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Sarbanes-Oxley's Whistleblower Provisions: A New Challenge for Employment Lawyers

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When enacting the Sarbanes-Oxley Act in 2002, Congress continued its expansion of whistleblower protection at the Federal level by including provisions prohibiting discrimination against workers who report possible fraud or misconduct at publicly traded corporations, or who cooperate with government investigations into possible corporate wrongdoing. Like several earlier whistleblower protection statutes, Congress assigned enforcement responsibility of the Sarbanes-Oxley whistleblower program to the Department of Labor (DOL).

One consequence of this assignment is that a wide range of employers, workers and their respective counsel are being introduced to a body of DOL administrative case law that has not previously received much public attention. In addition to the administrative forum provided by DOL, corporate whistleblower cases will be litigated before other adjudicators, including federal courts, state courts and arbitrators. This presentation reviews briefly the basic requirements of the statute and DOL's procedural regulations, and addresses a number of knotty issues that are likely to confront counsel who represent parties in Sarbanes-Oxley whistleblower cases.

The Labor Department's experience with whistleblower statutes dates back to 1972, when the Clean Water Act was amended to include employee protections.¹ Including Sarbanes-Oxley, the Labor Department now has jurisdiction over whistleblower complaints under eleven statutes that cover environmental protection, transportation, nuclear safety and corporate integrity issues:

Environmental: Clean Air Act; Clean Water Act; Safe Drinking Water Act; Toxic Substances Control Act; Solid Waste Disposal Act (also referred to as the Resource Conservation and Recovery Act); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or "Superfund" law)
Transportation: Surface Transportation Assistance Act (motor vehicles), **Wendell H. Ford Aviation & Reform Act for the 21st Century ("AIR 21")**; Pipeline Safety

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Improvement Act
Nuclear: **Energy Reorganization Act**
Corporate: **Sarbanes-Oxley Act.**²

Sarbanes-Oxley expressly incorporates the procedural components of the AIR 21 whistleblower statute (enacted in 2000), which itself incorporated aspects of whistleblower provisions previously found in the Energy Reorganization Act (ERA) and the Surface Transportation Assistance Act (STAA). Sarbanes-Oxley's whistleblower provisions are codified at 18 U.S.C. §1514A. The text of the whistleblower provisions can be found as an attachment to this paper. The Labor Department published final Sarbanes-Oxley procedural rules on August 24, 2004, codified as 29 C.F.R. Part 1980. 69 Fed. Reg. 52104.

In addition to the civil provisions aimed at protecting employees who report corporate fraud, Sarbanes-Oxley also seeks to protect whistleblowers by amending the federal criminal code, raising the possibility that individuals or employers that retaliate against whistleblowers may be subject to criminal prosecution. 18 U.S.C. 1348. Like the whistleblower provisions, the text of the Sarbanes-Oxley criminal provisions is found as an attachment to this paper.

The general context of DOL whistleblower protection activity.

At the outset, a brief observation needs to be made about the context of the whistleblower protection statutes that are enforced by DOL.

Each of the whistleblower protection statutes protects persons who engage in protected activities from acts of employment discrimination or retaliation by their employers or various other persons or entities. Not surprisingly, the legal analysis in the DOL administrative opinions relies heavily on judicial case law developed under other anti-discrimination statutes, most notably Title VII. There is, however, a subtle but important distinction between the whistleblower statutes and other anti-discrimination laws that colors DOL's approach to whistleblower cases, particularly with regard to remedies.

Although DOL whistleblower cases typically are litigated as if they are private lawsuits, with employee complainants (plaintiffs) prosecuting actions against one or more respondents (typically including the complainant's direct employer) for alleged unlawful conduct, both DOL and the Federal courts take the view that these legal actions are not pursued merely to vindicate the employee's individual rights under the statute. Instead, protecting whistleblowers has been viewed as a part of a much broader regulatory enforcement scheme for particular industries. In the words of DOL's Administrative Review Board,

The whistleblower protection laws are not intended merely to protect the private rights of individual employees, but are part of a broader

enforcement scheme that promotes critical public interests. “Congress recognized that employees in the . . . industry are often best able to detect . . . violations and yet, because they may be threatened with discharge for cooperating with enforcement agencies, they need express protection against retaliation for reporting these violations.” *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) (explaining rationale for comparable whistleblower provision of the Surface Transportation Assistance Act). Thus “[t]he Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms but health and safety hazards to the public.” *Beliveau v. United States Dep’t of Labor*, 170 F.3d 83, 88 (1st Cir. 1999). Similarly, referring to the analogous employee protection provision of the Clean Water Act, the Third Circuit explained that:

Such “whistle-blower” provisions are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment, such as the Clean Water Act and nuclear safety statutes. They are intended to encourage employees to aid in the enforcement of these statutes by raising substantiated claims through protected procedural channels. * * * The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or punish employee efforts to bring the corporation into compliance with the Clean Water Act’s safety and quality standards. If the regulatory scheme is to effectuate its substantial goals, employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute.

Passaic Valley Sewerage Comm'rs v. United States Dept of Labor, 992 F.2d 474, 478 (1993), cert. denied, 510 U.S. 964 (1993).

Hobby v. Georgia Power Co. (Hobby II), ARB Nos. 98-166/169, ALJ No. 98-ERA-30 (ARB Feb. 9, 2001), 2001 WL 168898 *5, *aff’d sub. nom. Georgia Power Co. v. U.S. Dep’t of Labor*, No. 01-10916 (11th Cir. 2002)(unpublished).^{3 4}

As a consequence of this view that protecting whistleblowers is part of a regulatory enforcement scheme, whistleblower actions within the Labor Department can be surprisingly vigorous in their scope. For example, the successful complainant in the *Hobby* case (above) was

the head of a utility company division at the time of his discharge, and even had been assistant to the company president at one time. During his tenure with the company, he had never gone to a government agency alleging wrongdoing; instead, he had advised the company's senior executives of his concern that the company's restructuring of its nuclear operations might violate the requirements of its NRC operating license. The complainant was terminated after making these internal reports, ostensibly as part of a broader company reorganization that eliminated his division. The Labor Department concluded that even a senior corporate manager expressing concerns internally about possible statutory violations was entitled to protection. Perhaps more significant was DOL's remedy: in addition to directing back pay, interest, attorney fees, special damages, etc., DOL ordered that the complainant be reinstated to a senior-level management position at the utility, rejecting the company's request for a front-pay alternative. The Eleventh Circuit affirmed DOL's decision *en toto*.

Sarbanes-Oxley whistleblower provisions - what activities are protected?

"Blowing the whistle" (*i.e.*, protected activity) under the Sarbanes-Oxley Act is divided into two related types of activities. Similar to the other DOL-enforced statutes, employees who "file, cause to be filed, testify, participate in or otherwise assist" in government proceedings related to alleged violations of any SEC rule or regulation, federal mail fraud, wire fraud, bank fraud, or any other federal provision relating to fraud against shareholders are protected from adverse action. In addition, the Sarbanes-Oxley Act uniquely protects employees who "provide information, cause information to be provided, or otherwise assist" in investigations regarding conduct which the employee reasonable believes to be a violation of any SEC rule or regulation, federal mail fraud, wire fraud, bank fraud, or any other federal provision relating to fraud against shareholders. Employee assistance to investigations is protected when the investigations are conducted by (a) a federal regulatory or law enforcement agency; (b) any member or committee of Congress; or (c) a person with supervisory authority over the employee, or another person working for the employer who has authority to investigate, discover, or terminate misconduct. In other words, both external and internal reporting of possible wrongdoing are protected activity under the law.

Under the various whistleblower statutes already within its jurisdiction, DOL has interpreted the concept of proceedings very broadly. For example, DOL traditionally has viewed *any* internal employee efforts to alert management to possible violations as protected activity, a position that repeatedly has been affirmed by the appellate courts. There are even older cases in which DOL has found employee leaks to the media to be protected activity, under the theory that the contacts were a preliminary step toward "causing" a proceeding to be filed.⁵ Because the adjudication process at DOL usually is slow and the number of DOL-filed whistleblower complaints limited, it may take a while to determine DOL's current view of the scope of protected activity under Sarbanes-Oxley's "proceedings" language.

Protection for employees who participate in *investigations* – particularly congressional investigations – is a feature in the Sarbanes-Oxley Act that is not explicitly found in the other DOL-enforced statutes. This “investigations” provision has provoked some disagreement between Congress and the Executive Branch. In his 2002 signing statement, President Bush suggested that whistleblower contacts with Congress would be protected only if the communication took place within the context of “investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose,” *i.e.*, contacts with legislative committees having jurisdiction over corporate matters.⁶ This restricted interpretation has been abandoned by the Department.⁷

Who is barred from discriminating?

The underlying goal of Sarbanes-Oxley is to protect *investors* from fraudulent practices. The whistleblower provisions of the Act therefore are targeted at protecting persons who allege wrongdoing at *publicly-traded companies*.⁸ Prohibited discrimination includes discharge, demotion, suspension, harassment, or other discrimination in employment terms and conditions.

Although one early ALJ decision suggested that whistleblowing activity at non-publicly traded subsidiaries of covered companies would fall outside Sarbanes-Oxley protections,⁹ subsequent ALJ decisions have rejected this narrow interpretation as inconsistent with the law’s objectives, instead allowing whistleblower charges by employees of non-public subsidiaries to move forward so long as a publicly-traded parent corporation is named in the charge.¹⁰ The ARB has not issued a definitive ruling on this issue, but it is likely that the statute’s coverage will be interpreted broadly.

The statute prohibits discrimination by publicly traded companies as well as “any officer, employee, contractor, subcontractor, or agent of such company.” This provision plainly contemplates personal liability by corporate officers and other employees for discriminatory acts, and thus represents a significant shift from the other DOL whistleblower statutes, which generally have restricted liability to an employing entity, and not individual actors.

It should be noted that under DOL case law it is clear that liability for discrimination is not limited to actions by a company against its own employees. It is entirely possible for companies (or corporate officers, employees, etc.) to be found liable for discrimination against persons who work for third parties, *e.g.*, the corporation’s subcontractors or agents. For example, assume that Susan Miller (an executive of ABC Corporation) determines that Joe Jones, an auditor employed by ABC Corporation’s outside accounting firm, is leaking information to a member of Congress about possible fraud at ABC. Miller concludes that Jones can’t be trusted, and contacts the accounting firm and requests a change in auditors. ABC is a valuable client for the accounting firm, so the accounting firm’s management accommodates Miller’s

request and transfers Jones to another assignment. The new assignment is less desirable and has less promotion potential. Because Miller set in motion the events that resulted in harm to Jones, Jones may have viable discrimination claims against the accounting firm (his employer), ABC Corporation (the client), as well as personally against Miller (the client's officer).¹¹

Procedures for processing administrative complaints at DOL

Under Sarbanes-Oxley, employees who believe that they have been subjected to unlawful discrimination must file their complaint with the Labor Department within "90 days after the date on which the violation occurs."¹² The preamble to the Labor Department's regulations interpret the limitation period as beginning "once the employee is aware or reasonably should be aware of the employer's decision."¹³

Within DOL, the agency that will receive and initially investigate Sarbanes-Oxley whistleblower complaints is OSHA, which performs the same investigative function under the other DOL-enforced whistleblower statutes. Upon the filing of a complaint, OSHA notifies the named person(s) of the charge and its substance. The regulations indicate that a complaint will be dismissed without investigation if the complainant does not establish the elements of a *prima facie* case of discrimination, although this determination most likely will be made only after some interviews are conducted by DOL investigators to supplement the initial complaint. During the course of the investigation, respondents have an opportunity to respond and present their position.

If, following the investigation, OSHA finally concludes on a preliminary basis that the complainant has met his or her burden of proof (discussed below), then OSHA will issue a preliminary order of relief in favor of the complainant at the investigative stage. Otherwise, OSHA will dismiss the complaint. Either party then has an opportunity to object to OSHA's findings and request a full evidentiary hearing before a Labor Department administrative law judge. Note that any relief ordered by OSHA is stayed upon the filing of a hearing request, except that a preliminary order of reinstatement is effective immediately and is not stayed while the complaint is being litigated. Instead of returning the employee to the workplace during the litigation, DOL regulations provide that mere "economic reinstatement" may be allowed if the employer establishes that returning the employee to the job would create a security risk.¹⁴ Note, however, that even if the employer ultimately prevails in the case, it will not be entitled to recapture wages and benefits paid to the employee during the administrative trial and appeal period.¹⁵

The hearing stage will be conducted by an administrative law judge pursuant to the Labor Department's hearing rules, found at 29 C.F.R. Part 18. The Department regulations indicate that the agency expects Sarbanes-Oxley whistleblowers to take responsibility for prosecuting these cases themselves, and that the Department ordinarily will not act as a

prosecutor – although DOL reserves the right to participate in any case as an *amicus* or interested party, at its discretion. The ALJ's decision becomes the final decision of the Department unless a subsequent appeal is taken to DOL's Administrative Review Board (ARB). ARB decisions are, in turn, subject to review by the Courts of Appeals.

The Labor Department's track record in processing whistleblower cases speedily is problematic. The process has fully three levels – (1) investigation and initial findings by OSHA; (2) discovery, trial and preliminary decision by an ALJ; and (3) appellate review by the ARB. In a new feature unique to Sarbanes-Oxley among the DOL-enforced statutes, Congress has given whistleblowers the option to file their complaint in Federal district court any time after 180 days following the filing of their complaint, if DOL has not yet issued a "final decision" in the case. Like the AIR 21 whistleblower program, whistleblowers who bring frivolous complaints of discrimination may be required to pay damages of up to \$1,000 to the prevailing employer.¹⁶

Even though DOL's Sarbanes-Oxley regulations suggest that the agency is prepared to take steps to streamline the hearing process in order to meet this 180-day deadline, experience teaches that few (if any) whistleblower cases will be investigated, tried and appealed within a 6-month period from the filing of a complaint. Thus there is a real possibility that whistleblowers may go through the discovery and hearing process before DOL, and perhaps even receive an ALJ initial decision, and then file their case *de novo* in the courts.

The Labor Department appears to be very concerned with this "two bites at the apple" situation. The preamble to the final Sarbanes-Oxley regulations suggests that ALJs may limit discovery (to speed up the trial process) and "may exercise discretion to limit discovery unless the complainant agrees to delay filing a complaint in Federal court for some definite period of time beyond the 180-day point."¹⁷ It is unclear whether the ALJs will choose to exercise this "discretion," which may raise due process concerns and appears to be an effort to limit a right guaranteed in the statute itself. In the interim regulations, the Department suggested that district courts might interpret the filing of a Sarbanes-Oxley court complaint as if it were a request for mandamus, essentially sending the case back to DOL for a final administrative decision.¹⁸

Interaction with other forums and possible "choice of forum" issues

One of the interesting aspects of the employee protection provisions is that these corporate whistleblower actions will be litigated in a variety of forums, presenting some challenging decisions for litigators. Although the statute requires a Federal action to be initiated through a complaint to the Labor Department, there is a real likelihood that many complainants will have the option to file a *de novo* action in Federal district court, given the practical difficulties DOL will face in reaching a final decision within 180 days of filing the initial complaint. But in addition to these two Federal forums (administrative and judicial), Sarbanes-

Oxley explicitly preserves the employee's "rights, privileges, or remedies . . . under any Federal or State law, or any collective bargaining agreement." 18 U.S.C. §1514A(d). The experience under other DOL-enforced whistleblower statutes suggests that employees in states with strong state-level whistleblower statutes or wrongful discharge policies often prefer filing in the state courts. And in addition to possible litigation in Federal and State forums (and even possible protections under collective bargaining agreements), it is likely that many Sarbanes-Oxley-type disputes will be subject to mandatory arbitration under employment contracts.

Except in situations where an employee is contractually obligated to pursue his or her claim through arbitration (discussed *infra*), the choice of forums for litigating a Sarbanes-Oxley whistleblower complaint is solidly within the control of the complainant.

One of the advantages that employees will enjoy by filing under the Federal statute is a highly pro-employee **burden of proof**. Sarbanes-Oxley incorporates by reference the highly pro-plaintiff burden of proof found in the AIR 21 statute (which, in turn, was largely based on the Energy Reorganization Act). Under this standard, an employee may prevail in a discrimination claim merely by showing that unlawful discrimination was a "contributing factor" in the employer's adverse action. Note that the improper motive does not need to be the *predominant* factor motivating the employer's action, only a *contributing* factor. Once an employee meets this minimal burden of proof, employers or other respondents will be found liable for discrimination unless they can demonstrate by "clear and convincing evidence" that they would have taken the same employment action even in the absence of whistleblowing activity. As the Eleventh Circuit observed in an ERA case applying the same "contributing factor" burden of proof scheme,

For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves"

Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1472 (11th Cir. 1997). In light of the level of public outrage over corporate fraud, the court's language would appear to apply with equal force to Sarbanes-Oxley cases.

In addition to a highly favorable burden of proof for complainants, Sarbanes-Oxley's "**interim reinstatement**" provision (discussed above) also is a compelling reason for terminated employees to file their whistleblower complaint before DOL, rather than in a state forum. For employees who have a meritorious claim, the interim reinstatement feature may provide a relatively speedy road back to the workplace – or, alternatively, significant bargaining power in any settlement negotiations.

Litigation before the Labor Department is not without its drawbacks, however. A major potential problem involves the power of DOL's administrative law judges to issue **subpoenas**

for testimony or evidence from persons or entities not party to the dispute. In a 2000 decision, *Childers v. Carolina Power & Light Co.*, the Department's Administrative Review Board held that ALJs have inherent subpoena power even in circumstances where the underlying statute does not expressly mention subpoena authority (e.g., Sarbanes-Oxley), but where the statute requires an agency to conduct a formal "on the record" administrative proceeding under the APA.¹⁹ The Solicitor of Labor has rejected the ARB's position on ALJ subpoena power over non-parties in a memorandum issued to the agency's field staff; however, the Solicitor's office historically has taken the view that ALJs have broad power of compulsion over parties to a whistleblower dispute.²⁰ One federal district court seems to have concluded that, absent express statutory authority, Labor Department ALJs lack subpoena power under the whistleblower statutes over *both parties and non-parties*.²¹ Nonetheless, it is this author's understanding that some ALJs continue to follow the ARB's *Childers* decision and continue to issue subpoenas.²²

To the extent that Sarbanes-Oxley whistleblowers or respondents need access to information from non-parties to litigate their cases, the cloud surrounding the subpoena issue may present very real problems. Of course, unlike the environmental, nuclear and transportation whistleblower programs administered by DOL, employees who file complaints under Sarbanes-Oxley have the option of filing their case in Federal district court once the 180 time limit has been reached. In cases where subpoena authority is critical to litigating the claim, moving the case into the judicial system may be an important strategic choice.

Another possible concern that may influence the choice of forum involves **settlements**. Even though whistleblower cases at DOL normally are litigated as if they are private-party lawsuits, with the complainant entirely responsible for prosecuting the action, both the statute and DOL's implementing regulations require parties to submit settlement agreements to DOL for the agency's approval.²³ DOL review of settlements is required at all stages of the Sarbanes-Oxley process. If a case is settled at the initial investigative stage, the agreement is reviewed by OSHA. Later in the process, the settlement agreement is reviewed and approved either by the ALJ or the ARB.²⁴

Substantively, DOL's approval of settlement agreements is routine and presents few problems. However, an important consequence of submitting the settlement agreement to the Labor Department for approval is that the agreement becomes subject to disclosure under the Freedom of Information Act (FOIA). Confidentiality is a common expectation as part of settlement negotiations, and the inability to negotiate a confidential settlement in whistleblower cases pending before DOL most likely will be a serious obstacle to settlement in major disputes. For cases that have been pending before DOL for more than 180 days, it may be possible to circumvent this FOIA problem by filing the action to Federal district court, entering into a confidential settlement and then moving to dismiss the court case.

Some employees may find it preferable to avoid the Federal system entirely and bring suit under state whistleblower statutes or wrongful discharge law. Although bringing an action

via the state courts may mean that the employee loses the favorable “contributing factor” burden of proof under Sarbanes-Oxley and the possibility of an interim order of reinstatement by the Labor Department, state court actions may offer a number of advantages to the complainant and the complainant’s counsel, e.g., familiar procedures, clear subpoena power, the ability to reach confidential settlements, jury trials, more generous recoveries, etc. In addition, in light of the relative short (90 day) time limitation for filing a complaint at DOL under Sarbanes-Oxley, some actions that would be untimely if filed at DOL may be viable under state laws that having longer filing deadlines.

Since it is clear from the text of the Sarbanes-Oxley statute itself that state remedies are not pre-empted, some corporate whistleblower-type actions certainly will be litigated under state laws.²⁵ And it has not been uncommon for “repeat whistleblowers” to give both Federal and state forums a try.²⁶ In light of the different case law and burdens of proof of Federal vs. state laws, it is conceivable that whistleblowers may attempt to bring actions in both Federal administrative and state judicial forums concurrently.

Finally, it merits noting that a Federal district court in *Boss v. Salomon Smith Barney, Inc.*, has held that Sarbanes-Oxley does not preempt mandatory arbitration of employment claims pursuant to private employment contracts.²⁷ The employment agreement in the *Boss* case required all “claims . . . [under any] federal, state or local statute, regulation or common law doctrine, regarding . . . termination of employment” to be arbitrated under the NASD arbitration program. Because of Sarbanes-Oxley’s unusual burden of proof provisions, as well as the wide variety of state laws that may also be implicated in a corporate whistleblower discrimination case, it is likely that employment arbitrators and reviewing courts will face difficult challenges when attempting to apply external law to arbitration decisions in this field.

CONCLUSION

The employee protection provisions of the Sarbanes-Oxley Act represent an aggressive effort by Congress to facilitate the reporting of fraudulent activities on the part of publicly traded companies. The combination of a strongly pro-complainant burden of proof, unusual procedural hurdles and multiple forums in which these complaints may be litigated is likely to present challenges and opportunities for practitioners for many years to come.

1. Pub. L. 92-500, 86 Stat 890 (Oct. 18, 1972).
2. CAA (42 U.S.C. §7622); CWA (aka Water Pollution Control Act, 33 U.S.C. §1367); SDWA (42 U.S.C. §300j-9(i)); TSCA (15 U.S.C. §2622); SWDA (aka RCRA) (42 U.S.C. §6971); CERCLA (42 U.S.C. §9610); STAA (49 U.S.C. §31105); AIR 21 (49 U.S.C. § 42121); PSIA (49 U.S.C. §60129); ERA (42 U.S.C. § 5851); SOX 18 U.S.C. §1514A.
3. Note: Full text copies of whistleblower decisions issued by the Labor Department's Administrative Review Board are available on the DOL's Office of Administrative Law Judges website (<http://www.oalj.dol.gov/libwhist.htm>) as well as Westlaw and LEXIS. Although Westlaw and LEXIS offer superior search capabilities, the Labor Department's website also can be very helpful to practitioners because it usually includes the full text of trial-level decisions reached by the Department's ALJs.
4. See also *Hobby v. Georgia Power Co. (Hobby I)*, No. 98-ERA-30 (Sec'y Aug. 4, 1995), 1995 WL 848134 (corporate executive as whistleblower).
5. *Diaz-Robainas v. Florida Power & Light Co.*, 92-ERA-10 (Sec'y Jan. 16, 1996), 1996 WL 171408 *6 (employee who is about to reveal nuclear safety concerns to the press is engaging in protected activity under the ERA).
6. See Statement by the President on signing the Sarbanes-Oxley Act, July 30, 2002 (available at www.whitehouse.gov/news/releases/2002/07/20020730-10.html) (suggesting that protection of reporting of securities fraud to members of Congress might be limited).
7. See 69 Fed. Reg. 52106, comments on 29 C.F.R. §1980.102 ("Complaints to an individual member of Congress are protected, even if such member is not conducting an on-going Committee investigation within the jurisdiction of a particular Committee[.]")
8. Specifically, a company "with a class of securities regulated under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 781), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)." 18 U.S.C. §1514A(a).
9. *Powers v. Pinnacle Airlines Corp.*, 2003-AIR-12 (ALJ Mar. 5, 2003).
10. *Morefield v. Exelon Services, Inc.*, 2004-SOX-2 (ALJ Jan. 28, 2004); *Gonzalez v. Colonial Bank*, 2004-SOX-39, Order Granting Motion to Amend Complaint (ALJ Aug. 17, 2004) (allowing Complainant to amend complaint to add publicly-traded parent company as a named respondent).
11. See, e.g., *Stephenson v. NASA*, ARB No. 96-080 ALJ No. 94-TSC-5 (ARB Feb. 3, 1997), 1997 WL 65773.
12. 18 U.S.C. 1514A(b)(2).
13. 69 Fed. Reg. 52106, citing *EEOC v. United Parcel Service*, 249 F.3d 557 (6th Cir. 2001).

14. 29 C.F.R. §1980.105(a)(1).
15. 69 Fed. Reg. 52109.
16. See 49 U.S.C. §42121(b)(3)(C).
17. 69 Fed. Reg. 52109-10.
18. 68 Fed. Reg. 31862.
19. *Childers v. Carolina Power & Light Co.*, ARB No. 98-077, ALJ No. 97-ERA-32 (ARB 2000), 2000 WL 1920346.
20. *E.g., Immanuel v. Wyoming Concrete Indus.*, ARB No. 96-022 (May 28, 1997), *aff'd in part and rev'd in part sub nom. Immanuel v. United States Dep't of Labor*, 139 F.3d 889 (4th Cir. 1998)(unpublished decision).
21. *Bobreski v. EPA*, 284 F. Supp. 2d 67 (D.D.C. 2003). Note that the district court in *Bobreski* does not distinguish between *investigative* subpoenas and *trial* subpoenas, which was a core consideration in the ARB's *Childers* decision.
22. *Peck v. Safe Air Int'l*, ALJ No. 2001-AIR-3 (ALJ Aug. 20, 2001)(ALJ order denying FAA motion to quash subpoena); *Taylor v. Express One Int'l*, ALJ No. 2001-AIR-2 (ALJ Dec. 6, 2001)(ALJ order denying DOL motion to quash subpoena).
23. *Beliveau v. United States Dep't of Labor*, 170 F.3d 83, 88 (1st Cir. 1999); *Macktal v. Sec'y of Labor*, 923 F.2d 1150 (5th Cir. 1991); *Ruud v. Westinghouse Hanford Co.*, No. 88-ERA-33 (Sec'y June 7, 1994), 1994 WL 897303 (remanding case for hearing when parties refused to provide a copy of a settlement agreement for the Secretary's review; see also *Ruud v. Westinghouse Hanford Co.*, ARB Nos. 99-023, 99-028, ALJ No. 1988-ERA-33 (ARB Apr. 18, 2002) (Approval of Settlement & Order of Dismissal with Prejudice).
24. 29 C.F.R. §1980.111.
25. See, e.g., *Germann v. Vulcan Materials Co.*, 106 F.Supp.2d 1010 (S.D. Ca. 2000)(state court action alleging wrongful termination under state law in retaliation for complaints that federal trucking regulations were being violated not preempted by STAA whistleblower provision); *Gaballah v. PG&E*, 711 F.Supp 988 (N.D. Ca. 1989)(state law action alleging discharge for activity protected under the ERA does not raise federal question, remanded to state courts).
26. *E.g., Germann v. CalMat Co.*, ARB No. 99-114, ALJ No. 99-STA-15 (ARB Aug. 1, 2002); *Gaballa v. Carolina Power & Light Co.*, ARB No. 99-090, ALJ Nos. 96-ERA-43, 98-ERA-34 (ARB May 23, 2002).
27. *Boss v. Salomon Smith Barney, Inc.*, 2003 WL 21146653 (S.D.N.Y. 2003).

SARBANES-OXLEY §806, WHISTLEBLOWER PROTECTION PROVISION

18 U.S.C. 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. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against 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.

(b) ENFORCEMENT ACTION. –

(1) In general. – A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by –

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over

such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.— An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.— Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.— An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.— An action under paragraph (1) shall be commenced not later than 90 days after the date on which the violation occurs.

(C) REMEDIES.—

(1) IN GENERAL.— An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.— Relief for any action under paragraph (1) shall include –

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(d) RIGHTS RETAINED BY EMPLOYEE. – Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.

SARBANES-OXLEY §1107, AMENDMENT TO RETALIATION PROVISION OF THE CRIMINAL CODE

18 U.S.C. § 1513. Retaliating against a witness, victim, or an informant

(a) (1) Whoever kills or attempts to kill another person with intent to retaliate against any person for –

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings,

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is –

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 20 years.

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for –

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined under this title or imprisoned not more than ten years, or both.

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(d) There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

(e) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.