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Whistle While You Work

Protecting your company against whistleblower threats under Sarbanes-Oxley

November 16, 2006

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2006 labor & employment seminar
Important Legal and Litigation Issues Facing Employers

As we approach the fourth anniversary of the Sarbanes-Oxley Act of 2002 ("SOX"), it is a good time to review the impact of the statute and strategies for covered employers to avoid liability. SOX addresses a wide range of matters, from conflicts of interest affecting securities analysts, to significantly enhanced criminal penalties for mail fraud, wire fraud and violations of the Employee Retirement Income Security Act (ERISA). Perhaps most importantly for employers, Section 806 of the Act creates a civil right of action that protects employees of covered companies from retaliation for reporting covered conduct. Employers should be aware that this section may reach a broader range of conduct and provide a more potent array of remedies than previously anticipated.

I. Whistleblower Protections Under SOX

A. COVERED EMPLOYERS

- Companies registered as publicly traded under Section 12 of the Securities Exchange Act of 1934.
- Companies required to file reports under Section 15(d) of the Securities Exchange Act of 1934.

B. PROTECTED EMPLOYEES

An employee is protected by SOX's whistleblower provisions if he or she directly or indirectly provides information or assistance to:

- a federal regulatory or law enforcement agency;
- a member of Congress or any Congressional committee;
- a supervisor within the company; or
- someone with "the authority to investigate, discover or terminate misconduct." 18 U.S.C. §1514A(a)(1).

C. PROTECTED ACTIVITY

A whistleblower is protected against retaliation for reporting conduct that he or she reasonably believes constitutes a violation of:

- Federal criminal law proscribing mail, wire or bank fraud;
- any rule or regulation of the Securities and Exchange Commission (SEC); or
- any provision of Federal law "relating to fraud against shareholders . . ." 18 U.S.C. §1514A(a)(1).

A whistleblower is also protected for filing, testifying, participating in or otherwise assisting with a proceeding relating to an alleged violation of any SEC rule or regulation or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. §1514A(a)(2).

D. ADVERSE EMPLOYMENT ACTIONS

A covered employer may not:

- discharge;
- demote;
- suspend;
- threaten;
- harass; or
- discriminate against a covered employee.

E. COMPLAINT PROCEDURE

- A whistleblower who alleges that he or she has experienced an adverse employment action may file a complaint with the Office of the Area Director of the Occupational Safety and Health Administration (OSHA) responsible for enforcement activities in the geographic area where the complainant resides or is/was employed. 29 C.F.R. §1980.103(c).
- OSHA will investigate the allegations if the complaint, supplemented through interviews of the whistleblower, alleges facts and evidence suggesting that the accused person knew or suspected that the employee engaged in protected activity and that the protected activity was a "contributing factor" in the adverse employment action.
- Even if the whistleblower makes such a prima facie showing, OSHA will not investigate if, within 20 days of receipt of notice of the complaint, the employer submits clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity.
- If OSHA decides to investigate prior to issuing findings of facts, it will, if reasonable cause exists to believe that SOX was violated, give notice of the preliminary conclusion and the relevant evidence and afford the employer an opportunity to submit a response and meet with the investigator.
- OSHA must complete its investigation with in 60 days of the filing of the complaint.
- A party may appeal OSHA's preliminary determination to an Administrative Law Judge ("ALJ"). Timely objections will stay the provisions of a preliminary order, but, as discussed in more detail below, a provision requiring reinstatement of the whistleblower is effective immediately upon receipt.
- The ALJ will allow parties to take discovery, call witnesses and present their case at a hearing, and will complete *de novo* review of the matter.
- The ALJ decision may be appealed to the United States Department of Labor's Administrative Review Board ("ARB") within 10 days.

- Within 60 days of the final order of the ARB, any person adversely affected may petition for review in the United States Circuit Court of Appeals for the circuit in which the violation occurred, or in which the complainant resided on the date of the alleged violation.
- A whistleblower may also
  - Bring a *de novo* action in district court if the DOL has not issued a final decision within 180 days of the complaint and such delay is not due to the whistleblower's bad faith.
  - Seek rights and remedies under any other federal or state law or under a collective bargaining agreement.

F. PRELIMINARY STATEMENT

- As discussed above, a SOX complainant can be ordered back to work before the employer has had a hearing or final determination of liability.
- Prior to the enactment of SOX, the threat of mandatory reinstatement prior to a final decision was almost unheard of in employment law. The impact of this potential remedy is magnified by the fact that a SOX whistleblower can often be a high-ranking executive working in a sensitive position.
- The interim final rule implementing SOX provided for an exception to preliminary reinstatement when the respondent established that the complainant "is a security risk." 29 C.F.R. §1980.105(a)(1). This exception, however, was narrowly construed and applied "only in situations where the named person clearly established . . . that the reinstatement of an employee might result in physical violence against persons or property." 69 Fed. Reg. at 52, 109.
- An employer may petition the ALJ for a stay of a preliminary reinstatement order. If a stay is denied, and the employer can establish "to OSHA's satisfaction that reinstatement is inadvisable for some reason," the ALJ may order that, pending a final determination, the complainant receive full pay and benefits without actually returning to work. While such "economic reinstatement" can mitigate some of the potential disruption of having a terminated employee return to work while he or she is litigating against the company, the DOL specifically rejected the suggestion that the employer be entitled to reimbursement for the costs of such reinstatement if ultimately successful in the litigation.
- Preliminary reinstatement is a potential weapon that can be used by unscrupulous employees to leverage a more generous severance package based on allegations that may be barely colorable under SOX. While an employer can forestall preliminary reinstatement if it is able to establish in the initial administrative investigation by "clear and convincing evidence" that there was no SOX violation, this may be

difficult to accomplish in all but the most frivolous cases, given the broad interpretations of SOX whistleblower protection applied in many recent decisions.

G. OTHER CIVIL REMEDIES

A prevailing whistleblower is entitled to be made whole. Available remedies include:

- reinstatement with the same seniority status that the employee would have had, but for the discrimination;
- back pay with interest; and
- compensation for special damages sustained as a result of the discrimination, including litigation costs, expert witness fees and reasonable attorneys' fees. 29 CFR §1980.105(a}(1}.
- In addition to civil sanctions, SOX imposes criminal penalties for any person who knowingly seeks to retaliate against whistleblowers, including interference with a person's employment or livelihood. 18 U.S.C.§1513.
- Notably, the criminal provision of SOX is unique among whistleblower statutes in that it includes individual, as opposed to corporate, criminal liability.
- Penalties under this section can include fines of up to $250,000 for individuals and $500,000 for corporations, or imprisonment of up to 10 years, or both. 18 U.S.C. §1513.
- SOX also creates two new federal crimes that can be used by a whistleblower to trigger the civil anti-retaliation provisions:
  - Section 802 establishes a general "anti-shredding" law, which carries a maximum 20-year prison sentence. This law applies broadly to “any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter . . . within the jurisdiction of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation." 18 U.S.C. §1515.
  - Section 802 also creates a new crime for the "willful failure to preserve financial audit papers of companies that issue securities as defined in the Securities Exchange Act of 1934." 18 U.S.C. §1520. This crime is a felony and carries a maximum 10-year prison sentence.
  - It is important to note that these crimes not only create individual liability for directors, officers, and other employees, but also establish new fraud crimes subject to the civil whistleblower protection of SOX.

II. Summary of Selected ALJ and Court Decisions

A. WHAT CONSTITUTES A COVERED EMPLOYER?

- In *Carnero v. Boston Scientific Corp*., 433 F. 3d 1 (1st Cir. 2006), the First Circuit Court of Appeals upheld the ALJ's dismissal of a SOX whistleblower claim brought by a Brazilian citizen against his employers, two Brazilian subsidiaries of a U.S. parent company. The Court held that the ALJ's dismissal was proper because SOX does not contain a clear expression of congressional intent to extend beyond U.S. boundaries, which is necessary to overcome the "well-established presumption against … [the] extraterritorial application of Congressional statutes."
- Plaintiff in *Brady v. Calyon Securities (USA)*, 406 F. Supp. 2d 307 (S.D. N.Y. Nov. 8, 2005) alleged that the underwriting services performed by his employer on behalf of a publicly traded company were sufficient to subject his employer to SOX whistleblowing liability as an "agent' of a publicly traded company. The U.S. District Court for the Southern District of New York dismissed the action, holding that "[t]he mere fact that defendants may have acted as an agent for certain public companies in certain limited financial contexts related to their investment banking relationship does not bring the agency under the employment protections of [SOX]." The Court further held that an employer may be held liable for SOX whistleblowing violations as an "agent" of a publicly held company if, and only if, it served as an agent with respect to the complainant's employment.
- However, the ARB has utilized a different interpretation of "agency" when the alleged agent is a subsidiary. For example, in *Klopfenstein v. PCC Flow Techs. Holding Inc*., DOL ARB No. 04-149, May 31, 2006, the ARB held that a complainant may maintain a SOX whistleblower action against his employer, a privately held subsidiary of a publicly traded company, if the subsidiary constitutes an "agent" of the parent "under the general common law of agency.

B. WHAT CONSTITUTES AN ADVERSE EMPLOYMENT ACTION?

- One month after the complainant in *Halloum v. Intel Corp.*, DOL ALJ No. 2003-SOX-7, March 7, 2004, was presented with a corrective action plan to address shortcomings in his work, he took medical leave. Thereafter, the complainant reported to the SEC that his manager had instructed him to delay payment of invoices into subsequent quarters to increase cash on the company's balance sheet. The complainant believed this to be a fraudulent accounting practice, and subsequently made a similar report to the company's CEO. Upon his return to work, the complainant's manager altered his corrective action plan in ways the complainant believed were meant to set him up to fail, force his resignation, and retaliate against him for whistleblowing.

- Even though the SEC investigation exonerated the company, the ALJ determined that SOX does not require more than that the whistleblower "reasonably believes" that the reported conduct occurred and that it violated one of the laws or regulations enumerated by SOX.
- The ALJ further determined that, while the initial performance plan was not retaliatory, the modification of the complainant's performance plan to remove his supervisory responsibilities and add responsibility for an unreasonable cost-reduction assignment was an unfavorable personnel action. The ALJ held that "[a]n employment action is unfavorable if it is reasonably likely to deter employees from making protected disclosures. A complainant need not prove termination or suspension from the job, or a reduction in salary or responsibilities."
- Noting that SOX whistleblowers must establish that the alleged protected activity was a contributing factor to the adverse employment action, the ALJ cited to *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993), where the Federal Circuit found that a contributing factor is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." The ALJ held that a whistleblower "need not prove his protected conduct was a `significant,' 'motivating,' substantial,' or `predominant' factor in an adverse employment action."
- However, the ALJ determined that even if the company had not issued a modified performance plan, it would have terminated the complainant's employment for recording conversations with other employees against company policy, coercing subordinates to give positive responses during the investigation, and his poor performance. Accordingly, because the employer would have taken the same employment action in the absence of the allegations, the ALJ denied the complaint.

C. WHAT ACTIVITY BY THE WHISTLEBLOWER IS PROTECTED?

- In *Getman v. Southwest Sec., Inc.*, ARB Case No. 04-059, July 29, 2005, the ARB determined that an equity research analyst did not engage in an act of whistleblowing under SOX when she refused to upgrade a stock rating because she believed a higher rating would lead to misrepresentation in violation of SEC rules. In reversing the ALJ's decision, the ARB held that complainant's "unspecified refusal" did not constitute a protected activity because it did not convey to her employer that she reasonably believed that upgrading the stock rating would constitute a fraud on its shareholders.
- In *Henrich v. Ecolab, Inc*., ARB Case No. 05-030, June 29, 2006, the plant manager of a detergent company reported that his company was permitting improper material to be used in its products. The company investigated the matter and, over a year later, decided to write off twenty percent of its manufacturing material as not suitable for use.

Complainant refused to approve the write-off because he believed that the company still intended to use the improper material in manufacturing. However, complainant never told his boss about the refusal, and failed to explain to anyone at the company why he was refusing.

- Relying on the holding of *Getman*, *supra*, the ARB found that complainant's refusal did not constitute a protected activity because it failed to provide the employer with information about potential SOX violations. As explained by the ARB, "a would-be whistleblower must actually express his concerns in order for his activity to be considered protected."
- The ALJ's decision in *Smith v. Hewlett Packard*, 2005-SOX-88 to 92 (January 16, 2006) held that complainant failed to engage in a protected activity when he threatened to go to the EEOC if the company did not remedy institutional discrimination because such a complaint fails to allege a fraud against shareholders. In arriving at this conclusion, the ALJ noted that, although a company's fraudulent disclosures about its equal employment practices may impact the company's value on the public market, that threshold was not met in this case because the company's "mere knowledge that [a company practice] adversely affects minorities (without knowing whether the result was intentional) coupled with an insider's access to disgruntled employees' conversations about 'external resolutions' is not enough."
- In *Platone v. FLYi Inc*., DOL ARB No. 04-154, September 29, 2006, complainant alleged that her employment was terminated because she reported what she believed to be an illegal scheme on the part of her employer to overpay pilots in order to improve its bargaining position with the pilots' union. The employer defended, arguing that complainant's employment was terminated because of a conflict of interest which arose out of her romantic relationship with an official with the pilots' union. The ALJ found for complainant and issued a remedial order in her favor. However, the ARB disagreed, holding that her report did not constitute a protected activity because, although it "raised a possible violation of internal union policy and … a concern on how this might affect [the employer's] ability to collect a debt" it did not indicate fraud against company shareholders. In so holding, the ARB indicated that whether an employee has engaged in a protected activity is determined by looking at what the employee communicated to the employer, not what was reported in the employee's OSHA complaint.
- The ARB further held that complainant failed to demonstrate any violation of securities laws because the evidence showed that the company lost less than $1,500 due to its alleged illegal scheme and a reasonable shareholder would not likely find such minor losses to be material, as required for liability under Rule 10b-5.

D. HOW DIRECT MUST THE CONNECTION BE BETWEEN THE WHISTLEBLOWER'S ALLEGATIONS AND "SECURITIES FRAUD"?

- In *Morefield v. Exelon Services, Inc.*, DOL ALJ No. 2004-SOX-2, January 28, 2004, the complainant, the former Vice President of Finance for a corporate subsidiary, alleged that he had been threatened, intimidated and, ultimately, terminated from his employment after he reported that top management of the subsidiary intentionally manipulated internal financial results, forecasts and accounting records to make the company's financial performance appear better than it actually was. Though the complaint had been dismissed at the administrative level, the ALJ reinstated it.
- In seeking dismissal, the company contended, first, that no violation of any applicable securities rule or law had been stated because external reports were not affected by the alleged internal overstatement of revenues and, second, that since the overstatement of approximately $2 million amounted to less than one-ten thousandth of one percent of the ultimate parent's revenues, there was no reasonable basis for believing that it was material. The ALJ rejected both arguments, contending as to the first that because SOX whistleblower protection extends to "any federal law broadly relating to fraud against shareholders," it encompassed alleged violations "of accounting rules and the adequacy of internal accounting controls" for covered companies. As to the second argument, the judge concluded that because SOX "places no minimum dollar value on the protected activity it covers" and is "largely a prophylactic" measure, SOX whistleblowing protection applied even for "seemingly paltry sums' and irrespective of whether materiality was an element of the predicate SOX-required frauds.
- In *Hendrix v. American Airlines, Inc.*, DOL ALJ No. 2004-SOX-23, December 9, 2003, the complainant alleged retaliation for participating in an investigation of a co-worker who had been accused of creating sculptures during his work time out of the company's spare parts. Because the coworker violated FAA and company procedures for tagging and disposing of scrap parts, the employee was protected by the federal aviation whistleblower statute. Rejecting (as in *Morefield*) the administrator's dismissal of the complaint, the ALJ concluded that the whistleblower was also protected by SOX because he reasonably believed that the co-worker "was committing fraud against [the airline] and its shareholders by creating art objects for personal gain out of company material, on company time." While the conduct was undoubtedly dishonest and, perhaps, even deceptive, the ALJ never explained how it was fraudulent, let alone one of the predicate frauds required for SOX whistleblower protection, except to say that the sculpting machinist "undoubtedly used the mail or wires as part of his sculpture business," and thus his fraudulent activity is of a kind proscribed by federal law.

- The decision in *Hopkins v. ATK Tactical Systems*, DOL ALJ No. 2004-SOX-19, May 27, 2004, gave a more limited interpretation of the scope of SOX coverage. The complainant alleged that he was subjected to a hostile work environment and saw his employment terminated after he reported to his superiors, the EPA and OSHA that his work site had released "thousands of gallons of sludge water into the ground avatar system" due to poor maintenance and overdue inspections. The ALJ noted that SOX's legislative history "makes it clear that fraud is an integral element of a cause of action" and, while "fraud" for SOX whistleblower purposes was "undoubtedly broaden than the standard under SEC antifraud regulations, "an element of intentional deceit that would impact shareholders or investors is implicit," He therefore recommended dismissal because the complaint did not address "any kind of fraud" and did not involve "transactions related to securities."
- In *Harvey v. Home Depot, Inc.*, DOL ALJ No. 2004-SOX-20, May 28 , 2004, the complainant alleged that he was the victim of workplace racial discrimination. The ALJ considered that "an implicit argument may be made that a company which permits discriminatory practices despite its public policy of equal opportunity is acting contrary to the best interests of its shareholder," but rejected this argument as not "directly related to fraud against shareholders." The ALJ also considered that the existence of racial discrimination may "adversely affect the accuracy of corporate disclosures mandated by SOX." While recognizing that this °reasonable argument . . . has some logical appeal," the ALJ rejected this argument as well, concluding that, on an individual level, compliance with equal opportunity standards has "a very marginal connection" with the reporting of a company's accurate accounting and financial condition."
- In *Games v. Raymond lames & Assocs.*, DOL ALJ No. 2004-SOX-58, January 10, 2005, the ALJ determined that a complainant is required to prove "by a preponderance of the evidence" that he or she reasonably believed that the individual accused engaged in the alleged conduct. Barnes, who alleged that her employment was terminated in retaliation for reporting her boss's allegedly unethical or improper securities trading practices, failed to meet this requirement. The ALJ noted that Barnes did not present documents or testimony that any improper trades occurred, did not raise her concerns when she completed a confidential internal audit questionnaire a few months prior to the termination of her employment, and that both this audit and an investigation conducted by the respondent after the complainant's allegations found no evidence of improper practices. The fact that the ALJ in *Barnes* applied the reasonable belief standard to reject the claim while other decisions (e.g. *Hendrix*) have not, points out the inconsistency that has marked SOX cases to date.
- In *Klopfenstein v. PCC Flow Techs. Holding, Inc.*, *supra*, the ARB rejected the ALJ's ruling that a complainant may only establish the necessary causal connection by proving that his employment was terminated "because of" his protected activity. Instead, the ARB held

that complainant need only show that retaliation for whistleblowing was a "contributing factor" in the company's decision to terminate his employment. As described by the ARB, a contributing factor is "any factor which alone or in combination with other facts, tend to affect the outcome of a decision."

- In *Romaneck v. Deutsche Asset Mgmt*, 2006 WL 2386237 (N.D. Cal. Aug 17, 2006), plaintiff alleged that his employment was terminated in anticipation of his testimony to the SEC and as a result of documents and other evidence he provided to the SEC. The District Court for the Northern District of California held that, because the termination occurred before plaintiff provided any evidence to the SEC, plaintiff failed to establish the necessary causal connection between his termination and those activities. However, the Court permitted plaintiff's SOX claim to proceed to the extent that his employer terminated his employment in anticipation of the testimony he would provide to the SEC.

E. HOW HAVE ALJS AND COURTS ADDRESSED PRELIMINARY ORDERS OF REINSTATEMENT

- *In Bechtel v. Competitive Technologies*, DOL ALJ No. 2005-SOX-0033, 2005-SOX-0034, March 29, 2005, the ALJ considered OSHA's preliminary order awarding more than $750,000 in back wages, costs, and compensatory damages and reinstating the employment of two senior executives of a Connecticut technology company who alleged that their employment was terminated in retaliation for complaining about corporate fraud. Arguing that reinstatement should be stayed, the employer raised the discovery of misconduct by the complainants that justified termination, the "inherent friction of litigation," the resulting interference with the employees "discovery efforts and trial preparation," and the hostility between the parties that caused the employment relationship to be "untenable." The ALJ refused to stay the reinstatement, determining that, despite the "uncomfortable circumstances that would reasonably accompany their return to the workplace," the employer was unable to establish that it would experience "irreparable harm" if the complainants were reinstated.
- Thereafter, the employer refused to reinstate the plaintiffs and plaintiffs filed an action in the District Court for injunctive relief. After determining its jurisdiction to enforce the order, the Court rejected the employer's argument that plaintiffs were required to establish the elements for injunctive relief in order to obtain a reinstatement order. Instead, the Court held that the DOL, through OSHA, is empowered to determine whether a reinstatement order is warranted and, if such an order is issued, plaintiff is entitled to injunctive relief "regardless of whether the elements for preliminary injunctive relief [are] established."

- The employer appealed the District Court's ruling and, in a plurality decision issued on May 1, 2006, the Second Circuit Court of Appeals reversed and vacated the lower court's injunction. Although two of the three members of the Court agreed that reversal was proper, neither judge could agree on the rational underlying the decision. Judge Jacobs based his decision on jurisdictional grounds, holding that SOX does not permit judicial enforcement of DOL reinstatement orders. Judge Leval, on the other hand, held that the DOL's preliminary order of reinstatement violated constitutional due process and was, therefore, unenforceable because the ALJ denied the employer an opportunity to rebut the evidence submitted in support of reinstatement.
- In *Welch v. Cardinal Bankshares Corp.*, 2006 WL 2838894 (October 5, 2006), the ALJ issued a preliminary order of reinstatement to the former Chief Financial Officer of Cardinal Bankshares Corp., who then moved in District Court for an injunction enforcing the reinstatement order. Upon the employer's motion, the Court dismissed plaintiff's action on the ground that the Court lacked subject matter jurisdiction to enforce a preliminary order by the ALJ.
- The Court also noted that its decision requires the court to disregard Code of Federal Regulations, Title 29, section 1980.113 (permitting complainants to file a civil action in the U.S. District Court to enforce preliminary orders of reinstatement issued by the ALJ) because its provisions directly conflict with the plain language of SOX.
- In support of its decision, the Court noted that "[t]he lack of authority of the district court to immediately enforce preliminary orders of reinstatement while an appeal is pending before the ARB ensures that appeals go through all levels of the administrative process before reaching federal court" thereby avoiding "a rapid sequence of reinstatement and discharge." Moreover, by denying district courts jurisdiction to enforce preliminary reinstatement orders during the ARB appeals process will prevent inconsistency and confusion.
- The Court concluded by stating that nothing prevents District Courts from enforcing final orders, such as those issued by the Department of Labor.

F. ARBITRATION AGREEMENTS

- In *Ulibarri v. Affiliated Computer Services*, 2005-SOX-46 and 47, January 13, 2006, the ALJ upheld the parties agreement to arbitrate disputes arising out of federal law and stayed the SOX proceedings pending the outcome of arbitration.
- Thereafter, complainant failed to initiate arbitration proceedings and respondent employer moved to dismiss for lack of prosecution. Complainant, who was having trouble retaining and keeping legal counsel, claimed that he was unable to proceed with arbitration unless he received money for attorney's fees. The ALR held that complainant

was not required to have an attorney present during the arbitration, denied complainant's request for attorney's fees, and dismissed the action.

- Several months later, in *Alliance Bernstein Inv. Research Mgmt. v. Schaffran,* 445 F. 3d 121 (2nd Cir. 2006), the Second Circuit Court of Appeals enforced complainant's written agreement to arbitrate "any dispute, claim or controversy that may arise between me and my firm…that is required to be arbitrated under the rules, constitutions or bylaws of the [NASD]." Accordingly, the Court refused to decide whether complainant's whistleblower claim is exempt from arbitration under NASD rules and, instead, held that the issue of arbitrability must be decided by an arbitration panel.

G. OTHER REMEDIES

- In *Murray v. TXU Corp*., 2005 U.S. Dist. LEXIS 10945 (N.D. Tex. June 7, 2005), plaintiff sought compensation for "special damages" due to alleged damage to his reputation and exemplary or punitive damages in connection with his SOX action. The U.D. District Court for the Northern District of Texas held that "special damages" do not include claims for injury to reputation or exemplary damages and disallowed plaintiff's claim for punitive damages.
- The Court also granted employer's motion to strike plaintiff's demand for a jury trial, holding that SOX does not provide plaintiff with the right to a jury trial.

III. Suggestions for Covered Employees

A. ESTABLISH A WRITTEN CODE OF BUSINESS CONDUCT AND ETHICS.

- Covered employers should ensure that the code of business conduct and ethics is consistent with the "code of ethics" required for CEO and senior financial officers under SOX Section 406.
- The code of business conduct and ethics should, among other things, expressly require employees to report any violations of law and/or the code to the company.
- The code of business conduct and ethics should be distributed to employees who should be required to sign an acknowledgement of receipt and agreement to abide by the code.
- A copy of the code of business conduct and ethics should be included with the information provided to new employees and explained during orientation.
- The code of business conduct and ethics should be periodically reviewed to determine whether updates are necessary and should be periodically redistributed as a reminder to employees.

B. ESTABLISH PROCEDURES FOR REPORTING AND INVESTIGATING COMPLAINTS

- Covered employers should recognize that existing procedures for dealing with other types of employee complaints (e.g., "Open Door Policy°) may not be sufficient and should determine whether procedures for reporting and investigating complaints covered by SOX should be integrated with existing procedures or issued as stand-alone procedures.
- SOX Section 301 requires the audit committee of a covered Board of Directors to (1) establish procedures for receiving, retaining, and handling complaints regarding accounting, internal accounting controls, or auditing matters, and (2) establish a means for their employees to submit accounting or auditing matters. However, this section does not mandate a specific set of procedures. The SEC has stated that it expects each audit committee to develop procedures that work best under the company's individual circumstances.
- Determine which arm of the organization is best suited to initially receive complaints - i.e. audit committee, legal department, human resources department, specialty designated compliance officer, Ombudsperson, etc. and provide more than one avenue for reporting.
- Ensure that others who may receive a complaint (i.e., supervisors, EEO Compliance Officer, etc.) recognize SOX issues and relay complaints to the appropriate person or committee.
- Consider procedures for receiving anonymous complaints via e-mail, phone, or fax hotlines that are accessible outside of regular business hours.
- Decide whether internal personnel should staff the hotline or whether this function should be outsourced to a third-party vendor. If intake is handled by internal personnel, will anonymity be lost due to voice recognition or familiarity with company employees? Can internal personnel act impartially? Do third-party vendors have adequate understanding of the company's business and culture to create written records of complaints that are accurate and not out of context? How will third-party vendors respond if subpoenaed for records or testimony?
- Consider establishing a database or other case management system to keep track of complaints and their disposition.
- Distribute written procedures to employees and require them to sign acknowledgement of receipt and agreement to abide by the procedures. Periodically redistribute procedures as a reminder to employees.
- Include a copy of the procedures in new employee packets and explain the procedures during orientation.
- Consider other avenues for communicating procedures to employees, such as during staff meetings, in employee newsletters, or via the Intranet.

- Adequately train and educate persons designated to implement and enforce the procedures. Failure by an employer to follow its own procedures in a consistent manner may be cited by a whistleblower to attack the employer's credibility.

C. INVESTIGATE

- Determine whether the Audit Committee, management or other designated personnel should screen complaints and decide which complaints will be investigated.
- Investigate promptly and thoroughly.
- Consider using an independent investigator. Although not necessary to comply with SOX, it may help ensure anonymity, confidentiality, and security. Investigations of senior management by subordinates will always be suspect.
- Interviews must include a reminder regarding the company's policy against retaliation and policy to maintain confidentiality to the extent possible.
- Interviews should not be audiotaped without prior express written and recorded consent. Audiotaping investigatory interviews has other risks that should be considered.
- Document the investigation from start to finish, including the findings.
- Communicate the findings to the whistleblower {unless the complaint was made anonymously).
- Decide whether the investigation will be conducted by counsel. Bear in mind that if the company's reliance upon investigation is asserted as a defense, the privilege is likely to be waived.

D. HOLD OFF ON DISCIPLINE AND DISCHARGE FOR SEEMINGLY UNRELATED MISCONDUCT OR PERFORMANCE PROBLEMS

- In most cases, employers are well served to maintain the status quo until completion of the investigation. Proximity in time between the complaint and the adverse employment action may create the presumption of retaliation. Remember that a whistleblower need only show that the protected activity was a contributing factor to the adverse employment action.
- Consider offering paid administrative leave.
- Make sure you can show, by clear and convincing evidence, that you would have taken the same unfavorable employment action in the absence of protected activity.

E. DEVELOP A PLAN TO HANDLE QUESTIONS AND BAD PRESS.

F. TAKE APPROPRIATE CORRECTIVE ACTIONS.