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Recent Developments In Whistleblower Retaliation Law

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I. The Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002, commonly referred to as SOX, was passed in response to high-profile corporate wrongdoing. A prime example of the type of corporate wrongdoing that Congress passed SOX to prevent is the infamous Enron scandal, and unlike many laws protecting employees, the overarching purpose of SOX is to safeguard *investors* in public companies and restore trust in the financial markets. As noted by Justice Ginsburg in *Lawson et al v. FMR LLC et al:*

> In the Enron scandal that prompted the Sarbanes-Oxley Act, contractors and subcontractors, including the accounting firm Arthur Andersen, participated in Enron's fraud and its cover up. When employees of those contractors attempted to bring misconduct to light, they encountered retaliation by their employers. The Sarbanes-Oxley Act contains numerous provisions aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies. See, *e.g.*, 116 Stat. 750-765, 773-774, 784, §§101-107, 203-206, 307.
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> The Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act) aims to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." S. Rep. No. 107-146, p. 2 (2002) (hereinafter S. Rep.). Of particular concern to Congress was abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a "corporate code of silence"; that code, Congress found, "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." *Id.*, at 4-5 (internal quotation marks omitted). When employees of Enron and its accounting firm, Arthur Andersen, attempted to report corporate misconduct, Congress learned they faced retaliation, including discharge. As outside counsel advised company officials at the time, Enron's efforts to "quiet" whistleblowers generally were not proscribed under then-existing law. *Id.*, at 5, 10. Congress identified the lack of whistleblower protection as "a significant deficiency" in the law, for in complex securities fraud investigations, employees "are [often] the only firsthand witnesses to the fraud." *Id.*, at 10.

Lawson v. FMR LLC, 134 S. Ct. 1158, 1162, 188 L. Ed. 2d 158 (2014).

Section 806 of Sarbanes-Oxley addresses this concern. Titled "Protection for Employees of Publicly Traded Companies Who Provide Evidence of Fraud," §806 added a new provision to Title 18 of the United States Code, 18 U. S. C. §1514A, which reads in relevant part:

§ 1514A. Civil action to **protect** against **retaliation** in **fraud cases**

(a) Whistleblower Protection for Employees of Publicly Traded Companies.--No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),[1] or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—

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

As noted above, SOX contains several significant anti-retaliation provisions. The first concerns Securities Act violation reports under Section 806 of SOX. Section 806 protects employees of publically traded companies from retaliation for reporting reasonably suspected violations of certain federal laws and regulations. These include alleged violations of (1) the Federal Securities Act and related laws contained in 18 U.S.C. §§ 1341, 1343, 1344, or 1348 (securities fraud, mail fraud, bank fraud, wire, radio, or television fraud); (2) SEC rules and

regulations; or (3) any other federal law against shareholder fraud. Section 806 protects the filing of reports, testimony, participation, or assistance given to (a) a federal law enforcement or regulatory agency, (b) members of Congress, or (c) a person with supervisory authority over the employee. Pub. L. No. 107-204 §§ 806, 116 Stat. 745, 802-04 (codified at 18 U.S.C. § 1514 A). Section 929A of Dodd-Frank amended SOX's anti-retaliation provisions.

A. The OSHA Investigative Process

Pursuant to 18 U.S.C. § 1514A(b), a person who alleges retaliatory discharge under SOX must first file a complaint with the Secretary of Labor. The Secretary of Labor has delegated to OSHA authority to administer such complaints. *See* 18 U.S.C. 1514A(b) (statutorily charging Secretary of Labor with enforcement of SOX claims); Secretary of Labor's Order No. 5–2002, 67 FR 65008–01, 67 FR 65008 (Oct. 22, 2002) (delegating authority to investigate SOX claims to OSHA); *see also* 29 C.F.R. § 1980.103(c) ("The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee.") There are several ways that a plaintiff can file a complaint with OSHA under SOX, including online, by fax or mail, or calling a local OSHA regional or area office. Thus, procedurally, SOX is enforced by OSHA and requires that an employee file a complaint with OSHA first. This is unlike the Dodd-Frank Act, which has no administrative filing requirements.

The Occupational Safety and Health Administration (OSHA) is an agency within the United States Department of Labor. Congress established OSHA under the Occupational Safety and Health Act, signed into law by President Nixon in 1970. Over the years, OSHA's investigative role has grown exponentially as new whistleblower protections are passed and OSHA has been given the responsibility of enforcing them. OSHA is responsible for enforcing the whistleblower provisions of over twenty different statutes. *See* United States Dep't of Labor, Occupation Safety & Health *http://www.whistleblowers.gov/factsheets_page.html*. Whistleblower protections administered by OSHA protect employees from retaliation for reporting violations of various airline, commercial motor carrier, motor vehicle safety, consumer product, environmental, consumer finance, food safety, health insurance reform, nuclear, pipeline, public transportation, railroad, maritime, and securities laws. Each law has its own deadline to file with OSHA, ranging from 30 days to 180 days. SOX requires a complainant to file a complaint within 180 days.

After the complaint is filed, OSHA contacts the complainant to decide whether or not to conduct an investigation. If an investigation proceeds, a complainant has the opportunity to offer documents and other evidence, and the employer is notified of the complaint and allowed to submit a response. Information provided by the complainant is provided to the employer. In cases where the evidence supports the allegations, OSHA will issue an order for the appropriate relief.

OSHA is required to investigate retaliation claims when a prima facie case is made. To meet his or her prima facie burden in a retaliation case, an employee must show that the complainant engaged in protected activity, that the employer either knew or suspected the

activity, an adverse action occurred or was threatened, and the allegations are sufficient to raise an inference that the protected activity motivated or contributed to the adverse action.

After a complainant makes a prima facie case, the burden shifts to the employer. The employer must prove by clear and convincing evidence that the same action would have occurred regardless of the protected activity.

In 2014, OSHA received 3,060 cases under the various whistleblower protection laws, with 145 of those cases filed under SOX. This is actually a decrease from prior years.

B. Complaint Exhaustion Requirements

Recently, the Fifth Circuit issued an opinion in *Wallace v. Tesoro Corp.*, a case in which a former employee brought a retaliation claim against his former employer alleging the employer terminated him for engaging in protected activity in violation of the Sarbanes-Oxley Act's whistleblower protections. The Western District of Texas entered a dismissal, and the Plaintiff, Kevin Wallace, appealed. Upon appeal, the Fifth Circuit partially reversed the lower court's decision and revived Wallace's SOX claims. *Wallace v. Tesoro Corp.*, 13-51010, 2015 WL 4604967, at *1 (5th Cir. July 31, 2015).

Wallace was the Vice President of Pricing and Commercial Analysis at Tesoro Corporation, and was fired in March of 2010. Wallace claimed in his lawsuit that Tesoro Corporation terminated his employment for engaging in activity protected under SOX when he reported suspected wire fraud. Wallace claimed that he engaged in protected activity relating to four categories of suspected unlawful activity: 1) taxes on revenues of certain financial forms, including the company's Forms 10-K and 10-Q filings, even though the funds were collected only for transmittal to the treasury; 2) that Tesoro had a side agreement in violation of anti-trust laws; 3) that Wallace disclosed, on two annual certificates of compliance that he had observed retaliation for raising concerns about violations of the Tesoro Code of Conduct; and 4) that Tesoro was engaged in wire fraud by providing some customers advance notice of price changes and by giving after the fact discounts to certain customers. *Id.*

After his termination in March of 2010, Wallace timely filed a complaint with OSHA in May of 2010, stating that Tesoro had retaliated against him for engaging in protected activity, citing retaliation for marking "yes" to the retaliation questions on the certificates of compliance, investigating the "continuing anti-trust issues in Idaho Falls" and "discovering taxes collected by Tesoro were being booked as revenue." The complaint did not, however, mention price signaling, inconsistent discounts, or wire fraud. *Id.*

Wallace's complaint was dismissed by OSHA in October of 2010. The Administrative Review Board ("ARB") did not issue a final decision on Wallace's case within 180 days of his filing the complaint, so he sued in federal district court in February 2011. Later, Wallace filed a second amended complaint containing the four categories of protected activities, and then over objections, Wallace filed a third amended complaint. Tesoro moved to dismiss the third amended complaint, raising for the first time that the wire-fraud based claims had not been presented in the OSHA complaint and were unexhausted. The district court accepted the recommendation of

the Magistrate Judge, and dismissed the first three categories of Wallace's protected activity, because the district court found that Wallace was not objectively reasonable in believing that booking taxes as revenue violated SEC rules, that Wallace had not engaged in protected activity in relation to the Idaho Falls anti-trust issues because he had not reported the pricing issue to Tesoro before his termination, and finally, that his 2008 Certificate disavowed retaliation, so he did not show a reasonable belief that he had experienced retaliation. Finally, the district court found that the 2009 Certificate was not protected activity because it contained no information other than a checked box and a refusal to say more except in private. The district court also accepted the Magistrate's recommendation to dismiss the wire-fraud portion of the third-amended complaint as outside the scope of the OSHA complaint filed by Wallace. *Id.*

Wallace appealed, and the Fifth Circuit reversed the decision in part, finding that as to his allegations regarding his investigation into Tesoro's allegedly booking taxes as revenues, that Wallace had adequately plead that he engaged in protective activity related to that practice. *Id.*

As part of its analysis, the Fifth Circuit found that exhaustion of administrative remedies in SOX cases is a prerequisite to filing in much the same way as with Title VII cases. The Fifth Circuit noted that OSHA has low requirements for filing a complaint, but that to be sufficient, a complaint must still allege facts and evidence that make a prima facie showing. Such facts and evidence must show that the employee engaged in protected activity and identify the employer conduct that the complainant believes to be illegal. The purpose behind filing a complaint is to trigger an investigation and conciliation procedures, and it would thwart the administrative scheme if a plaintiff could sue on claims that the investigating agency never had a chance to resolve. *Id.* at *5.

This resulted in the Fifth Circuit applying the same exhaustion standard in SOX retaliation cases as Title VII cases. The scope of a SOX complaint is limited to the sweep of the investigation that could reasonably be expected to ensue from the administrative complaint. "Litigation may encompass claims reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint." *Id.*

C. Amendments to SOX by Dodd-Frank Act in 2010

SOX was specifically amended by §922 of the Dodd-Frank Act to allow a longer window of time to report complaints, from 90 days to 180 days, to disallow arbitration, and make clear that SOX complainants have a right to trial by jury.

D. Protected Conduct Under Sarbanes-Oxley

SOX's plain language provides the standard for establishing protected activity. In order to show protected activity, in cases where the complainant's asserted protected conduct involves providing information to the employer, the Plaintiff must only show that he or she "reasonably believes" that the conduct complained of constitutes a violation of the laws listed at Section 1514. 18 U.S.C.A. § 1514A(a)(1). In the language of the statute, protected activity under §1514A includes "any lawful act done by the employee" to provide information to a federal regulatory or law enforcement agency, any member of Congress or any committee of Congress, or a person

with supervisory authority over the employee regarding any conduct *which the employee reasonably believes* constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders[.] 18 U.S.C. § 1514A(a)(1) (emphasis added) *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 805 (6th Cir. 2015). As such, the act allows internal complaints to be protected.

The Act does not define "reasonable belief," but cases defining reasonable belief have examined the legislative history establishing Congress's intent in adopting this standard. Senate Report 107-146, which accompanied the adoption of Section 806, provides that "a reasonableness test is also provided . . . which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts" (See generally, *Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 478 (3d Cir. 1993)). S. Rep. 107-146 at 19 (May 6, 2002). Reasonable belief does not require complainant to tell management or the authorities why the belief is reasonable, nor do SOX complainants need to show their disclosures are definitely and specifically related to the relevant laws that they are complaining about. *See, e.g., Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 725 (4th Cir. 2006); *Collins*, 334 F. Supp. 2d 1365, 1377-78 (N.D. Ga. 2004)). Importantly, SOX complainants do not need to establish criminal fraud. This is because requiring a complainant to allege, prove or approximate the elements of fraud, would be contrary to the whistleblower protection provision's purpose. *Sylvester v. Parexal* ARB No. 07-123, ALJ Nos.-SOX-39 and 42 (ARB May 25, 2011). As part of this, when filing in federal court, a plaintiff need not meet the heightened pleading requirements of Fed. Rule. Civ. Proc. 9 to avoid a motion to dismiss. *Smith v. Corning Inc.*, 496 F. Supp. 2d 244, 250 (W.D.N.Y. 2007).

The seminal decision defining protected conduct under SOX is the *Sylvester v. Parexal* case which abrogates an earlier decision, *Platone v. FLYi, Inc.*. ARB No. 07-123, ALJ Nos.-SOX-39 and 42 (ARB May 25, 2011); ARB Case No. 04-156, 2006 WL 3246910 (Sept. 29, 2006). SOX complainants need only show that they reasonably believed the conduct they complained about violated a relevant law. *Sylvester v. Parexal* ARB No. 07-123, ALJ Nos.-SOX-39 and 42 (ARB May 25, 2011). There is no requirement that an employee wait until misconduct occurs to engage in protected activity, just that the employee reasonably believes that the violation is likely to happen. *Sylvester v. Parexal* ARB No. 07-123, ALJ Nos.-SOX-39 and 42 (ARB May 25, 2011).

Allegations of shareholder fraud is not required to be protected by SOX, because SOX addressed corporate fraud generally and a complaint based on a reasonable belief that a violation of any of the categories of fraud listed in SOX have been violated is sufficient to engage in protected activity. *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1131-32 (10th Cir. 2013). Included in the list of employer conduct is a violation of mail fraud or wire fraud, both of which are very broad and which courts have begun to apply in a variety of contexts.

E. Contributing Factor Causation Standard

Unlike trends in discrimination suits, the contributing factor standard has become increasingly employee friendly in the past few years. A whistleblower under SOX must prove by a preponderance of the evidence that his or her protected activity was a "contributing factor" in the decision to terminate.

The regulations implementing Section 806, as well as the decisions of numerous circuit courts, establish the elements of a prima facie claim for violation of § 1514A. A claimant must show: (1) she engaged in protected activity or conduct; (2) the employer knew of her protected activity; (3) she suffered an unfavorable personnel action; and (4) her protected activity was a contributing factor in the unfavorable personnel action. *See* 18 U.S.C. § 1514A(b)(2)(C); 49 U.S.C. § 42121(b); 29 C.F.R. § 1980.104(b)(1)(2007); *Harp v. Charter Commc'ns, Inc.*, 558 F.3d 722, 723 (7th Cir. 2009) (collecting cases). *Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1129 (10th Cir. 2013).

> This element is broad and forgiving: the Board has defined a "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect *in any way* the outcome of the decision." *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, No. 04–149, 2006 WL 3246904, at *13 (Admin. Rev. Bd. May 31, 2006) (emphasis added) (quotation omitted); *see also Allen*, 514 F.3d at 476 n. 3. "[T]he contributing factor standard was 'intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.' " *Klopfenstein*, 2006 WL 3246904, at *13 (quoting *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed.Cir.1993)). Temporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test. *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir.2009); *see also Marx v. Schnuck Mkts., Inc.*, 76 F.3d 324, 329 (10th Cir.1996) (stating, in context of Fair Labor Standard Act's "motivating factor" element, "protected conduct closely followed by adverse action may justify an inference of retaliatory motive").

Lockheed Martin Corp. v. Admin. Review Bd., U.S. Dept. of Labor, 717 F.3d 1121, 1136 (10th Cir. 2013)

In *Fordham v. Fannie Mae*, ARB No. 12-061, 2014 WL 5511070 (Oct. 9, 2014) and *Powers v. Union Pac. R.R.*, ARB No. 13-034, 2015 WL 1519813 (Mar. 19, 2015), the ARB explained that a whistleblower must prove by a preponderance of the evidence that his or her protected activity was a contributing factor in the employer's decision to take an adverse action. Also, the ARB explained that an employer's evidence that it took the challenged action for a legitimate business reason will not be considered when determining whether a whistleblower has made his or her contributing factor showing. *Id.* The employee must make an initial showing that the protected activity was a "contributing factor" to the adverse employment decision by making at least an allegation sufficient to raise an inference of reprisal. *Id.* Further, the ARB stated:

> Quoting *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), the ARB has repeatedly noted two critical aspects of the "contributing factor" causation

test: (1) that by "contributing factor" is meant "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision," and (2) that the "contributing factor" standard was "intended to overrule existing case law which required a whistleblower to prove that his protected conduct was a 'significant,' "motivating,' 'substantial,' or 'predominant' factor in [the] personnel action."

The significance of the definitional aspect of the "contributing factor" test is that (again as the ARB has repeatedly noted) under this proof standard a complainant need not prove that the respondent's asserted reason for its action is pretext, which would be necessary as one means of prevailing if the respondent's evidence in support of its action was to be weighed against the complainant's causation evidence. Even if the respondent establishes a legitimate basis for its action, the complainant will nevertheless prevail at the "contributing factor" causation stage as long as the complainant can prove by a preponderance of the evidence that his or her protected activity was also a factor in the adverse personnel action. "A complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather may prevail by showing that the respondent's reason, while true, is only one of the reasons for its conduct, and another [[contributing] factor is the complainant's protected activity.

Regarding Congress's elimination of the previously existing requirement that the complainant prove that protected activity was a ""significant," "motivating," "substantial," or "predominant" factor in the personnel action by adoption of the "contributing factor" test, it is pointed out that the prior requirement necessitated the *weighing* of the parties' respective causation evidence under the preponderance of the evidence test. This weighing is *exactly* what the "contributing factor" statutory provision was designed to eliminate. Different ultimate facts are at issue in the two separate stages of proof. In the first stage, the question is whether protected activity (or whistleblowing) was *a factor* in the adverse action. Certainly at this stage an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well as the credibility of the complainant's causation evidence. However, the question of whether the employer has a legitimate, non-retaliatory reason for the personnel action and the question of whether the employer would have taken the same adverse action *in the absence of the protected activity* for that reason only require proving different ultimate facts than what is required to be proven under the ""contributing factor" test. An employer's legitimate business reasons may neither factually nor legally negate an employee's proof that protected activity contributed to an adverse action. Rather, the respondent must prove the statutorily prescribed affirmative defense that it would have taken the same personnel action had the complainant not engaged in protected activity by the statutorily prescribed "clear and convincing" evidentiary burden of proof.

Id.

There are a number of court decisions following this path indicating that the "contributing factor" standard is employee-friendly, including in the Fifth Circuit. *See, e.g., Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013) (observing that "contributing factor" burden-shifting is "much easier for a plaintiff to satisfy than [Title VII's] *McDonnell Douglas* standard."); *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) ("For employers, this is a tough standard, and not by accident."). It is settled that a contributing factor is any factor, which alone or in combination with other factors, tends to affect the outcome of the decision. *E.g., Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 (5th Cir. 2014) (citing *Allen v. Admin. Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008)). But the evidentiary framework clarified in *Fordham* and *Powers* ensures that when the protected acts are closely intertwined with the adverse action taken, the respondent "bears the risk that the influence of legal and illegal motives cannot be separated." *Powers*, 2015 WL 1519813 at 19 (*citing Abdur-Rahman v. Dekalb Cnty*., ARB No. 08-003; ALJ No. 2006-WPC-002, slip op. at 12 (May 18, 2010)). The most recent Fifth Circuit case found that:

> To maintain an anti-retaliation claim under SOX, the employee must prove that his protected conduct was a "contributing factor" in the employer's adverse action. *(internal citation omitted).* The Review Board found here that Menendez's whistleblowing was indeed a "contributing factor" in Halliburton's disclosure of his identity as the whistleblower. (Given the facts of this case, it is difficult to see how a different outcome could have been possible.) Halliburton contends that, as a matter of law, it is not enough that the protected conduct be a "contributing factor" in the employer's adverse action. Rather, according to Halliburton, an employee must prove a "*wrongfully-motivated* causal connection." (Emphasis added.) The principal problem with Halliburton's argument is that it conflicts with our statement in *Allen* that a "contributing factor" is "*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Id.* at 476 n. 3 (citation omitted, emphasis added). Furthermore, the argument entirely lacks support in the case law. We are unaware of any court that has held that, in addition to proving that the employee's protected conduct was a "contributing factor" in the employer's adverse action, the employee must prove that the employer had a "wrongful motive" too. On the contrary, the Federal Circuit has explained that "a whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected conduct] was a contributing factor to the personnel action." *Marano v. Dep't of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993). "Regardless of the official's motives, personnel actions against employees should quite simply not be based on protected activities such as whistleblowing." *Id.* (citation and alteration omitted). We reject Halliburton's argument that the Review Board committed legal error by failing to require proof that the company had a "wrongful motive."

Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 262-63 (5th Cir. 2014).

The burden shifting framework under SOX is further employee- friendly in that once the complainant has demonstrated by a preponderance of the evidence that his or her protected

conduct was a contributing factor in the adverse action, the only way an employer can avoid liability is by demonstrating through clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity. *See Manendez,* ARB Case Nos. 09-002, 09-003, ALJ Case No. 2007-SOX-05 at *11 (ARB Sept. 13, 2011).

F. Employer Defenses

SOX employs a burden-shifting framework that is favorable to whistleblowers. Under this framework, once the complainant has shown through a preponderance of the evidence that the protected activity was a contributing factor in the adverse employment action, the employer must show through clear and convincing evidence that it would have taken the same adverse action, even in the absence of the protected activity. See *Menendez,* ARB Case Nos. 09-002, 09-003, ALJ Case No. 2007-SOX-05, at *11 (ARB Sept. 13, 2011).

A critical decision issued by the ARB in 2014 defines the burden that an employer must meet to establish this defense. In contrast to the burden-shifting framework of most laws protecting employees, the employer faces a heavy burden. See *Speegle v. Stone & Webster Construction,* ARB 13-074, 2005-ERA-006 (ARB Apr. 25, 2014).

Speegle is actually not a SOX case, but an Energy Reorganization Act ("ERA") case. However, under the ERA, an employee must also show that protected activity was a contributing factor in his or her termination, and if the complainant does so, the employer must show by clear and convincing evidence that it would have taken the same adverse employment action. In *Speegle*, the ARB issued a decision establishing a 3 part framework that ALJs are required to apply in determining whether the employer met its burden under the mixed motives defense:

> (1)How "clear" and "convincing" the independent significance is of the non-protected activity, (2) the evidence that proves or disproves whether the employer "would have" taken the same adverse actions; and (3) the facts that would change in the "absence of" the protected activity.

Clear evidence was interpreted to mean that the employer has presented evidence of unambiguous explanations for the adverse actions in question, and convincing evidence is evidence that has been defined as evidence that is "highly probable." The burden of proof under clear and convincing evidence is more rigorous than the preponderance of the evidence standard and indicates that the thing to be proved is highly probable or reasonably certain. Quoting the Supreme Court, the *Speegle* ARB stated:

> In *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), the Supreme Court defined "clear and convincing evidence" as evidence that suggests a fact is "highly probable" and "immediately tilts" the evidentiary scales in one direction. We find that the Court's description in *Colorado v. New Mexico* provides additional useful guidance for the term "clear and convincing" evidence, and we incorporate it into our application of the ERA whistleblower statute.

Speegle, ARB 13-074, 2005-ERA-006.

The ARB expressly found that it was not enough to show that the employer could have terminated Speegle, but that it would have in fact terminated his employment. *Id.* The ARB found it was not enough to show that the conduct was a sufficient independent reason, but that the employer would have actually terminated him for the conduct complained of by the employer. *Id.*

Courts have cited *Speegle* specifically in other cases, such as in a case where the plaintiff alleged violations of the anti-retaliation provisions of the Federal Railroad Safety Act:

> Evidence of whether BNSF would have dismissed Gunderson in the absence of his protected activity may include "temporal proximity between the non-protected conduct and the adverse actions," *Speegle v. Stone & Webster Constr., Inc.,* ARB No. 13–074, ALJ No.2005–ERA–006, at *7 (ARB Apr. 25, 2014) (2014 WL 1758321); the thoroughness of BNSF's investigation, *see Kuduk,* 768 F.3d at 792; "statements contained in relevant office policies," *Speegle,* ARB No. 13–074 at *7; "the independent significance ... of the non-protected activity," *id.;* and whether the dismissal was "approved by others in senior management," *see Kuduk,* 768 F.3d at 792.

Gunderson v. BNSF Ry. Co., 14-CV-0223 PJS/HB, 2015 WL 4545390, at *14 (D. Minn. July 28, 2015)

Although not citing *Speegle* specifically, the Sixth Circuit has summarized the analysis as:

> Whistleblower claims alleging a violation of § 1514A are subject to a burden-shifting framework. *Feldman v. Law Enforcement Associates Corp.*, 752 F.3d 339, 344 (4th Cir. 2014). First, the plaintiff must establish a prima facie case by proving, under a preponderance of the evidence standard, that (1) he engaged in protected activity; (2) the employer knew or suspected, either actually or constructively, that he engaged in the protected activity; (3) he suffered an unfavorable personnel or employment action; and (4) the protected activity was a contributing factor in the unfavorable action. *Id.; Riddle v. First Tenn. Bank, Nat'l Assoc.*, 497 Fed. Appx. 588, 594 (6th Cir.2012). The employer may then avoid liability if it proves "by clear and convincing evidence that the employer would have taken the same personnel action in the absence of the protected activity." *Feldman*, 752 F.3d at 345. (quoting *Welch v. Chao,* 536 F.3d 269, 275 (4th Cir.2008)).

Rhinehimer v. U.S. Bancorp Investments, Inc., 787 F.3d 797, 805 (6th Cir. 2015).

G. Post-Employment Protection for Former Employees

In a recent case, a district court refused to dismiss a former employee's SOX claim against Dish network for retaliation that occurred post-employment. *Kshetrapal v. Dish Network, LLC*, 14-CV-3527 PAC, 2015 WL 857911, at *1 (S.D.N.Y. Feb. 27, 2015). The plaintiff in that case, Tarun Kshetrapal, was employed by Dish Network as the Associate Director of South Asian Marketing from March 2007 through November 2008. While employed, Kshetrapal reported to Tracy Thompson West, the Vice President for International Marketing and Programming. West hired a marketing firm, and Kshetrapal had concerns that he voiced about the marketing firm's invoicing to Dish. Plaintiff informed West and Dish's General Manager of Programming, Izabela Slowikowska, that he believed the firm was invoicing Dish for work that was not performed correctly or at all. Plaintiff contended that West and Slowikowska knew about the fraudulent invoices, but were receiving kickbacks to continue to employ the agency. Kshetrepal performed an investigation and found information substantiating his suspicions, but West and Slowikowska reprimanded Kshestrpal for investigating. After his investigation, plaintiff refused to sign invoices he believed to be fraudulent, and after a series of events, Dish forced the plaintiff to resign.

After Kshestrpal's termination, because of the nature of the conduct that occurred, a legal disagreement arose between the marketing firm and Dish. Kshestrpal was deposed in the course of this litigation, and he testified regarding the fraudulent invoicing and misconduct. On multiple occasions thereafter, Dish Network either refused to do business with companies Kshestrpal worked for or on one occasion directed a business partner of Dish's not to hire Kshestrpal. Kshestrpal sued under SOX along with other claims, and as part of his claims he included this post-termination conduct. The district court found that Kshestrpal could include his claims for post-termination conduct under SOX, because he still fell under the definition of employee for purposed of SOX:

> Since the term "employees" is ambiguous, the Court turns to other sources to resolve the ambiguity. *See id* at 345, 117 S.Ct. 843. One such source is the regulations and administrative decisions promulgated by the Department of Labor ("DOL").[2] The implementing regulations specifically define "employee" to include "an individual presently *or formerly* working for a covered person." 29 C.F.R. § 1980.101 (emphasis added). Similarly, the Administrative Review Board ("ARB") recently held that an employee's post-termination whistleblowing can constitute protected activity under SOX. *See Levi v. Anheuser Busch Inbev,* 2014 WL 4050091, at *2, 2014 DOL SOX LEXIS 42, at *5 (ARB July 24, 2014) ("[Plaintiffs] *post-discharge filings* with OSHA of the whistleblower complaints constitute SOX-protected activity .... The ALJ erred in limiting his consideration of whistleblower activity to only [plaintiff's] actions occurring prior to his discharge from employment.") These interpretations comport with the intended purpose of SOX-to "combat what Congress identified as a corporate culture, supported by law, that discourages employees from reporting fraudulent behavior not only to the proper authorities ... but even internally," *Bechtel, 710 F.3d at 446; see Lawson v. FMR LLC, 134 S. Ct. at 1170* (purpose of SOX is to "encourage

> whistleblowing by ... employees who suspect fraud involving the public companies with whom they work").

Kshetrapal v. Dish Network, LLC, 14-CV-3527 PAC, 2015 WL 857911, at *3 (S.D.N.Y. Feb. 27, 2015).

As there are not many court cases addressing the definition of employee under SOX, this will be an area to watch as more SOX cases make their way through the courts.

H. Damages in SOX cases

1. Back Pay

Back pay is specifically authorized under SOX. The general rule regarding back pay awards in SOX cases is similar to other employment cases and has been described as:

> [T]he back pay award should therefore be based on the earnings the employee would have received but for the discrimination. A complainant bears the burden of establishing the amount of back pay that a respondent owes. However, because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, unrealistic exactitude is not required in calculating back pay, and uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating party.

Platone v. Atlantic Coast Airlines Holdings, Inc, 2003-SOX-27, at 2 (ALJ July 13, 2004) (internal citations omitted), rev'd on other grounds sub nom, *Platone v. FLYi, Inc.,* ARB 04-154 (ARB Sept. 29, 2006), aff'd sub nom. *Platone v. Dep't of Labor,* 548 F.3d 322 (4th Cir. 2008) (internal citations omitted).

2. Front Pay

Although there is a preference for reinstatement, front pay has also been awarded in lieu of reinstatement. *See, e.g., Hagman v. Washington Mutual Bank, Inc.,* 2005-SOX-00073, at 26-30 (ALJ Dec. 19, 2006), *appeal withdrawn by employer and dismissed,* 07-039 (ARB May 23, 2007) (awarding $640,000 in front pay to a banker whose supervisor became verbally and physically threatening when Hagman disclosed concerns about the short funding of construction loans).

Recent developments have also shown that courts are willing to award front pay in lieu of reinstatement in SOX actions. For example, in a relatively recent East District of Virginia case, a district court stated front pay was a potential remedy after the plaintiff prevailed in a jury trial. *See Jones v. SouthPeak Interactive Corp. of Delaware,* 986 F. Supp. 2d 680 (E.D. Va. 2013), *aff'd* 777 F.3d 658 (4th Cir. 2015)(former chief financial officer of a video game publisher was terminated two days after she filed a complaint with the Enforcement Division of the Securities and Exchange Commission).

In *Jones*, plaintiff Andrea Jones' worked for SouthPeak as the Chief Financial Officer, Terry M. Phillips was Chairman of the Board of SouthPeak, and Melanies J. Mroz was the President, Chief Executive Officer and a Director of SouthPeak. *Id.*

In February 2009, Phillips and Mroz agreed that Phillips would advance some of his personal funds to enable SouthPeak to purchase Nintendo games for its inventory. The then Vice-President of Operations at SouthPeak, Patrice Strachan, instructed that the games be reflected on the inventory of the company but that the advance made by Phillips not be listed on SouthPeak's books as payable or a liability. Strachan also directed that no one discuss the advance with Jones. Because of this, SouthPeak's quarterly financial report to the SEC reflected the inventory but did not reflect a cost for purchasing the inventory. Jones became aware of this discrepancy, and based on her conversations with people at SouthPeak, concluded the failure to report was an attempt to inflate SouthPeak's profits. *Id.*

Jones then made several reports about the irregularity to the Audit Committee of SouthPeak's Board of Directors and to the company's outside counsel, none of which led to any remedial action. After making internal complaints, Jones filed a complaint with the Enforcement Division of the SEC on August 12, 2009. Two days later, on August 14, 2009, Phillips and Mroz terminated Jones without notice. The jury awarded $593,000 in back pay against the company defendant, $178,500 in compensatory damages against individual defendant Philips, and $178,500 against individual defendant Mroz. The court amended the judgment to reflect $470,000 in back pay and $123,000 in compensatory damages against the company, and remitted the awards against Mroz and Phillips to $50,000 each. *Id.*

Immediately after the jury tendered its verdict, Jones filed a motion seeking pre-judgment and post-judgment interest on the back pay award, and front pay in lieu of reinstatement. Although the district court did not find front pay to be a remedy available to Jones, the court recognized that:

> . . . the Department of Labor's Interim Final Rule on SOX Retaliation Complaints states that: "Front pay has been recognized as a possible remedy in cases under Sarbanes–Oxley ... in circumstances where reinstatement would not be appropriate." Procedures for the Handling of Retaliation Complaints Under Section 806 of the Sarbanes–Oxley Act of 2002, as Amended, 76 Fed.Reg. 68084, 68088 (Nov. 3, 2011). The Interim Rule cites two Sarbanes–Oxley administrative decisions for that proposition. *See Brown v. Lockheed Martin Corp.*, 2008–SOX–49, 2010 WL 2054426, at *55 (Jan. 15, 2010); *Hagman v. Washington Mutual Bank, Inc.*, 2005–SOX–73, 2006 WL 6105301, at *32 (Dec. 19, 2006). Other administrative decisions that predate the Interim Rule have reached the same conclusion. *See Welch v. Cardinal Bankshares Corp.*, ARB No. 06–062, ALJ No.2003–SOX–15 (ARB June 9, 2006); *Kalkunte v. DVI Financial Services, Inc.*, 2004–SOX–00056, 2005 WL 4889006 (July 18, 2005).

Jones v. SouthPeak Interactive Corp. of Delaware, 986 F. Supp. 2d 680, 683 (E.D. Va. 2013), *aff'd* 777 F.3d 658 (4th Cir. 2015).

Although the Court specifically ruled that front pay was an available remedy, the court found it was not available to Jones based on the specific facts of the case because the defendant company had ceased operations. The court did not go so far as to say that front pay was unavailable in cases where the company is no longer in operation, but did state that a plaintiff seeking front pay has a higher burden in such cases. In this particular case, the court found Jones was not entitled to front pay because she did not produce enough evidence to show that without her unlawful termination she would have been able to find another comparable CFO position after the date she would have been laid off because the company ceased operations.

3. Special Damages

A plaintiff prevailing under SOX can recover all relief necessary to make the employee whole, including special damages. These damages include damages for impairment of reputation, personal humiliation, mental anguish and suffering, and other non-economic harm resulting from retaliation. *See Kalkunte v. DVI Fin. Servs*., ARB Nos. 05-139, 05-140 at 11, ALJ No. 2004-SOX-56 at 11 (ARB Feb. 27, 2009). Special damages are uncapped in SOX claims, and include several different categories of damages. The statute calls for payment of any relief necessary to make the complainant whole, including compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney's fees. In *Halliburten*, the Fifth Circuit described the scope of these provisions in the following manner, noting that damages for reputational harm may also be appropriate:

> In light of SOX's plain text and the foregoing considerations, we find that the statute affords noneconomic compensatory damages, including emotional distress and reputational harm. SOX affords "*all* relief necessary to make the employee whole" (emphasis added), and we think Congress meant what it said. "All means all." *See Kennedy v. Lynd*, 306 F.2d 222, 230 (5th Cir. 1962). If an employee suffers emotional distress from actionable retaliation, then emotional damages are "necessary to make the employee whole." *See Hammond*, 218 F.3d at 892–93 ("Providing compensation for [emotional distress] comports with the statute's requirement that a whistleblowing employee 'be entitled to all relief necessary to make the employee whole.' "); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1199 (11th Cir. 2007) ("[E]motional damages, like other forms of compensatory damages, are designed to make the plaintiff whole."); *Dobbs–Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 547 (6th Cir. 1999) ("This court has recognized that in making a plaintiff whole it often will be appropriate to award ... damages for emotional harm."); *accord Tembenis v. Sec'y of Health & Human Servs.*, 733 F.3d 1190, 1193 (Fed. Cir. 2013). The same is true for reputational harm and damages for such. *See Dobbs–Weinstein*, 185 F.3d at 547; *Hanna v. WCI Communities, Inc.*, 348 F.Supp.2d 1332, 1334 (S.D.Fla.2004); *Mahony v. KeySpan Corp.*, No. 04–CV–554, 2007 WL

805813, at *7 (E.D.N.Y. Mar. 12, 2007). Thus, under the statute's text, such noneconomic compensatory damages are available.

Halliburton, Inc. v. Admin. Review Bd., 771 F.3d 254, 266-67 (5th Cir. 2014).

4. Attorneys' fees and costs of suit

In addition to expressly allowing for back pay, SOX specifically states a complainant can recover expert witness fees and litigation costs, including attorneys' fees under 18 U.S.C. § 1514(c)(2)(C). The lodestar method has been approved by several courts when calculating damages. *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658, 676 (4th Cir. 2015).

5. Recent Jury Verdicts

After the recent amendments to SOX through the Dodd-Frank Act, a jury trial is now clearly available to SOX claimants. Prior to the passage of Dodd-Frank in 2010, whether a jury trial was available to SOX claiminants was debatable. As a result, more SOX cases have been tried to juries recently, some with notable results. In fact, between 2014-2015 there have been several high profile, million dollar plus jury awards in SOX cases.

In the *Zulfer* SOX case, the jury awarded a six million dollar verdict. On March 5, 2014, a California jury awarded $6 million to Catherine Zulfer, a former accounting executive with Playboy. Zulfer claimed that Playboy had terminated her in retaliation for raising concerns about executive bonuses to Playboy's Chief Financial Officer and Chief Compliance Officer that were not approved by Playboy's Board of Directors. *Zulfer v. Playboy Enterprises Inc., JVR No. 1405010041, 2014 WL 1891246* (C.D. Cal. 2014).

In another Ninth Circuit case, the appellate court recently affirmed a $2.2 million dollar damages verdict plus another $2.4 million in attorneys' fees to two former in-house counsel. In that case, two individuals who had served as in-house counsel at International Game Technology alleged they had been terminated in retaliation for disclosing shareholder fraud related to a company merger. *Van Asdale v. Int'l Game Tech.*, 763 F.3d 1089, 1094 (9th Cir. 2014).

In *Perez v. Progenics Pharmaceuticals*, a jury awarded Julio Perez $1.6 million in compensatory damages. Amazingly, the Plaintiff, although initially represented by counsel, proceeded pro se shortly before the Defendant moved for summary judgment through trial.

Progenics Pharmaceuticals employed Julio Perez as a Senior Manager of Pharmaceutical Chemistry. During his employment, Perez worked on the development of a drug (Relistor) designed to treat post-operative bowel dysfunction and opioid-induced constipation. *Perez v. Progenics Pharm., Inc.*, 965 F. Supp. 2d 353, 358 (S.D.N.Y. 2013), *reconsideration denied,* 46 F. Supp. 3d 310 (S.D.N.Y. 2014). The project was a joint project between Progenics and Wyeth, and the two companies released a joint press release that extolled the positive preliminary results of Relistor. *Id.* Soon after, Wyeth executives sent a memo to Progenics's senior executives directly contradicting the press release, stating that Relistor failed to show sufficient clinical activity in its second trial phase and therefore the drug should not continue towards a final clinical trial. *Id.* Perez reviewed the memo, and sent a memo of his own to Progenics' Senior

Vice President and General Counsel on August 4, 2008, stating that Progenics was defrauding shareholders and engaging in illegal activity since "representations made to the public were not consistent with the actual results of the relevant clinical trial." The next day, Perez was questioned about how he obtained the confidential memo, and Perez was terminated almost immediately thereafter on the alleged grounds that he refused to explain how he came into possession of the memo. Perez was able to rebut this reason by showing that memorandum was in fact widely distributed, and thus show his termination was the result of retaliation for his protected activity.

II. Dodd-Frank Wall Street Reform and Consumer Protection Act

The Dodd-Frank Wall Street Reform and Consumer Protection Act was passed in 2010, and in addition to creating new causes of action for whistleblowers, the act amended and expanded SOX as discussed above. Dodd-Frank has a number of new whistleblower incentives and protections. Dodd-Frank includes two "bounty" programs in which individuals reporting violations share in any recovery made by the federal government. In addition to the bounty programs, there are anti-retaliation provisions protecting employees.

Before Dodd–Frank was enacted, whistleblowers who suffered retaliation for reporting violations of the securities laws were not without recourse. The Sarbanes–Oxley Act of 2002 established a private right of action for whistleblowers as well. *See* Pub.L. No. 107–204, § 806, 116 Stat. 745, 802 (codified at 18 U.S.C. § 1514A). The Sarbanes–Oxley and Dodd–Frank causes of action for whistleblowers are, however, "substantively different," and each has its "own prohibited conduct, statute of limitations, and remedies." *Ahmad v. Morgan Stanley & Co.*, 2 F.Supp.3d 491, 497 (S.D.N.Y.2014). Notably, a whistleblower seeking to assert a Sarbanes–Oxley claim must first file an administrative complaint with the Secretary of Labor through the Occupational Safety and Health Administration ("OSHA"). *See* 18 U.S.C. § 1514A(b)(1)(A); 29 C.F.R. § 1980.103(c). The Dodd–Frank cause of action, by contrast, has no exhaustion requirement. *See* 15 U.S.C. § 78u–6(h)(1)(B). Moreover, while a Sarbanes–Oxley whistleblower may obtain "back pay, with interest," a Dodd–Frank whistleblower is entitled to "2 times the amount of back pay otherwise owed to the individual, with interest." *Compare* 18 U.S.C. § 1514A(c)(2)(B), *with* 15 U.S.C. § 78u–6(h)(1)(C)(ii).

Dodd-Frank will likely provide a remedy that overlaps with SOX, but offers a much longer statute of limitations, double back pay, and the opportunity to proceed directly in federal court without exhausting administrative remedies. Recent decisions about procedural aspects of Section 929A claims, however, suggest that Section 929A could be a weaker remedy than SOX in some respects. In particular, Section 929A claims are not exempt from mandatory arbitration agreements and Section 929A does not expressly provide the right to a jury trial.

A key portion of Dodd-Frank is contained in the SEC's Whistleblower Reward Program, which has started to gain momentum. Under Section 922(a) of Dodd-Frank, a whistleblower that provides original information to the SEC that results in monetary sanctions exceeding $1 million shall be paid an award of ten to thirty percent of the amount recouped.

A. Causes of Action Under Dodd-Frank

Dodd-Frank's anti-retaliation provisions are similar to SOX, but not identical. Dodd-Frank's protections are more narrow, providing coverage only to employees who have provided information about their employer to the SEC in accordance with the whistleblower bounty program. Section 21F(h)(1)(A). This includes because they have initiated, testified, or assisted in any investigation related to the program or because the whistleblower has made disclisres required or protected under SOX, the Securities Exchange Act of 1934, or any other law, rule, or regulation under the jurisdiction of the SEC.

Unlike SOX, a Dodd-Frank claim may be filed directly in federal court. The statute of limitations is three years after the date when the material facts of the action are known are should have been known to the employee.

B. Circuit Split Alert

In a very recent Dodd-Frank Wall Street Reform and Consumer Protection Act case, a Southern District of New York court granted an employer's motion for summary judgment and the employee appealed to the Second Circuit. In this case, *Berman v. Neo@Ogilvy LLC*, 14-4626, 2015 WL 5254916 (2d Cir. Sept. 10, 2015), the district court ruled that the whistleblower protection provisions of the Dodd-Frank Act protected only employees discharged for reporting violations to the Securities and Exchange Commission and not internal complaints. Reversing, the Second Circuit ruled that the as the SEC has interpreted its own whistle-blower rules not to require a report to the SEC, that agency was entitled to *Chevron* deference for its interpretation that an internal report of accounting irregularities sufficed.

This decision is in direct contraction of a Fifth Circuit case, *Asadi v. G.E. Energy (USA).* The plaintiff in *Asadi*, Khaled Asadi, was a US based employee of GE Energy. Asadi's position required him to coordinate with Iraq's governing bodies in order to manage and obtain energy service contracts for GE. Asadi became concerned with an alleged corrupt action that he believed violated the Foreign Corrupt Practices Act ("FCPA"), he immediately informed a Regional Executive for GE of his concerns and along with a colleague, reported his concerns to the ombudsperson for G.E. Shortly after he reported his concerns, he received a negative performance review, even though his previous ten performance reviews had been positive. His work began being taken away, and then GE began "constant and aggressive severance negotiations" with him, until GE abruptly terminated Asadi on June 24, 2011. Thereafter, Asadi filed suit alleging his termination was illegal retaliation for disclosing the acts he believed violated FCPA.

Noting that Dodd-Frank created a private cause of action for whistleblowers, the Fifth Circuit nonetheless defined whistleblowers under Dodd-Frank as a person or persons who reports a violation of securities laws to the Securities and Exchange Commission. Ruling out the possibility of Dodd-Frank covering internal complaints in *Asadi,* the Fifth Circuit ruled:

> Plaintiff Asadi does not claim that he reported GE's alleged FCPA violation to the SEC, but rather claims to have furnished the information

> to his supervisor and to GE's ombudsperson. Therefore, Plaintiff does not fit within Dodd–Frank's definition of a whistleblower.

Asadi v. G.E. Energy (USA), LLC, CIV.A. 4:12-345, 2012 WL 2522599, at *3 (S.D. Tex. June 28, 2012), *aff'd sub nom. Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013)

C. Arbitration and Right to a Jury Trial Under Dodd-Frank

Although the provisions for prohibiting arbitration are a part of the Dodd- Frank act, because they are contained in a separate section from the Dodd-Frank whistleblower provisions a handful of courts have ruled that Dodd-Frank whistleblower retaliation claims are not exempt from pre-dispute arbitration agreements. As reasoned in *Khazin v. TD Ameritrade Holding Corp*:

> The Anti–Arbitration Provision is expressly limited to a single category of disputes: those "arising under *this* section," meaning Section 1514A of the United States Code. 18 U.S.C. § 1514A(e) (2) (emphasis added). That section contains the Sarbanes–Oxley cause of action for retaliation against whistleblowers. *See id.* § 1514A(a)-(c). The Dodd–Frank cause of action, however, is not located in the same title of the United States Code, let alone the same section. *See* 15 U.S.C. § 78u–6(h).

Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 490 (3d Cir. 2014)

As amended by Dodd-Frank, Section 806 of SOX includes an express right to a jury trial. 15 U.S.C. § 1514A(b)(2)(E). Section 929A of Dodd-Frank, however, does not contain an express right to jury trial. In late 2013, a Georgia district court held that Section 929A plaintiffs are not entitled to trial by jury. *Pruett v. BlueLinx Holdings, Inc.*, 2013 WL 6335887, slip op. at *7 (N.D. Ga. Nov. 12, 2013).

III. Other Whistleblowing Statutes Enforced By OSHA

There are a number of other anti-retaliation statutes enforced by OSHA, and OSHA publishes a chart listing statutes enforced, remedies available, and deadlines to file a complaint. A copy of this chart is included as part of these materials, but some examples of other whistleblowing protections for employees are:

Asbestos Hazard Emergency Response Act (AHERA)(1986) 15 U.S.C. §2651 protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems. The requires a complaint be filed within 90 days, and does not contain any kick-out provisions, but does allow for back pay, compensatory, and punitive damages.

The Surface Transportation Assistance Act (STAA)(1982) as amended by the 9/11 Commission Act of 2007 49 U.S.C. § 31105 is perhaps a law that covers a more common situation. STAA protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for

reporting violations of those regulations. A complainant has 180 days to file, but STAA allows for back pay, preliminary reinstatement, compensatory damages, and punitive damages. STAA also includes a kick-out provision, allowing individuals to sue in federal court after 210 days. STAA is also a contributing factor standard, like SOX.

There are several anti-retlaliation provisions tied to environmental statutes, such as the Safe Drinking Water Act 42 U.S.C. §300j-9(i), the Federal Water Pollution Control Act, 33 U.S.C. §1367, the Toxic Substances Control Act 15 U.S.C. §2622, and the Solid Waste Disposal Act 42 U.S.C. §6971. The retaliation provisions of these statutes all have a 30 day deadline to file a complaint with OSHA, no kickout provisions, but do allow backpay, compensatory, and punitive damages.

In addition to these examples, OSHA enforces the following whistleblower laws:

- Section 11(c) of the Occupational Safety & Health Act 29 U.S.C. §660(c)
- International Safe Container Act 46 U.S.C. §80507
- Clean Air Act 42 U.S.C. §7622
- Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. §9610
- Energy Reorganziation Act of 1974, 42 U.S.C. § 5851
- Wendell H. Ford Aviation Investment and Reform Act 49 U.S.C. §42121
- Pipeline Safety Improvement Act 49 U.S.C. §60129
- Federal Railroad Safety Act 49 U.S.C. 20109
- National Transit Systems Security Act 6 U.S.C. §1142
- Consumer Product Safety Improvement Act 15 U.S.C. §2087
- Affordable Care Act 29 U.S.C. §218c
- Seaman's Protection Act 46 U.S.C. §2114
- Consumer Financial Protection Act 12 U.S.C. §5567
- FDA Food Safety Modernization Act 21 U.S.C. §1012
- Section 31307 of the Moving Ahead for Progess in the 21st Century Act

IV. Federal Whistleblower Protection Act

The Whistleblower Protection Act of 1989 was passed to protect federal employees who report waste, fraud, and abuse, but after a number of unfavorable court decisions became weak. In 2012, President Obama signed the Whistleblower Protection Enhancement Act into law, strengthening this weak law. There are a number of critical areas that were strengthened by the amendments, including the addition of compensatory damages, a broadened definition of disclosure, increased ability to impose disciplinary action, full and fair relief for victims, extension of protection to TSA employees.

When Congress passed the original Whistleblower Protection Act of 1989, the act protected any disclosure of covered wrongdoing. These broad protections were significantly narrowed over the years. These decisions took away coverage in situations where the complaining employee made disclosures to the alleged wrongdoer, excluding disclosures made as part of an employee's normal job duties, and holding that a complaining employee disclosing information already known is not protected. See *Horton v. Dep't of Navy*, 66 F.3d 279, 281 (Fed. Cir. 1995) (holding that disclosures to the alleged wrongdoer are not protected); *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1141 (Fed. Cir. 1998) (excluding from WPA protection a disclosure made as part of an employee's normal job duties); *Meuwissen v. Dep't of Interior*, 234 F.3d 9, 11 (Fed. Cir. 2000)(employee's disclosure to supervisors did not provide information that was not already known).

The Whistleblower Protection Enhancement Act expressly negated many of these unfavorable decisions. Now, under the enhancements, a complaint made to a supervisor is protected along with disclosures made during the course of a whistleblower's job duties. The disclosure can reveal information that was previously disclosed, it does not need to be in writing, it can be made during a time the employee was off duty, and there is not a time limit on how long between the disclosure and the adverse action. Whistleblower Protection Enhancement Act of 2012, PL 112-199, November 27, 2012, 126 Stat 1465.

The new act provides specific protections to certain employees, including Transportation Security Administration employees and government scientists who challenge censorship. Finally, the WPEA has amended the WPA to allow compensatory damages.

V. Texas Whistleblowing Laws

A. Texas Whistleblower Act

Now that the enhancements to the whistleblower protection act have been passed, TELA members may want to push for similar enhancements to the Texas Whistleblower Act. Like the WPA, the Whistleblower Act was enacted to protect public employees. The Whistleblower Act prohibits a state or local government agency from suspending or terminating a public employee who in good faith reports a violation of law by the employer or another public employee to an appropriate law enforcement agency. Tex. Gov.'t Code Ann. §554.002(a) (Vernon 2004). The state "views whistleblowing by a public employee as a courageous act of loyalty to a larger community," and, like SOX, does not require that reported violation be correct, it must just be

done in good faith. *Tex. Dep't of Transp. v. Needham*, 82 S.W.3d 314, 320 (Tex. 2002). To establish a claim, the employee must prove:

- the employee is a public employee;
- who acted in good faith in making a report;
- the report involved a violation of the law;
- report was made to an appropriate law enforcement authority;
- retaliation occurred because the employee made the report.

Tex. Gov't Code Ann. §554.002 (West Supp. 2002); *City of San Antonio v. Heim*, 932 S.W.2d 287, 290 (Tex. App. – Austin 1996, writ denied)

1. Jurisdiction Issues

The Texas Whistleblower Act waives state sovereign immunity. Tex. Gov't Code Ann. §554.0035. There are two jurisdictional requirements under section 554.0035 for sovereign immunity to be waived: 1) the plaintiff must be a public employee; and 2) allege a violation of the Texas Whistleblower Act. *State v. Lueck*, 290 S.W.3d 876, 881 (Tex. 2009). The Texas Supreme Court has issued a series of decisions granting pleas to the jurisdiction to defendants because the plaintiff was unable to allege a violation of the Texas Whistleblower Act due to a deficiency in pleading the elements of Section 554.002(a). In other words, the Texas Supreme Court considers the elements of section 554.002(a) as "jurisdictional facts" that must be properly pled for the State to waive immunity and for a plaintiff to move forward on his case. *Id.* The Texas Supreme Court discussed this issue at length in *State v. Lueck*, and has expanded it in recent cases, including *Office of Attorney Gen. v. Weatherspoon*, which is discussed more fully below. 14-0582, 2015 WL 5458683, at *1 (Tex. Sept. 18, 2015). These cases have made it much more difficult to move forward in claims under the Texas Whistleblower Act and significantly increased the likelihood of a court granting a plea to the jurisdiction.

In *Lueck*, the Court rejected Plaintiff's argument that by requiring him to establish an actual violation of the statute at the pleadings stage, this requirement goes beyond an initial review of jurisdiction. *Lueck*, 290 S.W.3d at 880. The Texas Supreme Court stated that because the State may assert sovereign immunity from suit by a plea to the jurisdiction the facts underlying the merits and subject matter jurisdiction are intertwined, even if that means the trial court must consider evidence to decide the jurisdictional issues raised. *Id.*

2. Reports by Employees

The definition of "report" under the Whistleblower Act includes "any disclosure of information regarding a public servant's employer tending to directly or circumstantially prove the substances of a violation of criminal or civil law, statutes, administrative rules or regulations." *Texas Dept. of Assistive and Rehabilitative Services v. Howard*, 182 S.W.3d 393, 399-400 (Tex. App.—Austin 2005) (*quoting Davis v. Ector County*, 40 F.3d 777, 785 (5th Cir. 1994)).

3. Good Faith

There is a requirement that the complaining employee believed the conduct that he or she was reporting was a violation of the law, that belief must be reasonabable in light of his or her training or experience. According to current case law, to be in "good faith" the employee's belief about the reported authority's powers must be "reasonable in light of the employee's training and experience." *Tex. Dep't of Transp. v. Needham,* 82 S.W.3d 314, 321 (Tex. 2002). Authority to discipline its own employees or to investigate internally does not support a good faith belief that the entity is an appropriate law enforcement agency. *Univ. of Tex. Sw. Med. Ctr. v. Gentilello,* 398 S.W.3d 680, 686 (Tex. 2013). The investigating authority must have outward looking powers, and "it must have authority to enforce, investigate, or prosecute violations of law against third parties outside the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties. *Id.*

4. Violation of the Law

Under the Act, "law" is defined as a) a state or federal statute; b) an ordinance of a local governmental entity; or c) a rule adopted under statute or ordinance. Tex. Gov't Code §54.001(1) (Vernon 2004).

5. Report Made to Appropriate Law Enforcement Authority

For an employee to fall under the protection of the Texas Whistleblower Act, the employee must make a complaint to an appropriate law enforcement authority. The Texas Code provides what appears to allow some leeway for plaintiffs by providing a definition that allows an individual to report violations to an agency the employee, in good faith, believes is authorized to regulate, enforce, investigate or prosecute the violation. Specifically, the statute states:

TEX. GOV'T CODE § 554.002

(a). An "appropriate law-enforcement authority" is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:

(1) regulate under or enforce the law alleged to be violated in the report; or

(2) investigate or prosecute a violation of criminal law. *Id.* § 554.002(b).

Recent decisions from the Texas Supreme Court have yielded an unforgiving standard, however. In a recent Texas Supreme Court case, the Texas Supreme Court overruled two lower court decisions that had allowed a former Office of the Attorney General attorney's whistleblower claims to go forward. The Supreme Court overruled the lower courts on the grounds that complaints made by the Plaintiff were not made to an "appropriate law enforcement authority." *Office of Attorney Gen. v. Weatherspoon*, 14-0582, 2015 WL 5458683, at *1 (Tex. Sept. 18, 2015). In the original action, the OAG had filed a plea to the jurisdiction arguing that Weatherspoon's allegations were not sufficient to invoke the Act and waive immunity. The Texas Supreme Court sided with the OAG and ruled that Weatherspoon could not show that her reports met the Act's requirements, thus the OAG remained immune from suit.

During her employment, Weatherspoon made comments regarding her interactions with a particular judge. Thereafter, two OAG attorneys attempted to coerce Weatherspoon into signing an affidavit regarding the judge, in an effort to recuse the judge in cases concerning OAG. Weatherspoon refused, and she reported the coercion to her managing attorney in the CSD. The attorney once again tried to force Weatherspoon to sign an affidavit. Weatherspoon reported the matter to her supervisor again, as well as to another managing attorney, an attorney trainer, and an attorney who worked with the OAG's open records division. Finally, Weatherspoon spoke with Alicia Key, the Director of Child Support and Charles Smith, the Deputy Director of Child Support. Key later called Weatherspoon and assured her there would be a full investigation, and told her that the attorney general Greg Abbot was aware of the issue. Key also told Weatherspoon that Greg Abbot wanted Weatherspoon to receive an apology. Key and her division chief both ordered Weatherspoon not to discuss her concerns about criminal conduct with anyone.

A key fact in the case was that Weatherspoon followed written policies maintained by the Office of the Attorney General, which stated that all potential criminal violations were to be reported internally and would be referred to the appropriate division of the Office of Special Investigations. The policy specifically prohibited investigations outside the proscribed guidelines, including a statement that:

> Under no circumstances shall an employee not assigned to OSI refer a criminal violation encountered in the course of their official duties to an outside law enforcement agency unless exigent circumstances exist that threaten immediate loss of life, and then only with the knowledge and approval of the Executive Administration.

Still, in its opinion issued September 18, 2015, the Texas Supreme Court rejected Weatherspoon's argument that the OAG was an appropriate law enforcement authority because it found that just because some OAG divisions had the authority to investigate, the entire OAG did not. The Supreme Court cited its earlier decision *Texas Department of Human Services v. Okoli*, for the proposition that a policy requiring reports be forwarded from one division lacking the required authority to another division in the same agency having the required authority does not mean an initial report is protected. *Office of Attorney Gen. v. Weatherspoon*, 14-0582, 2015 WL 5458683, at *3 (Tex. Sept. 18, 2015) citing *Texas Dep't of Human Services v. Okoli*, 440 S.W.3d 611, 616 (Tex. 2014).

The Texas Supreme Court also rejected arguments that Weatherspoon had a reasonable belief that she had reported her complaints to the appropriate law enforcement authority, emphasizing that just because a policy permits "employees to reasonably believe reports will be *sent* to an appropriate law-enforcement authority, it provides no reason to believe the reported-to supervisors *are* appropriate authorities." *Office of Attorney Gen. v. Weatherspoon*, WL 5458683 at *2.

The Supreme Court's reasoning relies heavily on an earlier case, *Texas Dep't of Human Services v. Okoli*. In its discussion of internal reports under the Texas Whistleblower Act, the Court stated:

> When an employee reports wrongdoing internally with the knowledge that the report will have to be forwarded elsewhere for regulation, enforcement, investigation, or prosecution, then the employee is not reporting "*to* an appropriate law[-]enforcement authority." Tex. Gov't Code § 554.002 (emphasis added). We have made this clear in previous decisions interpreting the "appropriate law[-]enforcement authority" requirement. In both *Needham* and *Lueck*, for instance, we denied Whistleblower Act protection to Texas Department of Transportation (TxDOT) employees who reported violations of law to supervisors within the department because those supervisors lacked appropriate law-enforcement authority. *Lueck*, 290 S.W.3d at 885–86 (holding the head of a division within TxDOT could not regulate or enforce federal traffic data-collection regulations); *Needham*, 82 S.W.3d at 320–21 (holding TxDOT could only internally discipline an employee who violated drunk-driving laws).

440 S.W.3d 611, 615 (Tex. 2014).

B. Worker's Comp Reports

The Texas Workers' Compensation Act provides that employees may report workplace health and safety violations on a "hotline." TEX. LAB. CODE. ANN. §411.081. (West 2015). An employer may not suspend or terminate the employment of, or otherwise discriminate against, an employee for using the telephone service to report in good faith an alleged violation of an occupational health or safety law. *Id.* §411.082. An employee who is terminated or suspended may bring suit within 90 days for reinstatement, lost wages, and reinstatement of employment benefits and seniority rights. *Id.* §411.083; *see also* 29 U.S.C. §660 (2012).

C. Hazard Communication Act

The Texas Legislature enacted the Hazard Communication Act to improve the health and safety of Texas employees by providing them with access to information regarding hazardous chemicals. TEX. HEALTH & SAFETY CODE ANN. §502.002(a)(1) (West 2010). The Act prohibits employers from retaliating against employees who engage in protected activities. *Id.* §502.017. Specifically, an employer may not terminate or other- wise discipline an employee for (1) filing a complaint,(2) assisting an inspector, (3) instituting a proceeding or causing a proceeding to be instituted under or related to the Act, (4) testifying or preparing to testify in a proceeding under the Act, or (5) exercising any other rights under the Act. *Id.* §502.017(c). An employee may not lose any pay, position, seniority or any other benefits for exercising his or her rights under the Act. *Id.* §502.017(d). Any purported waiver of rights by an employee under the Act is void. *Id.* §502.017(e). Moreover, an employer's request or requirement that an employee waive such rights constitutes a violation of the statute. *Id.*

The Agricultural Hazard Communication Act applies only to certain employers who use or store hazardous chemicals covered by the statute in agricultural areas of the state. TEX. AGRIC. CODE ANN. §125.003 (West 2004). The statute covers employers who hire agricultural laborers to perform seasonal or migrant work and whose gross annual payroll for those laborers is $15,000 or more, and employ- ers who hire agricultural laborers for purposes other than seasonal or migrant work and whose gross annual payroll for those laborers is $50,000 or more. *Id.* §125.003(a). If both the Hazard Communication Act and the Agricultural Hazard Communication Act apply, the employer is required to comply with the Hazard Communication Act only. *Id.* §125.017. However, a covered employer must comply with the Agricultural Hazard Communication Act with respect to all agricultural laborers not covered by the Hazard Communication Act. *Id.*

An employer who must comply with the Agricultural Hazard Communication Act may not discharge, discipline, or in any other manner discriminate against an agricultural laborer because the laborer has (1) made an inquiry, (2) filed a complaint, (3) assisted an inspector of the Department of Agriculture who may conduct or is conducting an inspection pursuant to the Act, (4) instituted or caused to be instituted any proceeding under or related to the Act, (5) testified or is about to testify in such a proceeding, or (6) exercised any rights afforded under the Act on behalf of the laborer or others. *Id.* §125.013(b). An agricultural laborer may not lose any pay, position, seniority, or other benefits for exercising his or her rights under the Act. *Id.*

D. Private Nursing Homes

Any person—including an owner or employee of a nursing home—who has reason to believe that a resident is being abused or neglected has an obligation to report it. TEX. HEALTH & SAFETY CODE ANN. §242.122(a), 242.1225 (West 2010). Texas law protects nursing home employees from adverse employment actions resulting from their reports of abuse or neglect of residents. *Id*. §242.133. An employee who is terminated, suspended, or otherwise disciplined or retaliated against for reporting abuse or neglect of a resident has a cause of action against his or her employer. *Id*. §242.133(a); *see Winters v. Hous. Chronicle Pub. Co.,* 795 S.W.2d 723, 724 (Tex. 1990).

The statute provides meaningful remedies for any individual who establishes a cause of action. A plaintiff may recover actual damages or $1,000.00 (whichever sum is greater), exemplary damages, reasonable attorney fees and court costs. TEX. HEALTH & SAFETY CODE ANN. §242.133(c) (West 2010). Actual damages include lost wages and compensation for mental anguish. *Id*. §242.133(c)(1). A plaintiff who has been terminated is entitled to reinstatement in addition to damages. *Id*. §242.133(d).

A plaintiff must bring suit or notify the Texas Workforce Commission of an intent to sue within 90 days after the date of the employer's retaliation. *Id*. §242.133(e). When a plaintiff gives notice of intent to sue to the Texas Workforce Commission, he or she must bring suit within 90 days of presenting of such notice. *Id*. If, however, the nursing home employer does not obtain a signed statement at the time the plaintiff is hired reflecting that the plaintiff understands his or her rights under the section, then the 90-day limitations period does not apply. *Id*. §242.133(h). In such cases a two year statute of limitations applies. *Id*. A suit under this statute may be filed in the county where the plaintiff resides, the county where the plaintiff

was employed by the defendant, or any county where the defendant conducts business. *Id*.§242.133(g). The plaintiff generally has the burden of proof. *Id*. §242.133(f). If the retaliatory conduct occurs within 60 days of the plaintiff's good faith report of abuse or neglect, a rebuttable presumption is created that the retaliation occurred by reason of the report. *Id*

E. Assisted Living Facilities

The Assisted Living Facility Licensing Act protects employees working in assisted living facilities, providing that a licensed facility "may not retaliate against a person for filing a complaint, presenting a grievance, or providing in good faith information relating to personal care services provided by the license holder." TEX. HEALTH & SAFETY CODE ANN. §247.068(a) (West 2010). In a 2011 decision, the Eighth Court of Appeals reviewed a retaliation and constructive discharge claim brought by an employee of an assisted living facility. *Emeritus Corp. v. Blanco*, 355 S.W.3d 270, 272 (Tex. App.—El Paso 2011, pet. denied). Blanco observed deteriorating conditions in an assisted living facility operated by Emeritus Corp., her employer, when the company significantly reduced staff hours for nurses and medical technicians. *Id*. at 273. Many nurses asked to be given a reduced workload during their shifts, transferred to other facilities, or resigned. *Id*. Blanco repeatedly complained to the company's administrators to no avail. *Id*. at 273-275. She received a reprimand and negative evaluations after voicing her concerns and she was held to higher standards for missing work after medical treatment that she attributed to the difficult working conditions. *Id*. at 273-274. Blanco filed suit for constructive discharge and prevailed in the trial court. *Id.* at 275. The employer appealed, arguing there is no private cause of action for retaliation under the Assisted Living Facility Licensing Act, and that the Legislature intended only to provide the state with the authority to penalize facilities for retaliatory actions. *Id*. at 275-276; TEX. HEALTH & SAFETY CODE ANN. §247.068 (West 2010). Reviewing the relevant Health and Safety Code provisions concerning health facilities, the appellate court concluded that while the statute—intending to protect health care providers—prohibited retaliation against assisted living staff, most provisions did not expressly provide for a private cause of action. *Id*. at 277-280. The court nonetheless stated that it was not obligated to follow the express language of the statute when "enforcing the plain language of the statute as written would produce absurd results." *Id*. at 280 (citing *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009) (Willett, J., concurring)). The court reasoned that the Act had no meaning whatsoever if only the state agency could enforce the statute. *Id*. Additionally, the court concluded that Blanco presented sufficient evidence at trial which would allow a reasonable jury to conclude that the working conditions were so intolerable that she was forced to resign. *Id*. at 280-282.

F. Health Care Facilities

Texas law requires employees of certain health care facilities to report abuse and neglect or other illegal, unprofessional or unethical conduct. TEX. HEALTH & SAFETY CODE ANN. §161.132 (West 2010). Any person, including an employee, associated with an inpatient mental health facility, a treatment facility, or a hospital that provides comprehensive medical rehabilitation services who has a reasonable belief that a patient or client of the facility has been, is or will be adversely affected by abuse or neglect must report the information supporting the belief to the agency that licenses the facility or to the appropriate state health care regulatory agency. *Id.* §161.132(a). Any employee of such a facility who reasonably believes or has

information that the facility, or an employee of or health care professional associated with the facility, has, is or will be engaged in illegal, unprofessional or unethical conduct that relates to the operation of the facility's operation or services must report the information supporting the belief to the agency that licenses the facility or to the appropriate state health care regulatory agency. *Id.* §161.132(b). The statute prohibits a covered hospital, mental health facility, or treatment facility from retaliating against any employee who reports a violation of law. *Id.* §161.134.

Covered employers under §161.134 include inpatient mental health facilities, treatment facilities, and hospitals. Under §161.131, "hospital" has the meaning assigned by §241.003, "inpatient mental health facility" has the meaning assigned by §571.003, and "treatment facility" has the meaning assigned by §464.001 of the Texas Health and Safety Code.

The extent of protected conduct under the statute is quite broad. A hospital, inpatient mental health facility, or treatment facility may not suspend or terminate the employment of, or discipline or otherwise discriminate against, an employee for reporting to the employee's supervisor, a facility administrator, a state regulatory agency, or a law enforcement agency a violation of law, including a violation of Chapter 161 (Public Heath Provisions), a rule adopted under the chapter, or a rule adopted by the Texas Board of Mental Health and Mental Retardation, the Texas Board of Health, or the Texas Commission on Alcohol and Drug Abuse. TEX. HEALTH & SAFETY CODE ANN. §161.134(a) (West 2010).

The statute provides substantial remedies for any employee who has been retaliated against for reporting a violation of law. An employee may sue for injunctive relief, damages, or both. *Id.* §161.134(b). Actual damages include damages for mental anguish even if an injury other than mental anguish is not shown. *Id.* §161.134(c). A prevailing plaintiff may recover exemplary damages and reasonable attorneys' fees. *Id.* §161.134(d). Additionally, a terminated employee may obtain reinstatement to his or her former position, compensation for lost wages, and reinstatement of lost employment benefits or seniority rights. *Id.* §161.134(e).

An employee who has been suspended, terminated, disciplined or otherwise discriminated against in violation of the statute must bring suit before the 180th day after the date the violation occurred or was discovered by the employee in the exercise of reasonable diligence. *Id.* §161.134(h). The employee may bring suit in the district court of the county in which the plaintiff was employed by the defendant employer or in any county in which the defendant conducts business. *Id.* §161.134(g). The plaintiff generally has the burden of proof. *Id.* §161.134(f). If the retaliatory conduct occurs before the 60th day after the date on which the plaintiff made a report in good faith of abuse and neglect or illegal, unprofessional or unethical conduct, a rebuttable presumption is created that the retaliation occurred by reason of the report. *Id.*

This statute does not abrogate any other right to sue or impair any other cause of action an employee may have against an inpatient mental health facility, a treatment facility, or a hospital for retaliation for reporting a violation of law. *Id.* §161.134(I).

G. Physicians

The Texas Medical Practice Act states that an employer cannot subject a physician to retaliation for reporting the conduct of another physician to the State Board of Medical Examiners. TEX. OCC. CODE ANN. §§ 160.002 & 160.012 (West 2012). A physician has a cause of action against a health care entity, or the owner or employee of such an entity that suspends or terminates the physician's employment or otherwise disciplines or discriminates against the physician for making such a report to the Board. *Id.* §160.012(b). Any physician who brings suit has the burden of proof. If, however, the Board or a court in which an action is brought determines that the reported case forming the basis of the action was one in which the physician was required to report under the Texas Medical Practice Act, this determination creates a rebuttable presumption that the physician's employment was suspended or terminated for reporting an act that imperiled a patient's welfare if the physician is suspended or terminated within 90 days after making the report in good faith. *Id.* §160.012(d). An action under this statute may be brought in the district court of the county in which the physician resides, in which the physician was employed by the defendant, or in which the defendant conducts business. *Id.* §160.012(e).

A prevailing physician may recover (1) actual dam- ages, including damages for mental anguish even though no other injury is shown, or $1,000, whichever amount is greater; (2) exemplary damages; (3) court costs; and (4) reasonable attorneys' fees. *Id.* §160.012(b). Additionally, a physician whose employment is suspended or terminated in violation of this statute is entitled to reinstatement to the physician's former position or severance pay in an amount equal to three months of his or her most current salary, and compensation for income lost during the period of suspension or termination. *Id.* §160.012(c).

H. Registered Nurses

Texas Law requires a registered nurse to report certain unprofessional or harmful conduct by a nurse or health care facility to an appropriate licensing board. TEX. OCC. CODE ANN. §§ 301.401 & 301.402 (West 2012). A nurse has a cause of action against an individual, organization, agency, health care facility, or any other person that suspends or terminates the nurse's employment or otherwise disciplines or discriminates against the nurse for reporting violations under Chapter 301, Subchapter I of the Tex. Occ. Code. *Id.* §301.413(c). Any nurse who sues under this section must demonstrate a causal relationship between the retaliatory action and the act of reporting. If, however, the Board or a court in which an action is brought determines that the report forming the basis of the action was authorized or required under Tex. Occ. Code Chapter 301 and was made without malice, this determination creates a rebuttable presumption that the nurse's employment was suspended or terminated for making the report, if the employer takes the adverse action within 60 days after the report was made. *Id.* §301.413(e). An employer cannot avoid liability by firing a nurse who has expressed intent to file a report. *Clark v. Tex. Home Health, Inc.*, 971 S.W.2d 435, 438 (Tex. 1998) (decided under prior law, Tex. Rev. Civ. Stat. Ann. art. 4525a). An action brought under this statute may be brought in the district court of the county in which the nurse resides, in which the nurse was employed by the defendant, or in which the defendant conducts business. *Id.* §301.413(f).

A nurse who establishes a violation of the statutory reporting provision may recover (1) actual damages, including damages for mental anguish even though no other injury is shown, or $5,000, whichever amount is greater; (2) exemplary damages; (3) court costs; and (4) reasonable attorneys' fees. Id. §301.413(c). Additionally, a nurse whose employment is suspended or terminated in violation of the statute is entitled to reinstatement to his or her former position or severance pay in an amount equal to three months of the employee's most current salary, and compensation for wages lost during the period of suspension or termination. Id. §301.413(d).

VI. Retaliation against employees under the National Labor Relations Act

For the most part, retaliation under the National Labor Relations Act is outside the scope of this paper. However, a general overview of retaliation under the NLRA is included to provide key issues for practioners to use as a starting point when evaluating cases.

The National Labor Relations Act of 1935 (NLRA) guarantees certain rights to employees. Under the NLRA, an employer cannot retaliate against an employee for engaging in protected activities such as self-organization, to bargain collectively, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. If an employee believes his rights as under the NLRA are being violated, the employee can file a charge with the National Labor Relations Board. An employee who prevails may be entitled to reinstatement, back pay, or other remedies.

To prove a retaliation claim, an employee must show:

1. That he or she engaged in a protected activity,
2. That the employer knew that the employee engaged in the protected activity,
3. That the employer took adverse action against the employee, and
4. That the employer intended to stop the employee from engaging in the protected activity.

A hot topic that the Board has wrestled with in recent years is the application of the NLRA to social media. In a recent case, the Board addressed protection of "likes" and comments in Facebook posts. In *Three D, LLC d/b/a Triple Play Sports Bar and Grille,* 361 NLRB No. 31 (2014), the Board held that a Facebook "like" and comment could constitute protected activity under Section 7.

Employees of Triple Play discovered they owed state taxes and speculated that they owed because of a clerical mistake by the Triple Play owner. *Id*. at *2. Some employees raised concerns with management regarding the tax issue and Triple Play scheduled a staff meeting to address employee concerns. *Id.* Before the meeting, a former employee vented about the issue in a Facebook status update on which the former employee and others made additional comments. *Id*. Triple Play alleged that the responsive comments made by the former employee were defamatory and disparaging to Triple Play. *Id*. at 3. Vincent Spinella, an employee of Triple Play, "liked" the former employee's initial Facebook status update. *Id.* Jillian Sanzone, another current employee, commented on the former employee's initial Facebook status update, calling the Triple Play owner an expletive. *Id.* at *2. The owner ultimately discharged Spinella and Sanzone for their involvement in the former employee's Facebook post. *Id*. at *3. The

Administrative Law Judge (ALJ) determined that Section 7 of the NLRA protected the Facebook discussion because the discussion related to terms of employment and was intended for the employees' mutual aid and benefit. *Id.* The Board affirmed. *Id*. at *1.

Triple Play argued that Sanzone and Spinella adopted the former employee's allegedly defamatory and disparaging comments as a result of their Facebook activities and therefore engaged in unprotected activity. *Id.* at *3. The NLRB disagreed and clarified that the standards announced in *NLRB v. Elec. Workers Local 1229* (*Jefferson Standard*)18 and in *Linn v. United Plant Guard Workers of Am.19* are applicable in this context. 361 NLRB No. 31 at *5-6. Applying the aforementioned standards, the Board has held that "employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protections." *Id*. at *5. The Board found that Spinella's "like" and Sanzone's comment endorsed their former co-worker's initial Facebook status update, which was protected under Section 7, and not the later comments made by the former employee. The Board then analyzed Spinella and Sanzone's comments under the Jefferson Standard and *Linn* and found that the comments were not disloyal because they did not mention Triple Play's products or services. *Id.* The Board further explained that the comments were not defamatory because there was no evidence that the employees' underlying claim, that their tax liability was due to an error by Triple Play, was maliciously untrue. *Id*. at *6. Additionally, the Board noted that Sanzone's use of an expletive in her comment was her way of voicing her opinion about the Triple Play owner. *Id*.

In contrast, recently the Board provided guidance on when social media posts are unprotected under the NLRA. In *Richmond District Neighborhood Center*, 361 NLRB No. 74 (2014), the Board affirmed an ALJ decision that a Facebook conversation between two employees was not protected under the Act. *Id*. at *1. Ian Callaghan and Kenya Moore worked for a community center that provides after-school activities for students and engaged in a Facebook conversation laced with profanity and disparaging remarks about the Center's management. *Id*. at *1-2. Among the topics discussed during the conversation were the employees' intentions to overlook the Center's rules and plan activities for the students on their own, plans to teach the students how to draw graffiti on the facility's walls, plans to engage in activities without considering the Center's budget, and plans to take field trips whenever they desired. *Id*. The Center became aware of the communication and rescinded offers of employment to Callaghan and Moore for the next school year. *Id*. at *2. Callaghan filed an unfair labor practice charge against the Center alleging he was terminated for engaging in protected concerted activity. *Id*. at *3. The Board found that the Facebook conversation exhibited "pervasive advocacy of insubordination" that was egregious enough to lose protection under the Act. *Id*. The degree of detail with which the employees discussed advocating insubordinate acts was key to the Board's decision. *Id.* The Board noted that its decision was not based on the employee's use of profanity or disparaging characterization of the Center's management staff. *Id*. n. 9.

U.S. Department of Labor
Occupational Safety and Health Administration
Notice of Whistleblower Complaint

OMB # 1218-0236

INFORMATION ABOUT FILING A WHISTLEBLOWER OR RETALIATION COMPLAINT WITH OSHA

FOR ALL EMPLOYEES:
OSHA administers the whistleblower protection provisions of more than twenty whistleblower protection statutes, including Section 11(c) of the Occupational Safety and Health (OSH) Act, which prohibits any person from discharging or in any manner retaliating against any employee because the employee has complained about unsafe or unhealthful conditions or exercised other rights under the Act. Whistleblower protection provisions administered by OSHA also protect employees from retaliation for reporting violations of various airline, commercial motor carrier, motor vehicle safety, consumer product, environmental, consumer finance, food safety, health insurance reform, nuclear, pipeline, public transportation agency, railroad, maritime and securities laws.

Each law requires that complaints be filed within a certain number of days after the alleged retaliatory action; the time periods vary from 30 days to 180 days. For example, Section 11(c) of the OSH Act requires that a complaint be filed within 30 days of the alleged retaliatory action and the International Safe Container Act requires that a complaint be filed within 60 days of the action. Visit the Whistleblower Protection Programs' website at www.whistleblowers.gov, or call 1-800-321-OSHA (6742), for more information about these time limits.

A complaint of retaliation filed with OSHA must allege that the complainant engaged in activity protected by the whistleblower provisions (such as reporting a violation of law), the employer knew about or suspected that activity, the employer subjected the complainant to an adverse action or threatened such action, and the protected activity motivated or contributed to the adverse action. Adverse actions include discharge, demotion, blacklisting, denial of promotion, harassment and generally any other action that would dissuade a reasonable employee from engaging in protected activity.

Upon receipt of a complaint, OSHA will contact the complainant to determine whether to conduct an investigation. It is very important that a complainant respond to such contact; if a complainant is unresponsive, OSHA cannot proceed with an investigation and the complaint will be dismissed. If OSHA proceeds with an investigation, the complainant will have an opportunity to offer documents and other evidence in support of the complaint, and the employer will be notified of the allegation and permitted to submit a response.

BY LAW, A COMPLAINANT'S INFORMATION, INCLUDING HIS/HER IDENTITY, MUST BE PROVIDED TO THE EMPLOYER. A WHISTLEBLOWER COMPLAINT FILED WITH OSHA CANNOT BE FILED ANONYMOUSLY.

If, after an investigation, the evidence supports the complainant's allegations and a settlement cannot be reached, OSHA will generally issue an order requiring that the complainant be reinstated and paid back pay and damages, if appropriate, which the employer may contest. In cases under the Occupational Safety and Health Act, Asbestos Hazard Emergency Response Act, and the International Safe Container Act, the Secretary of Labor may file suit in federal district court to obtain relief. Under other statutes, the Secretary may order relief for the complainant, but the employer may contest that decision before an administrative law judge.

FOR PUBLIC-SECTOR EMPLOYEES:

Coverage of public-sector employees varies by statute. If you are a public-sector employee and you are unsure whether you are covered under one or more of the whistleblower protection statutes that OSHA administers, call 1-800-321-OSHA (6742) for assistance, or visit www.whistleblowers.gov.

With the exception of employees of the U.S. Postal Service, public-sector employees (those employed as municipal, county, state, territorial or federal workers) are not covered by the Occupational Safety and Health Act. Non-federal public-sector employees may be covered in states which operate their own occupational safety and health programs approved by Federal OSHA. For information on the 27 federally approved State Plan States, call 1-800-321-OSHA (6742) or visit www.osha.gov/dcsp/osp/index.html.

All Federal agencies are required to establish procedures to assure that no employee is subject to retaliation or reprisal for the types of activities protected by Section 11(c). A federal employee who wishes to file a complaint alleging retaliation due to disclosure of a substantial and specific danger to public health or safety or involving occupational safety or health should contact the Office of Special Counsel - visit www.osc.gov.

Federal employees should also contact their agency's Designated Agency Safety and Health Officer (DASHO). See 29 C.F.R. 1960.6 for more information regarding DASHOs.

For assistance filing a complaint with a DASHO, federal employees may contact OSHA's Office of Federal Agency Programs. For contact information, visit www.osha.gov/dep/enforcement/dep_offices.html.

INSTRUCTIONS TO COMPLETE FORM

It is not necessary to use this form. OSHA will accept whistleblower complaints made orally (telephone or walk-in) or in writing, and in any language.

For your form to be properly filed, you must complete the fields that are marked as "required." Fields not designated as "required" are optional, but you are encouraged to complete the form as completely and accurately as possible. Briefly describe each allegation of retaliation (what happened?). If there is any particular evidence that supports your allegation, include the information in your description. If there is not enough space on the form, use the continuation sheets. However, as noted above, information contained in this complaint will be shared with the employer. Therefore, **DO NOT INCLUDE WITNESS NAMES OR THEIR CONTACT INFORMATION ON THIS FORM OR IN YOUR INITIAL COMPLAINT FILING.**

After you have completed the form, you may submit it to your local OSHA office by mail, fax, or hand-delivery. Contact 1-800-321-OSHA (6742) or visit www.osha.gov to locate a local OSHA office.

After you submit this form to OSHA, an OSHA representative will contact you.

PRIVACY ACT STATEMENT

This form requests personal information that is relevant and necessary to determine whether and how to conduct an investigation. OSHA collects this information in order to process complaints under its statutory and regulatory authority. Once a complaint is filed, the individual's name and information about the allegations of retaliation will be disclosed to the employer. During the course of an OSHA investigation, information contained in an investigative case file may be disclosed to the parties in order to resolve the complaint. During an investigation, information about the complaining party and the employer will not be released to the public except to the extent allowed under the Freedom of Information Act (FOIA). However, once a case is closed, it is possible that information contained in the complaint or a case file may be released to the public as required by the FOIA. Any such documents will be redacted as appropriate under the FOIA and the Privacy Act.

PAPERWORK REDUCTION ACT STATEMENT

According to the Paperwork Reduction Act, an Agency may not conduct or sponsor, and no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. Public reporting burden for this voluntary collection of information is estimated to be one hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to the Directorate of Whistleblower Protection Programs, Department of Labor, Room N4624, 200 Constitution Ave., NW, Washington, DC; 20210; Attn: Paperwork Reduction Act Comment. (This address is for comments only; do not send completed complaint forms to this office.)

OMB Approval # 1218-0236; Expires: 07-31-2016

PART 1 – EMPLOYEE INFORMATION

1. Name (last, first, middle initial) (*required*):

2. Present Address (Street, City, State, Zip) (*required*):

3. Telephone Numbers (include area code) (*at least one required*):

Home: ( )

Work: ( )

Cell: ( )

4. Email Address:

5. Preferred Method of Contact:	6. Best time to be contacted (include time zone):

7. Work Site Address at Place of Employment where Alleged Retaliation Occurred (Street, City, State, Zip):

8. Date of Hire at Place of Employment where Alleged Retaliation Occurred:

9. Job Title at Place of Employment where Alleged Retaliation Occurred:

10. Exclusive bargaining (union) representative (if any):

☐ Yes ☐ No ☐ I don't know

11. The person filing this complaint is (check one box):

☐ Employee ☐ Representative of Employee

☐ Other (specify)

If you are an authorized representative of the complainant, please complete Part 4 – Identification of Representative.

PART 2 – EMPLOYER CONTACT INFORMATION

12. Employer Name (*required*):

13. Name and Title of Management Person (for contact purposes only):

Name:

Title:

Phone:

14. Name and Title of Supervisor: Name: Title:	
15. Employer Mailing Address (if different from worksite address in #7):	
16. Employer Phone: ( )	17. Employer Fax: ( )
18. Employer Email:	
19. Type of Business:	

PART 3 – ALLEGATION OF DISCRIMINATION

Please answer the questions below in the space provided. If you need additional space, use the attached "Continuation Sheet."

20. What management person is responsible for the retaliation that you are reporting?

Name:

Position/Title:

21. What are the actions or events that you are reporting to OSHA? *You may check one or more of the boxes below, and/or describe the action(s) in the space provided.* (*required*)

□ Termination □ Discipline □ Demotion/Reduced Hours
□ Denial of Benefits □ Failure to Promote □ Negative Performance Evaluation
□ Failure to Hire/Re-Hire □ Harassment □ Suspension
□ Threat to Take any of the Above Actions □ Other (please describe):

22. When did the employer take these actions against you? *Please list all relevant date(s) to the best of your recollection. If you cannot remember the exact date(s), please put the approximate date(s).*

23. When did you first learn that the action(s) would be taken against you? *Please list all relevant dates(s) to the best of your recollection. If you cannot remember the exact date(s), please put the approximate date(s).*

24. What reason(s) did the employer give you for each of these actions?

25. Why do you believe the employer took these actions against you? *You may check one or more of the boxes below, and/or describe the reason in the space provided.*

- □ Called/Filed with OSHA
- □ Called/Filed with Another Agency
- □ Complained to Management
- □ Reported an Accident or Injury
- □ Participated in Safety and Health Activities
- □ Refused to Perform Task (please specify reason for refusal)
- □ Testified or provided statement in investigation or other proceedings (please specify)
- □ Other (please describe)

26. For any of the actions you listed in #25, please provide the relevant date(s) you engaged in that activity.

27. Do you believe the employer knew you engaged in the activity described in #25? If so, how do you think they learned of it?

28. Have you filed any previous complaints against this employer with OSHA regarding these or similar retaliatory actions?

☐ Yes ☐ No

If yes, please provide the complaint number and date filed.

Complaint Number:

Date filed:

29. Have you taken any other action(s) to appeal, grieve, or report this matter under any other procedure?

☐ Yes ☐ No

If yes, please list the agency/organization(s) with whom you have appealed/grieved/reported this matter, the date filed, the current status of the procedure, and any outcome:

30. How did you first become aware that you could file a complaint with OSHA?

☐ OSHA Website ☐ OSHA Poster ☐ News story ☐ OSHA Representative ☐ Union ☐ Other (please describe):

PART 4 – IDENTIFICATION OF REPRESENTATIVE

Complete this part if you are an authorized representative of the complainant. If an investigation is opened, you will be asked to submit a signed Designation of Representative Form that will be sent to you.

If you are filing this complaint on your own behalf, do NOT complete this part.

Name:

Title:

Organization Name (if any):

Union Affiliation (if any):

Address (Street, City, State, Zip Code):

Phone (day): ( )

Phone (cell): ( )

Email:

☐ By checking this box, I certify that the named employee has authorized me to act as their representative for purposes of this complaint.

PART 5 – CERTIFICATION

NOTE: It is unlawful to make any materially false, fictitious, or fraudulent statement to an agency of the United States. Violations can be punished by a fine or by imprisonment of not more than five years, or by both. See 18 U.S.C. 1001(a); 29 U.S.C. 666(g).

☐ By checking this box, I certify that the information in this complaint is true and correct to the best of my knowledge and belief.

Date:

CONTINUATION SHEET

Page No. __ of __

Part No. Continuation	Item/Question No.	Response

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes Desk Aid

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 11(c) of the Occupational Safety & Health Act (OSHA) (1970) *[29 U.S.C. § 660(c)]. Protects employees from retaliation for exercising a variety of rights guaranteed under the Act, such as filing a S&H complaint with OSHA or their employers, participating in an inspection, etc.* **29 CFR 1977**	30	*Private sector U.S. Postal Service Certain tribal employers*	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Asbestos Hazard Emergency Response Act (AHERA) (1986) *[15 U.S.C. § 2651]. Protects employees from retaliation for reporting violations of the law relating to asbestos in public or private non-profit elementary and secondary school systems.* **29 CFR 1977**	90	*Private sector State and local government Certain DoD schools Certain tribal schools*	90	No	Yes	No	Yes	Yes	15	OSHA	Motivating
International Safe Container Act (ISCA) (1977) *[46 U.S.C. § 80507]. Protects employees from retaliation for reporting to the Coast Guard the existence of an unsafe intermodal cargo container or another violation of the Act.* **29 CFR 1977**	60	*Private sector Local government Certain state government and interstate compact agencies*	30	No	Yes	No	Yes	Yes	15	OSHA	Motivating
Surface Transportation Assistance Act (STAA) (1982), as amended by the 9/11 Commission Act of 2007 (Public Law No. 110-053) *[49 U.S.C. § 31105]. Protects truck drivers and other covered employees from retaliation for refusing to violate regulations related to the safety or security of commercial motor vehicles or for reporting violations of those regulations, etc.* **29 CFR 1978**	180	*Private sector*	60	210	Yes	Yes	Yes	Yes 250K cap	30	ALJ	Contributing

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Safe Drinking Water Act (SDWA) (1974) *[42 U.S.C. § 300j-9(i)]. Protects employees from retaliation for, among other things, reporting violations of the Act, which requires that all drinking water systems assure that their water is potable as determined by the Environmental Protection Agency.* **29 CFR 24**	30	*Private sector Federal, state and municipal Indian tribes*	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Federal Water Pollution Control Act (FWPCA) (1972) *[33 U.S.C. § 1367]. Protects employees from retaliation for reporting violations of the law related to water pollution. This statute is also known as the Clean Water Act.* **29 CFR 24**	30	*Private sector State and municipal Indian tribes Federal sovereign immunity bars investigation of FWPCA complaints filed by federal employees*	30	No	Yes	No	Yes	No	30	ALJ	Motivating
Toxic Substances Control Act (TSCA) (1976) *[15 U.S.C. § 2622]. Protects employees from retaliation for reporting alleged violations relating to industrial chemicals currently produced or imported into the United States and supplements the Clean Air Act (CAA) and the Toxic Release Inventory under Emergency Planning & Community Right to Know Act (EPCRA).* **29 CFR 24**	30	*Private sector*	30	No	Yes	No	Yes	Yes	30	ALJ	Motivating
Solid Waste Disposal Act (SWDA) (1976) *[42 U.S.C. § 6971]. Protects employees from retaliation for reporting violations of the law that regulates the disposal of solid waste. This statute is also known as the Resource Conservation and Recovery Act.* **29 CFR 24**	30	*Private sector Federal, state and municipal Indian tribes*	30	No	Yes	No	Yes	No	30	ALJ	Motivating

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Clean Air Act (CAA) (1977) *[42 U.S.C. § 7622]. Protects employees from retaliation for reporting violations of the Act, which provides for the development and enforcement of standards regarding air quality and air pollution.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*
Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (1980) *[42 U.S.C. § 9610] A.k.a. "Superfund," this statute protects employees from retaliation for reporting violations of regulations involving accidents, spills, and other emergency releases of pollutants into the environment. The Act also protects employees who report violations related to the clean up of uncontrolled or abandoned hazardous waste sites.* **29 CFR 24**	*30*	*Private sector Federal, state and municipal*	*30*	*No*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Motivating*

Occupational Safety and Health Administration
Directorate of Whistleblower Protection Programs (DWPP)
Whistleblower Statutes Desk Aid

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Energy Reorganization Act of 1974, as amended by the Energy Policy Act of 2005 (Public Law No. 109-58) (ERA) *[42 U.S.C. § 5851]. Protects certain employees in the nuclear industry from retaliation for reporting violations of the Atomic Energy Act. Protected employees include employees of operators, contractors and subcontractors of nuclear power plants licensed by the Nuclear Regulatory Commission, and employees of contractors working with the Department of Energy under a contract pursuant to the Atomic Energy Act.* **29 CFR 24**	*180*	*Statute provides coverage of NRC and its contractors and subcontractors, NRC licensees and applicants for licenses, including contractors and subcontractors Agreement state licensees Applicants for licenses from agreement states, including their contractors and subcontractors DOE and its contractors and subcontractors. However, ARB case law indicates federal sovereign immunity will bar investigation of ERA complaints filed against many but not all federal agencies.*	*30*	*365*	*Yes*	*No*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) (2000) *[49 U.S.C. § 42121]. Protects employees of air carriers and contractors and subcontractors of air carriers from retaliation for, among other things, reporting violations of laws related to aviation safety.* **29 CFR 1979**	*90*	*Air carriers and their contractors and subcontractors*	*60*	*No*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Sarbanes-Oxley Act (SOX) (2002), as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Public Law No. 111-203) *[18 U.S.C. § 1514A]. Protects employees of certain companies from retaliation for reporting alleged mail, wire, bank or securities fraud; violations of the SEC rules and regulations; or violations of federal laws related to fraud against shareholders. The Act covers employees of publically traded companies, including those companies' subsidiaries, and employees of nationally recognized statistical rating organizations, as well as contractors, subcontractors, and agents of these employers.* **29 CFR 1980**	*180*	*Companies registered under §12 or required to report under §15(d) of the SEA and their consolidated subsidiaries or affiliates, contractors, subcontractors, officers, and agents, and nationally recognized statistical rating organizations*	*60*	*180*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Pipeline Safety Improvement Act (PSIA) (2002) *[49 U.S.C. § 60129]. Protects employees from retaliation for reporting violations of federal laws related to pipeline safety and security or for refusing to violate such laws.* **29 CFR 1981**	*180*	*Private sector employers, states, municipalities, and individuals owning or operating pipeline facilities, and their contractors and subcontractors*	*60*	*No*	*Yes*	*Yes*	*Yes*	*No*	*60*	*ALJ*	*Contributing*

Occupational Safety and Health Administration
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Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Federal Railroad Safety Act (FRSA), as amended by Section 1521 of the 9/11 Commission Act of 2007 (Public Law No. 110-053), and Section 419 of the Rail Safety Improvement Act of 2008 (Public Law No. 110-432) *[49 U.S.C. § 20109]. Protects employees of railroad carriers and their contractors and subcontractors from retaliation for reporting a work-place injury or illness, a hazardous safety or security condition, a violation of any federal law or regulation relating to railroad safety or security, or the abuse of public funds appropriated for railroad safety. In addition, the statute protects employees from retaliation for refusing to work when confronted by a hazardous safety or security condition.* **29 CFR 1982**	*180*	*Railroad carriers and their contractors, subcontractors, and officers*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250K Cap*	*30*	*ALJ*	*Contributing*
National Transit Systems Security Act (NTSSA), enacted as Section 1413 of the 9/11 Commission Act of 2007 (Public Law No. 110-053) *[6 U.S.C. §1142]. Protects transit employees from retaliation for reporting a hazardous safety or security condition, a violation of any federal law relating to public transportation agency safety, or the abuse of federal grants or other public funds appropriated for public transportation. The Act also protects public transit employees from retaliation for refusing to work when confronted by a hazardous safety or security condition, or refusing to violate a federal law related to public transportation safety.* **29 CFR 1982**	*180*	*Public transportation agencies and their contractors and subcontractors, and officers*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250K Cap*	*30*	*ALJ*	*Contributing*

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Product Safety Improvement Act (CPSIA) (2008) *[15 U.S.C. § 2087]. Protects employees from retaliation for reporting to their employer, the federal government, or a state attorney general reasonably perceived violations of any statute or regulation within the jurisdiction of the Consumer Product Safety Commission (CPSC). CPSIA covers employees of consumer product manufacturers, importers, distributors, retailers, and private labelers.* **29 CFR 1983**	*180*	*Manufacturing, private labeling, distribution, and retail employers in the United States*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Affordable Care Act (ACA) (2010) *[29 U.S.C. § 218c]. Protects employees from retaliation for reporting violations of any provision of title I of the ACA, including but not limited to discrimination based on an individual's receipt of health insurance subsidies, the denial of coverage based on a preexisting condition, or an insurer's failure to rebate a portion of an excess premium.* **29 CFR 1984**	*180*	*Private and public sector employers*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
Seaman's Protection Act, as amended by § 611 of the Coast Guard Authorization Act of 2010 (Public Law No. 111-281) (SPA) *[46 U.S.C. § 2114]. Protects seamen from retaliation for reporting to the Coast Guard or another federal agency a violation of a maritime safety law or regulation. Among other things, the Act also protects seamen from retaliation for refusing to work when they reasonably believe an assigned task would result in serious injury or impairment of health to themselves, other seamen, or the public.* **29 CFR 1986**	*180*	*Private-sector employers—vessel on which seaman was employed must be American-owned, as defined; world-wide coverage*	*60*	*210*	*Yes*	*Yes*	*Yes*	*Yes 250 K Cap*	*30*	*ALJ*	*Contributing*

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Consumer Financial Protection Act (CFPA) (Section 1057 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203) (2010) *[12 U.S.C. § 5567]. Protects employees performing tasks related to consumer financial products or services from retaliation for reporting reasonably perceived violations of any provision of title X of the Dodd-Frank Act or any other provision of law that is subject to the jurisdiction of the Bureau of Consumer Financial Protection, or any rule, order, standard, or prohibition prescribed by the Bureau.*	*180*	*Any person engaged in offering or providing a consumer financial product or service, a service provider to such person, or such person's affiliate acting as a service provider to it*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*
FDA Food Safety Modernization Act (FSMA) (2011) *[21 U.S.C. § 1012]. Protects employees of food manufacturers, distributors, packers, and transporters from retaliation for reporting a violation of the Food, Drug, and Cosmetic Act, or a regulation promulgated under the Act. Employees are also protected from retaliation for refusing to participate in a practice that violates the Act.*	*180*	*Any entity engaged in the manufacture, processing, packing, transporting, distribution, reception, holding, or importation of food*	*60*	*210 or within 90 days of OSHA finding*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*

Act/OSHA Regulation	Days to file	Respondents covered	Days to complete	Kick-Out Provision	Allowable Remedies				Appeal		Burden of Proof
					Backpay	Preliminary Reinstatement	Compen-satory	Punitive	Days	Venue	
Section 31307 of the Moving Ahead for Progress in the 21st Century Act (MAP-21) (a provision of Division C's Title I, the Motor Vehicle and Highway Safety Improvement Act of 2012) (2012). *Protects employees from retaliation by motor vehicle manufacturers, part suppliers, and dealerships for providing information to the employer or the U.S. Department of Transportation about motor vehicle defects, noncompliance, or violations of the notification or reporting requirements enforced by the National Highway Traffic Safety Administration (NHTSA), or for engaging in related protected activities as set forth in the provision.*	*180*	*Motor vehicle manufacturer, part supplier, or dealership*	*60*	*210*	*Yes*	*Yes*	*Yes*	*No*	*30*	*ALJ*	*Contributing*