INTRODUCTION

Undoubtedly the most widely discussed federal whistleblower statute is the enacted provision of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (July 30, 2002) that protects certain corporate whistleblowers who report financial or securities-related wrongdoing. As of March 21, 2006, 714 Sarbanes-Oxley whistleblower cases had been filed with the Department of Labor (285 of those coming in FY2005, an increase of 101 over FY2004). Six hundred nineteen cases have been completed, resulting in 642 determinations (the difference in number is due to the fact that some cases have multiple complainants, each of whom receives a separate determination) the Occupational Safety and Health Administration reports that 454 were dismissed, 92 were withdrawn, and 96 were determined to have merit (resulting in 81 settlements). Given increased media exposure and employee education about this law, and the breadth of the coverage and protections afforded, one can only anticipate a proliferation in the number of cases filed.

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3 Statistics made available by Director Office of Investigative Assistance, OHSA.
What whistleblowing is covered?

This statute provides a new civil remedy to employees of publicly traded companies who allege that they were retaliated against because they provided information about, or participated in an investigation relating to what they reasonably believed to be violations of securities statutes and regulations. See Pub. L. No. 107-204, § 806, codified at 18 U.S.C. § 1514A.

The investigation prong protects those who provide, or cause to be provided, information, or otherwise participate in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of specified federal securities and fraud law. The information or assistance must have been provided to, or the investigation must be conducted by, (1) a federal regulatory or law enforcement agency; (2) a member of Congress or any committee of Congress; (3) a person with supervisory authority over the employee; or (4) a person working for the employer who has the authority to investigate, discover, or terminate the misconduct.

The proceedings prong protects those who file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed, or about to be filed, relating to an alleged violation of federal securities and fraud laws. The Department of Labor has historically interpreted “proceedings” broadly to encompass internal reports to management, and potentially employee leaks to the media, on the grounds that such contacts were a “preliminary step” towards causing a proceeding to be filed or initiated.

What retaliation is prohibited?

This statute prohibits such companies and their officers, employees and agents, from discharging, demoting, suspending, threatening, harassing, “or in any other matter discriminat[ing] against an employee because of any lawful act done by the employee” relating to such alleged violations. Id. Successful claimants can obtain make-whole relief, including reinstatement, along with back pay with interest, and compensation for special damages, including litigation costs, expert witness fees, and reasonable attorney’s fees. 18 U.S.C. § 1514A(c); see generally “Sarbanes-Oxley Act of 2002,” H. Rept. No. 107-610 (July 24, 2002).

What Constitutes an Adverse Action?

To qualify as an adverse action sufficient to support a Sarbanes-Oxley whistleblower claim, the action must produce some tangible job consequence. Bechtel v. Competitive Technologies, Inc., 2005-SOX-33 (ALJ Oct. 5, 2005) (finding that the Respondent had not engaged in adverse action when it removed the Complainant's status as an officer of the company and failed to conduct an employment evaluation where there was no evidence of a loss of pay, raises, bonus, benefits, or other negative impact on employment conditions). Some ALJ’s have used a broader approach to the adverse action requirement, finding actions that are “reasonably likely to deter employees from making protected disclosures,” sufficient. See, Halloum v. Intel Corp., 2003 SOX 7, 15-16 (ALJ Mar. 4, 2004)(dismissed on other grounds and affirmed by ARB).
Arbitration and Settlement Agreements

As with other federal employment law statutes, employers may seek to avoid civil suit in federal court under Sarbanes-Oxley through settlement agreements releasing all claims and/or agreements to arbitrate. See, e.g., Ulibarri v. Affiliated Computer Services, 2005-SOX-46 and 47 (ALJ Jan. 13, 2006), Boss v. Salomon Smith Barney Inc., 263 F.Supp.2d 684,685 (S.D.N.Y. 2003) (nothing in the text or legislative history of the SOX evinces an intent to preempt the FAA), Moldauer v. Canadaguia Wine Co., ARB No. 04-022, ALJ No. 2003-SOX-26 (ARB Dec. 30, 2005)( case dismissed on timeliness grounds, but one board member but wrote separately that the severance agreement releasing all claims against the respondent should control the outcome).

Filing Process

To qualify for relief under the statute, the employee must file a complaint with OSHA within 90 days after the alleged violation. The 90 day requirement is strictly enforced. See, e.g Halpern v. XL Capital, Ltd. ARB No. 04-120, ALJ No. 2004-SOX-54 (ARB Aug. 31 2005)(rejecting complainants argument that he was entitled to tolling because he was unaware of unlawful motive for retaliatory action within the limitations period.) An Administrative Law Judge has recently dismissed a case as untimely holding that a tolling agreement entered into by the parties in furtherance of settlement negotiations was ineffective. See Szymonik v. TyMetrix Inc., Case No. 2006-SOX-50, (March 8, 2006). There is no written form required, but the complaint must be in writing, and should include a full statement of the allegations, with relevant dates. OSHA will then conduct an investigation if it determines that the employee has stated a prima facie case that his protected conduct was a contributing factor in an unfavorable employment action, and the employer has failed to rebut the claim by clear and convincing evidence. Otherwise, OSHA will dismiss the complaint.

Either party may appeal an adverse decision by OSHA to the Department of Labor’s Office of Administrative Law Judges, which then conducts an administrative hearing preceded by discovery. The ALJ’s decision can be appealed by the unsuccessful party to the Department of Labor’s Administrative Review Board, with further appeal to the U.S. Circuit Court of Appeals for the circuit in which the employee resided or the violation allegedly occurred.\(^4\) This statutory enforcement scheme is comparable to those of other federal whistleblower statutes administered by the U.S. Department of Labor, with one significant exception: a party can remove the claim to federal court if the Department of Labor does not resolve the claim within 180 days.\(^5\) Jurisdiction vests with the district court when the case is filed. Stone v. Duke Energy Corp., 432 F.3d 320 (4th Cir.2005) (case below 2003-SOX-12).

\(^4\) The ARB defers to ALJ's factual findings, especially where they are predicated on the ALJ's credibility determinations about the testimony of conflicting witness Halloum v. Intel Corp., ARB No. 04-068, 2003-SOX-7 (ARB Jan. 31,2006).

\(^5\) See 18 U.S.C. § 1514A (b)(1)(B) (Claimant may seek relief, “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, [by] bringing an action at law or equity for de novo review in the appropriate district court”). For a discussion of when a preliminary order may become “final” see, Hanna v. WCI Communities, Inc., 348 F. Supp. 2d 1332, (S.D. Fla. Nov. 18, 2004), Stone v. Duke Energy Corp., 432 F.3d 320 (4th Cir. 2005)(ALJ’s dismissal of employees
Department of Labor Reporting to SEC

One key provision of Sarbanes-Oxley is that the Department of Labor must supply the details of the employee’s charge to the Securities & Exchange Commission (SEC), to allow that agency the opportunity to conduct its own investigation. See 29 C.F.R. § 1980.1034(a). This provision provides a powerful incentive for the employer to settle a claim before it is filed with the Department of Labor.

Burdens of Proof

The statute provides that the burdens of proof in a Sarbanes-Oxley whistleblower are governed by the burdens in Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, (“AIR-21”), 49 U.S.C.A. § 42121(b).\(^6\) In January, the ARB restated the procedures and burdens of proof applicable to an AIR21 whistleblower complaint in Brune v. Horizon Air Industries, Inc., ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006). In Brune the Administrative Review Board differentiated the approach taken by OSHA at the investigatory stage, where a complainant need only raise an inference of the violation, from the approach at the hearing stage, where a complainant must prove by a preponderance of the evidence that protected activity contributed to the adverse action. If the complainant establishes a claim by a preponderance of evidence, the employer then faces a burden of proof and can avoid liability if it demonstrates by “clear and convincing evidence” that it would have taken the same adverse action absent the protected activity. Id.

Limitations on Coverage


administrative complaint was not a final decision depriving federal court of jurisdiction).

Sarbanes-Oxley covers large and small publicly traded companies. See Jayaraj v. Pro-Pharmaceuticals, Inc., 2003 SOX 32 (ALJ Feb. 11, 2005) (holding that high-tech start-up company with only five employees is covered by the Act since it has registered and its shares are traded on the OTC market). Numerous efforts to bring SOX whistleblower claims where the respondent is not a publicly traded company have been unsuccessful. See e.g., Judith v. Magnolia Plumbing Co., Inc., 2005-SOX-99 and 100 (ALJ Sept. 20, 2005) (contracts with municipal and federal governments insufficient); Goodman v. Decisive Analytics Corp., 2006-SOX-11 (ALJ Jan. 10, 2006) (engineering consulting contracts with publicly traded companies insufficient), Smith v. Hewlett Packard, 2005-SOX-88 to 92 (ALJ Jan. 19, 2006) (direct mail service provider for publicly traded company not covered). See also Brady v. Calyon Securities (USA), 406 F.Supp.2d 307 (S.D. N.Y. Nov. 8, 2005) (granting defendants motion to dismiss SOX claims brought by research analyst at non-publicly traded securities broker-dealer that acts as an agent or underwriter for publicly traded companies in limited financial contexts.), Roulett v. American Capital Access, 2004 SOX 78 (ALJ Dec. 22, 2004)(a publicly traded companies reliance on services purchase of products from non-publicly traded company insufficient to support SOX claim by employee of non-publicly traded company against publicly traded company).

It is important to note that corporate parent liability may attach in SOX cases under some circumstances. Kalkunte v. DVI Fin. Servs., Inc., No.2004-SOX-56 (ALJ July 18, 2005), (a non-publicly traded company was hired to operate a publicly traded company and was deemed an agent of the publicly traded company for SOX liability where main principal acted as non-publicly traded company’s Executive Officer and admitted that he had made the decision to fire the claimant.). However, dismissal is likely where there is insufficient evidence of commonality of management and purpose presented to justify parent liability for actions of subsidiary. McIntyre v. Merrill Lynch, Pierce, et al. and Merrill Lynch & Co., 2003-SOX-23 (ALJ Sept. 4, 2003) sets out criteria for determining whether a parent company is actually covered by the act including, enterprise "are: 1) interrelation of operations; 2) common management; 3) centralized control of labor relations; and 4) common ownership." Id. at 5a

Scope of Protected Activity

The scope of protected activity under the statute has been narrowly construed. In Marshall v. Northrup Gruman Synoptics, 2005-SOX-0008 (ALJ June 22, 2005), the Administrative Law Judge granted summary judgment against a plaintiff who had complained about violations of internal ethics policies and financial accounting methods. The ALJ interpreted the statute to mean that “an element of intentional deceit that would impact

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shareholders or investors is implicit” in a claim. Id. at 4. Thus, since the complainant had failed to raise an issues of fraud (but only violations of internal policies), he had not engaged in protected activity under the statute. Id. at 4-5. In Getman v. Southwest Securities, Inc., ARB Case No. 04-059 (ARB July 29, 2005), the Administrative Review Board reversed a finding that the Respondent had retaliated against the complainant. The ARB held that an equity research analyst had not engaged in protected activity by refusing to change a recommendation on a stock. Id. at 9. Rather, because she never complained that she had been pressured to change her recommendation, she did not engage in “whistleblowing.” Id.

“General inquires” have been found insufficient to support a claim for protected activity under the statute. See Lerbs v. Buca Di Beppo, Inc., 2004-SOX-8 (ALJ June 15, 2004), at 11. See generally Fraser v. Fiduciary Trust Co., 2006 WL 399468 (S.D.N.Y.) (Feb. 16, 2006). In Fraser, the court found that certain emails and memos written and distributed by complainant involving financial losses to the company that he believed could have been avoided were mere complaints that his advice or recommendations were not followed. Since the complainant failed to specify allegations of conduct that would alert Defendants that he believed the company was violating any federal rule or law related to fraud on shareholders the court found these complaints inadequate. In contrast, the court found that other complaints by the same plaintiff, though they did not particularly specify concerns about illegality, when taken in context, were sufficient to constituted protected activity. Fraser v. Fiduciary Trust Co., 2006 WL 399468 (S.D.N.Y.) (Feb. 16, 2006).

While ALJ’s have often narrowly interpreted the scope of Sarbanes-Oxley to protect only complaints relating to matters of potential securities fraud, the language of the statute explicitly covers a broader range of fraudulent activity including mail and wire fraud. But see Taylor v. Wells Fargo Texas, 204 SOX 43 (ALJ Feb. 14, 2005) (complaints that a coworker has been backdating letters of credit are protected activity under the Act, since mail fraud, wire fraud, and bank fraud may be implicated.)

Efforts to bring complaints about a company’s employment practices under the protection of the statute have failed. In a recent case the ALJ found that an employees complaints about longstanding institutional discriminatory practices, accompanied by warnings that if corrective action was not taken the employee would report the company to the EEOC, Department of Labor and other agencies, did not constitute protected activity because it was not a violation of federal law directly related to fraud against shareholders. Smith v. Hewlett Packard, 2005-SOX-88 to 92 (ALJ Jan. 19, 2006). See also Harvey v. The Home Depot, Inc., 2004 SOX 20 (ALJ May 28, 2005) (finding that neither general allegations of a violation of federal labor law, nor specific allegations of racial discrimination, are covered by the Act). In another case, the ALJ held that a plaintiff seeking protection for complaints that his salary did not comply with the requirements

9 The statute covers employees who participate in an investigation or proceeding regarding conduct the complainant believes relates to 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 (1)&(2). 18 U.S.C. §§1341, 1343, 1344, 1348, addresses mail fraud; wire, radio or television fraud; bank fraud; and securities fraud.
of the Fair Labor Standards Act did not constitute protected activity under the Act. Harvey v. Safeway Inc., 2004 SOX 21 (ALJ Feb. 11, 2005). However, the ALJ in this case also noted that, “complaints of systemic violations of the FLSA might reach the necessary magnitude to effectively perpetrate a fraud on shareholders because of the potential for influencing shareholder value.” Id.

**Reasonable Belief Requirement**

In order gain protection under the whistleblower provisions of Sarbanes-Oxley, an employee must act upon a “reasonable belief” that a specified federal securities or fraud law was violated. 10 ALJ’s have found that the belief must be objectively reasonable and it must be the actual belief of the complainant. See, e.g., Grant v. Dominion E Ohio Gas, 2004 SOX 63 (ALJ March 10, 2005). The belief must also pertain to federal law violations. In one case involving state insurance law violations, where no evidence of related federal law violations was presented, an employees’ refusal to participate and provide allegedly false answers in a random telephone interview conducted the California Department of Insurance did not constitute protected activity supportive of a SOX claim. Williams v. Sirva, Inc., 2006-SOX-6 (ALJ Feb. 13, 2006). While an employee who acts on a reasonable belief is protected even if that belief later turns out to be wrong, where the complainant’s belief is unreasonable from the outset, their activity will not be protected. Bechtel v.Competitive Technologies, Inc., 2005-SOX-33 (ALJ Oct. 5, 2005)(finding the employee’s belief that his employer was attempting to purchase company stock based on advance knowledge of the outcome of a lawsuit based on a draft press release, an overheard portion of a telephone conversation, and rumor insufficient basis for a reasonable belief).

**Remedies**

Some recent cases illustrate the range of remedies available in successful cases. In one recent case, the ALJ awarded, back pay, expenses of commuting to the new job, pre-judgment interest, expenses of finding a new job, and the cost of an air conditioner needed while living close to the new job Welch v. Cardinal Bankshares Corp., 2003 SOX 15 (ALJ Supplemental Recommended Decision, Feb. 15, 2005). In another, the ALJ noted that successful plaintiff’s may be entitled able to recover the value of lost stock options if pled with specificity. See Jayaraj v. Pro-Pharmaceuticals, Inc., 2003 SOX 32 (ALJ Feb. 11, 2005). In Welch v. Cardinal Bankshares Corp., 2005 WL 990535 (U.S. Dept. of Labor), 22 IER Cases 1197 2003-SOX-15 (Feb 15, 2005), claimant received to a range of relief including, reinstatement, back pay, costs associated with his job search, and other expenses. The respondents’ attempt to avoid reinstatement by re-electing the board and re-terminating the employee on the grounds of poor performance was rejected. Punitive damages are not available under Sarbanes-Oxley. Murray v. TXU Corp., No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444, at *4 (N.D. Tex. June 7, 2005) (reviewing the legislative history and noting that the omission of punitive damages from the statute is clear and unequivocal).

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10 18 U.S.C. § 1514A(a)(1)
Extraterritorial Application Prohibited

In the first Circuit Court decision issued on the whistleblower protections under the Sarbanes-Oxley Act, the First Circuit Court of Appeals recently held that the whistleblower provision of the SOX applies only to employees who work within the United States. See Carnero v. Boston Scientific Corp., 433 F.3d 1 (1st Cir. 2006) (case below 2004-SOX-18), (denying coverage where complainant was an Argentinian citizen resident in Brazil working for two Brazilian subsidiaries.) See also O’Mahony v. Accenture Ltd., 2005-SOX-72 (ALJ Jan. 20, 2006). But see Penesso v. LLC International, Inc., 2005-SOX-16 (ALJ Mar. 4, 2005) (finding SOX jurisdiction where the US citizen complainant was employed in Italy by the Italian subsidiary of a corporation headquartered in McLean, Virginia, and distinguishing Carnero on the basis of a substantial nexus to the United States, where protected activity and at least one retaliatory act occurred in the US).

Some Notable Cases

While federal district courts have had little opportunity to issue substantive decisions on Sarbanes-Oxley claims some early decisional law is emerging. One court denied the employer’s motion for summary judgment, since the two-week gap between the employee’s complaints and her termination were sufficient to show causation, i.e., that her protected activity was a contributing factor for the employer’s termination, and there were factual issues relating to whether the employer would have terminated her anyway, thereby precluding summary judgment. Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365 (N.D. Ga. 2004). The court found that plaintiff’s allegations that her employer was overpaying invoices to a company owned by a friend of the president of her employer, was overpaying sales agents based on personal friendships, and that kickbacks were paid for the purchase of lumber, thereby “circumvent[ing] the company’s system of internal accounting controls in violation of Section 13 of the Exchange Act,” was sufficient to set forth a claim that she engaged in protected activity. Id. at 1376-77. Moreover, the burden on defendants in a Sarbanes-Oxley case is to show, by “clear and convincing evidence that they would have fired Plaintiff absent her participation in protected activity,” which is a higher standard than the ordinary preponderance of the evidence standard. Id. at 1380 (citing Stone & Webster Eng’g Corp. v. Herman, 115 F.3d 1568, 1572 (11th Cir. 1997)). A court has held that the retaliatory removal of an employee’s job responsibilities is sufficient to state a claim. Willis v. Vie Fin. Group, Inc., No. Civ.A. 04-435, 2004 WL 1774575, at *6 (E.D. Pa. Aug. 6, 2004).

Reputational Injury and Jury Trials

There is already conflict over whether the Sarbanes-Oxley Act provides damages for reputational injury. Compare Hanna v. WCI Communities, Inc., 348 F. Supp. 2d 1332, 1334 (S.D. Fla. 2004)(holding that reputational injury is compensable under the provision of the act authorizing all relief “necessary to make the employee whole” and denying the respondent’s

Cases have also questioned the availability of jury trials under the statute in light of the absence of any explicit authorization for jury trials in the text of the statute. This issue remains open. See Murray v. TXU Corp., No. Civ.A.3:03-CV-0888-P, 2005 WL 1356444, (N.D. Tex. June 7, 2005) (granting motion to strike jury trial), but see Hanna v. WCI Communities, Inc., 348 F. Supp. 2d 1332, (S.D. Fla. 2004) (denying without prejudice motion to strike plaintiff’s demand for a jury trial). A federal court has also enforced preliminary order of reinstatement. See Bechtel v. Competitive Technologies, Inc., Civil No.: 3:05 cv 629 (AVC) (D. Conn., May 13, 2005). (granting an injunction enforcing an OSHA order that required CTI to immediately reinstate two complainants to their former positions).\(^{11}\)

**A Few Challenges in Final Rules**


**“Up the Ladder” Attorney Reporting Obligations**

On February 6, 2003, the Securities and Exchange Commission (SEC) published proposed final rules to implement the “reporting” requirements of Sarbanes-Oxley. See 68 Fed. Reg. 6296 (Feb. 6, 2003). These rules, codified at 17 C.F.R. Part 205, were to be effective August 5, 2003, absent further revision by the SEC. The SEC initially deferred action, pending further study, on the “noisy withdrawal” provisions, which would require an attorney to withdraw representation of a corporate client that engaged in financial or securities misconduct, and to notify federal authorities of the reasons for such withdrawing. See “Federal Lawmakers get Earful at Hearing on SEC Proposed ‘Noisy Withdrawal’ Rules,” 72 U.S.L.W. 2461-62 (Feb. 10, 2004). However, after soliciting comment and hosting a discussion concerning the potential impact of the proposed rules, the S.E.C. revised the final rule which became effective on August 5, 2004 without the “noisy withdrawal” provision.

As presently codified, attorneys who appear and practice before the SEC have a duty to report evidence of a material violation of the securities laws, and must report such evidence “up

\(^{11}\) A later decision by the ALJ effectively reversed this decision. Bechtel v. Competitive Technologies, Inc., 2005-SOX-00033 (Oct. 5, 2005) (an appeal has been filed).
the ladder,” to the chief legal officer and/or the chief executive officer. If the attorney believes that such reporting would be futile, or that the persons notified have not made an “appropriate response within a reasonable time,” the attorney must report the evidence further up the ladder to the Board of Directors, or the board’s audit committee, or another outside committee of the board. See 17 C.F.R. § 205.2 (2004). Alternatively, the attorney may report his or her concerns to the issuer’s legal compliance committee, and need not pursue the concerns any further. Id.

The attorney may reveal, without the issuer’s consent, the concerns to the SEC, including the disclosure of confidential information related to the attorney’s representation of the issuer, to the extent that the attorney reasonably believes that such disclosure is necessary to prevent the issuer from committing a material violation that is likely to cause substantial financial injury to the issuer or investors; or to rectify the consequences of such a violation; or to prevent the issuer from committing perjury or any other fraud on the SEC.

The American Bar Association proposed modifying the Model Rules of Professional Conduct governing confidentiality of client communications in order to enable attorneys to inform regulatory agencies about potential corporate misconduct. See B. Masters, “Lawyers Back Easing Confidentiality Rules; Corporate Fraud is Targeted,” Wash. Post, Apr. 30, 2003, at E-2. It remains to be seen whether the state courts will accordingly amend their Rules of Professional Conduct.

On July 26, 2003, the Washington State Bar Association rejected the ABA’s approach and held that attorneys admitted to the bar of that state could not disclose client confidences and secrets under Sarbanes-Oxley, unless those disclosures were required to be made, as opposed to merely being authorized under the SEC regulations. The WSBA held that discretionary disclosures would violate the attorney’s obligations under Rule 1.6, Rules of Professional Conduct (which authorizes, but does not require, revealing client confidences to prevent the client from committing a crime), since the SEC regulations encompass disclosures about civil violations that constitute non-criminal conduct.

On August 13, 2003, the State Bar of California similarly concluded that such disclosures would violate the obligations of California attorneys under that state’s ethics rules. The California ethics rules, which are both statutory and judicial enactments in that state, expressly prohibit disclosure of client confidences. The State Bar of California also concluded that the

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14 Cal. Bus. & Prof. Code, § 6068(e) (attorneys have duty to “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client”); Cal. R. Prof. Cond., Rule 3-600(B) (“If a member acting on behalf of an organization knows that an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is or may be a violation of law reasonably imputable to the organization, or in a
SEC lacked authority to pre-empt state ethics rules in this area, on the grounds that administrative agencies lack the power to make new laws, since their only authority is to propose and adopt regulations that implement Congressional intent as manifested by the statute.\footnote{See Letter from State Bar of Calif., supra, at 6-8.}

The Department of Labor’s Administrative Review Board held in February 2004 that an in-house attorney could not disclose client confidences in order to prove his whistleblowing claims. \textit{Willy v. Coastal Corp.}, ARB No. 97-107, 98-060 (ARB Feb. 27, 2004). Although \textit{Willy} did not involve Sarbanes-Oxley whistleblower claims, it arose under environmental whistleblower statutes that are also enforced by the Department of Labor, and which have similar statutory frameworks for proving the employee’s claims. \textit{See also} R. Adams & D.S. Katz, “Lawyers Who ‘Tell’ Risk All,” \textit{Nat’l L.J.}, Mar. 29, 2004, at 22. In a significant decision, the Fifth Circuit reversed the ARB and, as a matter of federal common law, flatly rejected its conclusion that the “attorney-client privilege is a \textit{per se} bar to retaliation claims under federal whistleblower statutes.” \textit{Willy v. Administrative Review Board}, 423 F.3d 483, 500 (5th Cir. 2005). The attorney-client privilege, the Court held, does not “mandate exclusion of all documents subject to the privilege.” \textit{Id.} Rather, the \textit{Willy} court recommended more limited means of addressing confidentiality concerns, such as the use of protective orders and \textit{in camera} proceedings. \textit{Id.} at 498.

\textbf{CONCLUSION}

Retaliation claims are an important aspect of employment litigation. Therefore, practitioners representing both employees and employers should work to mitigate and greatly reduce the incidence of retaliation in the workplace by ensuring that the entire workforce is properly informed as to (1) their rights to work in an atmosphere that is free of retaliation for engaging in conduct protected by the anti-discrimination statutes, and (2) their obligations to maintain such a workplace, including promptly investigating and remedying retaliation in the workplace. This preventive medicine will serve the socially desirable goals of the retaliation statutes and should reduce the need for litigation to resolve retaliation in the workplace.