent treatment
Investigating an Allegation of Fraud or Securities Violations

- Role of the audit committee
- Taking care not to pre-judge the complainant
- Consideration of employee’s request to involve own counsel
- Treat a charge seriously at the DOL investigatory phase
SOX’s Implications for Non-Public Companies

- Implementation of SOX-like statutes affecting private companies in other states
- Pending legislation in Massachusetts to provide similar whistleblower protections to employees of public charities
- Language in codes of conduct