

# **IMPLEMENTING AN EFFECTIVE "WHISTLEBLOWER" POLICY**



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# SARBANES-OXLEY ACT IS BORN



- Sarbanes-Oxley Act (SOA) contains employee “whistleblower” protection
- SOA broadest corporate government legislation since 1930's federal securities law enacted
- **Death** of Enron in December, 2001 gave **Birth** to SOA in July, 2002
- Revelations of accounting fraud (Arthur Andersen) and mismanagement in several public companies; Enron, WorldCom, Tyco, etc.



## NEW PROTECTED CLASS OF WHISTLEBLOWERS



- Whistleblowers in federal workplace protected in **nuclear** and **aviation** industries. Federal law also protects private employees who reveal violations of important public policy; **OSHA**, **False Claims Act**, **Title VII** of the **Civil Rights Act** and **environmental laws**
- **New** legal rights to employees of U.S. public companies and non-U.S. SEC reporting companies, who claim retaliation for providing information, assisting in an investigation, or participating in a proceeding concerning alleged violations of U.S. federal securities or anti-fraud laws

## CHARTS & TABLES

### 4. SUMMARY OF ANTI-RETALIATION STATUTES



STATUTE	AUTHORITY	PROTECTED ACTIVITY	MISC.
Americans with Disabilities Act (ADA)	42 USC §12203	Persons who oppose an act of disability discrimination or who make a charge or who assist, testify, participate in an investigation, proceeding, or hearing under this Act are protected from employer retaliation.	Reasonable attorney's fees may be awarded to a prevailing party, other than the U.S. §12205.
Age Discrimination in Employment Act (ADEA)	29 USC §623(d)	Persons who oppose an act of age discrimination or who make a charge, testify, assist, or participate in any manner in an investigation, proceeding, or litigation of an age discrimination claim are protected from employer retaliation.	The prohibitions in this Act shall be limited to individuals who are at least 40 years of age. §631.
Asbestos Hazard Emergency Response Act	15 USC §2651	Employees of a state or local educational agency who provide information relating to a potential violation to any other person, including a State or the Federal Government, are protected from employer retaliation.	
Asbestos School Hazard Abatement Act	20 USC §4018	Employees of a state or local educational agency who bring to the attention of the public information concerning any asbestos problem in school buildings are protected from employer retaliation.	
Asbestos School Hazard Detection Act	20 USC §3608	Employees of a state or local educational agency who bring to the attention of the public information concerning any asbestos problem in school buildings are protected from employer retaliation.	
Atomic Energy & Energy Reorganization Act	42 USC §5851(a)	Employees who report violations of the Atomic Energy Act, refuse to engage in unlawful practices, make a charge, or testify, assist, or participate in any manner in an investigation or proceeding are protected from employer retaliation.	Employees must file a complaint within 180 days after discharge or discrimination. §5851(b).
Bankruptcy Act	11 USC §525(b)	Persons who are debtors under the Bankruptcy Act are protected from employer retaliation solely because of their debtor status.	
Civil Servant Relief Act	5 USC §2302(b)(8); see 5 USC §1221(a)	Persons who refuse to coerce political activities of others or violate the law or who make a charge, or testify, assist, or participate in any manner in an investigation or proceeding are protected from employer retaliation.	
Clean Air Act	42 USC §7622(a)	Employees who make a charge, or testify, assist, or participate in any manner in an investigation or proceeding are protected from employer retaliation.	Employees must file a complaint within 30 days after discharge or discrimination. §7622(b)(1). Reasonable attorney's fees and expert fees may be awarded to a prevailing complainant. §7622(b)(2)(B)(ii).
Commercial Motor Vehicle Safety	49 USC §31105	Employees who file a complaint related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding or who refuses to operate a vehicle because of the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health or the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition are protected from employer retaliation.	





STATUTE	AUTHORITY	PROTECTED ACTIVITY	MISC.
Congressional Accountability Act	2 USC §1317	Employees who oppose any unlawful practice, or who initiate proceedings, make a charge, or testify, assist, or participate in any manner in a hearing or other proceeding are protected from employer retaliation.	
Employee Retirement Income Security Act (ERISA)	29 USC §1140	Participants or beneficiaries who exercise any right under an employee benefit plan or statute or who give information or testify in any inquiry or proceeding under ERISA or the Welfare & Pension Plans Disclosure Act are protected from retaliation.	
Equal Employment Opportunity Act (Title VII)	42 USC §§2000e-3(a)	Employees, applicants, or labor organization members who oppose unlawful employment practices or who make a charge or who testify, assist, or participate in a proceeding, investigation, or hearing are protected from employer retaliation.	Employees must first exhaust administrative remedies. <i>Rohler</i> , 576 F.2d 1260, 1265 (7th Cir.1978); <i>Union Bank</i> , 408 F.2d 867, 869 (9th Cir.1968). Employees must file a complaint within 180 days after an unlawful employment practice. §2000e-5(e); 29 CFR §1601.13(a) After receiving a Right to Sue Letter, employee must file suit within 90 days. §2000e-5(f)(1).
Executive Accountability Act	3 USC §417	Covered employees who oppose any unlawful practice or who initiate proceedings, make a charge, or testify, assist, or participate in any manner in a hearing or other proceeding are protected from employer retaliation.	
Family & Medical Leave Act (FMLA)	5 USC §6385  29 USC §§2615(a)(2), 2615(b)	Federal employees who take leave under this Act are protected from coercion, threats, and intimidation by fellow employees.  Persons who file a charge, give information or testify in an inquiry or proceeding are protected from employer retaliation.	
Fair Labor Standards Act/Equal Pay Act (FLSA/EPA)	29 USC §215(a)(3)	Employees who file any complaint or institute or cause to be instituted any proceeding under the FLSA or EPA or testify in any such proceeding, or has served on an industry committee are protected from employer protection.	
False Claims Act	31 USC §3730(h)	Employees who act lawfully in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed by or on behalf of the United States are protected from employer retaliation.	Reasonable attorney fees may be awarded to a prevailing employee.
Federal Acquisition Streamlining Act	41 USC §265(a)	Employees of public contractors who disclose to a Member of Congress or an authorized official of an executive agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract) are protected from employer retaliation.	



STATUTE	AUTHORITY	PROTECTED ACTIVITY	MISC.
Federal Credit Union Act	12 USC §1790b(a)	Employees of credit unions who provide information to the National Credit Union Board or the Attorney General regarding any possible violation of any law or regulation by the credit union or any director, officer, or employee of the credit union are protected from employer retaliation.  Employees of the National Credit Union Administration who provide information to the Administration or the Attorney General regarding any possible violation of any law or regulation by any credit union or the Administration, any director, officer, committee member, or employee of any credit union, or any officer or employee of the Administration are protected from employer retaliation.	Employees must file a complaint within 2 years after discharge or discrimination. §1790b(b).
Federal Employees Flexible & Compressed Work Schedules Act	5 USC §6132(a)(2)	Employees who request not to participate in a compressed schedule program are protected from coercion by fellow employees.	
Federal Employees Leave Sharing Act	5 USC §§6338, 6370	Employees who contribute, receive, or use annual leave under this Act are protected from coercion, threats, and intimidation by fellow employees.	
Federal Employers' Liability Act	45 USC §60	Employees of a common carrier who furnish voluntarily information to a person in interest as to the facts incident to the injury or death of any employee are protected from retaliation.	
Federal Mine Safety & Health Act	30 USC §815(c)	Miners, representatives of miners, or job applicants who file or make a complaint of an alleged danger or safety or health violation in a mine or who is subject to a medical evaluation and potential transfer subject to 30 USC §811, or who institute or testify at any proceeding under this Act or who exercise any statutory right under this Act are protected from employer retaliation.	Employees must file a complaint within 60 days after discharge or discrimination.
Federal Water Pollution Prevention & Control Act	33 USC §1367(a)	Persons who file or institute any proceeding under this Act or who testify in any proceeding resulting from the administration or enforcement of the provisions of this Act are protected from retaliation.	Employees must file a complaint within 30 days after discharge or discrimination. §1367(b).
Financial Institution Reform, Recovery & Enforcement Act	12 USC §1831j(a)	Employees of depository institutions or banking agencies who provide information to any Federal banking agency or to the Attorney General regarding a possible violation of any law or regulation or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety by the depository institution or any director, officer, or employee of the institution are protected from employer retaliation.	Employees must file a complaint within 2 years after discharge or discrimination. §1831j(b).
Foreign Service Labor Relations Act	22 USC §4115(a)(4)	Employees of the State Department who file a complaint or petition, or have given any information, affidavit, or testimony to the Foreign Service Labor Relations Board are protected from retaliation.	Employees who can raise issues under 22 USC §§4114 and 4115 must elect under which section they will raise the issues. §4115(d).
Hazardous Substance Release Act	42 USC §9610(a)	Employees who provide information to a State or to the Federal Government, file, institute any proceeding for the release of hazardous substances are protected from employer retaliation.	Employees must file a complaint within 30 days after discharge or discrimination. §9610(b).



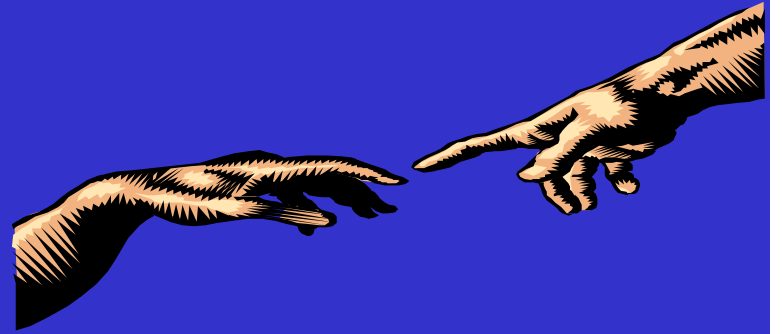
STATUTE	AUTHORITY	PROTECTED ACTIVITY	Misc.
Immigration Reform & Control Act	8 USC §1324b(5)	Persons who file a charge or a complaint, testify, assist, or participate in any manner in an investigation, proceeding, or hearing of the Special Counsel for Immigration-Related Unfair Employment Practices are protected from retaliation.	
International Safe Containers Act	46 USC App. §1506	Employees who report the existence of an unsafe container or report a violation of the Safe Containers for International Cargo to the Secretary of Labor are protected from retaliation.	
Jurors' Employment Protection Act	28 USC §1875	Employees who serve on a jury in any court of the United States are protected from employer retaliation.	
Labor-Management Reporting & Disclosure Act	29 USC §529	Union members who exercise any right under this Act are protected from retaliation by the labor organization or officers or employees of the labor organization.	
Longshoreman's & Harbor Workers' Compensation Act	33 USC §948a	Employees who claim or attempt to claim compensation from such employer or who testify in a proceeding of the Secretary of Labor are protected from employer retaliation.	
Migrant Seasonal & Agricultural Worker Protection Act	29 USC §1855(a)	Migrant or seasonal agricultural workers who, with just cause, file any complaint or institute or testify in any proceeding of the Secretary of Labor or who exercise, with just cause, any right or protection afforded by this Act are protected from retaliation.	Employees must file a complaint within 180 days after the violation occurs. §1855(b).
Military Whistleblower Protection Act	10 USC §1034(b)	Members of the armed forces who make or prepare an unrestricted communication to a Member of Congress, an Inspector General, or member of a Department of Defense audit, inspection, investigation, or law enforcement organization regarding a violation of a law or regulation or gross mismanagement a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety are protected from employer retaliation.	
National Labor Relations Act (NLRA)	29 USC §158(a)(4)	Employees who file charges or give testimony to the National Labor Relations Board are protected from employer retaliation.	
National Defense Authorization Act	10 USC §1587(b)	Nonappropriated fund instrumentality employees who make disclosures of information on violations of law or on mismanagement, gross waste, abuse of authority or substantial danger to public health or safety are protected from employer retaliation.	
	10 USC §2409	Employees of the Department of Energy who are engaged in defense activities and who make protected disclosures are protected from employer retaliation.	
	42 USC §7239	Employees of government contractors who disclose to a Member of Congress or an authorized official of an agency or the Department of Justice information relating to a substantial violation of law related to a contract (including the competition for or negotiation of a contract) are protected from employer retaliation.	
Occupational Safety & Health Act (OSHA)	29 USC §660(c)	Employees who file complaint or who institute or testify in any proceeding under this Act are protected from retaliation.	Employees must file complaint within 30 days after discharge or discrimination. §660(c)(2).



STATUTE	AUTHORITY	PROTECTED ACTIVITY	MISC.
Postal Reorganization Act	39 USC §1209	Postal service employees who form, join, and assist a labor organization or who refrain from any such activity are protected from employer retaliation.	
Railroad Safety	49 USC §20109(a)	Employees who file a complaint or testify at any proceeding of the National Railroad Adjustment Board are protected from retaliation.	Employees may not seek protection under this section and another provision of law for the same allegedly unlawful act of the carrier. §20109(d).
Safe Drinking Water Act	42 USC §300j-9(i)	Employees who commence, assist, participate, or testify in any proceeding under this Act are protected from employer retaliation.	
Solid Waste Disposal Act	42 USC §6971	Employees who file or institute any proceeding under this Act or an implementation plan or who testify in any proceeding resulting from the administration or enforcement of the provisions of this Act or an implementation plan are protected from retaliation.	Employees must apply for a review of discharge or discrimination within 30 days. §6971(b).
Surface Mining Control & Reclamation Act	30 USC §1293	Employees who file or institute any proceeding under this Act or testify in any proceeding resulting from the administration or enforcement of the provisions of this Act are protected from employer retaliation.	Employees must apply for a review of discharge or discrimination within 30 days. §1293(b).
Toxic Substances Control Act	15 USC §2622(a)	Employees who commence, testify, assist, or participate in a proceeding under this Act or in any other action to carry out the purposes of this Act are protected from employer retaliation.	Employees must file complaint within 30 days after discharge or discrimination. §2622(b).
Unfair Labor Practices Act	5 USC §7116(a)(1)	Agency employees who file a complaint, affidavit, or petition, or has given any information or testimony under this Act are protected from employer retaliation.	Employees must file a complaint within 6 months, unless the person filing was prevented or the unfair labor practice was undiscovered in that period. §7118.
Uniformed Services Employment & Reemployment Rights Act	38 USC §4311	Persons who (1) commence an action to enforce a protection afforded any person under this Act, (2) testify or otherwise made a statement in or in connection with any proceeding under this Act, (3) assist or otherwise participate in an investigation under this Act, or (4) exercise a right provided for in this Act are protected from employer retaliation.	
Witness Intimidation	18 USC §1512	Persons who are preparing to testify in an official proceeding are protected from intimidation, physical force, threats, corrupt persuasion, harassment, misleading conduct, or death.	A TRO or a protective order may be issued in a Federal criminal case to prevent and restrain witness intimidation, other than misleading conduct. §1514.
	18 USC §1513	Persons who testify in an official proceeding or provide information to law enforcement are protected from retaliation.	
	42 USC §1985(2)	Persons who attend or testify in a civil rights court proceeding are protected from injury or influence.	



# NEW ERA FOR WHISTLEBLOWERS



- Prior to Enron collapse, whistleblowers viewed by employer/co-workers as disloyal or disgruntled
- Glorified as heroes only in the movies: “Serpico, Silkwood, Erin Brockovich and The Insider”
- Whistleblowers heroes du jour: 2002 Time Magazine: “Year of the Whistleblower.” Sherron Watkins, Cynthia Cooper and Coleen Rowley as persons of the year

DECEMBER 30, 2002 / JANUARY 6, 2003

SPECIAL DOUBLE ISSUE

# PERSONS OF THE YEAR

# TIME



## The Whistleblowers

CYNTHIA COOPER  
OF WORLDCOM

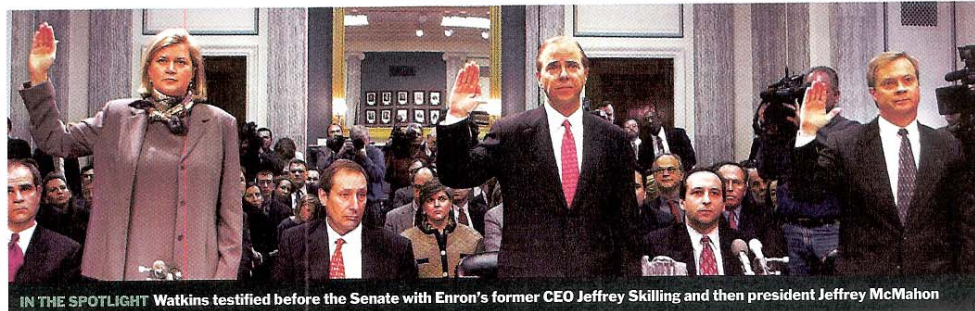
COLEEN ROWLEY  
OF THE FBI

SHERRON WATKINS  
OF ENRON



## PERSONS OF THE YEAR

COLEEN ROWLEY CYNTHIA COOPER SHERRON WATKINS



IN THE SPOTLIGHT Watkins testified before the Senate with Enron's former CEO Jeffrey Skilling and then president Jeffrey McMahon

# The Party Crasher

BY JODIE MORSE AND AMANDA BOWER

**On Feb. 13, the day before** she gave the first of two damning testimonials to Congress, Enron vice president Sherron Watkins spent the afternoon in a cluttered conference room in the Rayburn House building on Capitol Hill. It was a cram session of sorts, a final chance for Watkins, her attorney and congressional staff members to review the dozens of subpoenaed documents she would be quizzed on the next morning. As they ate cold pizza, someone drew her attention to an e-mail titled "Confidential Employee Matter" that had been written by

one of Enron's external lawyers. "Per your request," it began, "the following are some bullet thoughts on how to manage the case with the employee who made the sensitive report." Her eyes skipped halfway down the page: "Texas law does not currently protect corporate whistle-blowers. The Supreme Court has twice declined to create a cause of action for whistle-blowers who are discharged..."

Her pulse quickened. "I'm reading this and I'm thinking, Oh my God, it's [dated] two days after I met with Ken Lay. Talk about shoot the messenger. I can't believe they looked into firing me," she says, sounding wounded even now in the retelling. "It was a horrible response. There's nothing in there to remind them to remember the code of conduct, the vision and values."

This was how hard Watkins had fallen for Enron. Here she was, almost six months to the day since she first warned chairman Kenneth Lay of "an elaborate accounting hoax." Her boss had long ago confiscated

her hard drive, and she had been demoted 33 floors from her mahogany executive suite to a "skanky office" with a rickety metal desk and a pile of make-work projects. The atmosphere had grown so ominous that she had called office security for advice on self-defense. But still, Watkins simply could not fathom that this company, the one she had tried to save from itself, had considered taking away the job she loved.

The next morning Watkins appeared before the tangle of cameras in her periwinkle blazer, with her pastor seated directly behind her. For five hours, she patiently explained the intricacies of the financial schemes that had allowed the energy giant to conceal billions of dollars of debt in dubious partnerships. Though Watkins had not worked in accounting for a decade, she knew the arcane material cold, making it sound as simple and intelligible as long division. She was relaxed enough to give the Representatives a taste of her piercing Texas wit. But her square jaw clenched whenever she spoke about her

feelings for the company. She firmly indicted several top executives, yet she insisted that Lay was a "man of integrity." And she spoke almost wistfully of Enron's "electric" atmosphere, of people "energized to change the world." It was Valentine's Day, and she was still very much in love.

For months afterward, Watkins faithfully went to work each day. In the absence of any real assignments, she could only bear witness to all that she had wrought, looking on as Enron auctioned off everything down to the sign at its headquarters (price: \$44,000) and as the firm's esteemed accountants, Arthur Andersen, went down in their own wave of scandal.

Only now, a year later, has she begun to think of fashioning a life without Enron. In November, she left her \$165,000 job. But her future is shaky. She plans to start a global consulting firm to advise company boards on governance and ethics, though CEOs privately chuckle at the thought of opening up to the gimlet-eyed Watkins. The first to speak out,





# WHY COMPANIES MUST ADOPT WHISTLEBLOWER POLICES

- To protect against whistleblower liability
- Give audit committee central role since already deals with internal controls and auditing matters
- Whistleblower complaints will deal with financial matters effecting financial statements (10-Qs and 10-Ks)



# CIVIL WHISTLEBLOWER PROTECTION



- Section 806 of SOA - Whistleblower protection
- Imposes civil liability on a company that takes retaliatory action against an employee
- Protects employee who: 1) provides information; 2) causes information to be provided; 3) otherwise assists in investigation regarding information that employee reasonably believes constitutes wire fraud, mail fraud, bank fraud or a violation of securities fraud or 4) any SEC rule or federal law relating to fraud on shareholders
- Employee also protected who: 1) files; 2) causes to be filed; 3) testifies; 4) participate in; 5) or otherwise assists in a proceeding filed or about to be filed relating to frauds listed above
- Prior to SOA **no** protection for employees of publicly traded companies who report fraud.

### **Text of SOA Section 806**

(a) IN GENERAL—Chapter 73 of title 18, United States Code, is amended by inserting after section 1514 the following:

‘Sec. 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,<sup>1</sup> 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,<sup>2</sup> 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.'.

**(b) CLERICAL AMENDMENT.—**The table of sections at the beginning of Chapter 73 of title 18, United States Code, is amended by inserting after the item relating to section 1514 of the following new item:

**"1514A. Civil action to protest against retaliation in fraud cases."**



# REASON FOR LAW



- Congress concerned that corporate employees needed outlet to report fraud. Patch work of state laws. Whistleblower in one state might be more vulnerable to retaliation than fellow worker in another state.
- Congress felt the need to encourage and protect those who report fraud to counter corporate culture that punishes whistleblowers for being “disloyal” or who take “litigation risk.”



Dilig, Joe

From: Jordan, Carl  
Sent: Friday, August 24, 2001 7:02 PM  
To: Butcher, Sharon (Enron)  
Subject: Confidential Employee Matter

ATTORNEY CLIENT PRIVILEGED COMMUNICATION

Sharon:

Per your request, the following are some bullet thoughts on how to manage the situation with the employee who made the sensitive report.

1. I agree that it is a positive that she has requested reassignment to another department. Assuming suitable position can be found, I recommend documenting in memo form that the transfer is being effected in response to her request. This would be worded to convey that the company has considered and decided to accede to her request for reassignment. See comments below re additional items to be addressed in the memo.
2. I suggest that the memo also name a designated company officer for her to contact in the unlikely event that she believes she is being retaliated against for having made the report. Case law suggests then will have the burden of reporting any perceived retaliation and allowing the company a reasonable opportunity to correct it before quitting and asserting a constructive discharge. (Note: If there is any chance that the decision might be made in the future to discharge the employee for making the report - e.g., if the company concludes that the allegations were not made in good faith - then this assurance probably should be given, at least until later when (if) the company is satisfied that the employee was not acting in bad faith or otherwise improperly.)
3. The memo should contain language that conveys that the other terms of her employment - specifically her status - remains unchanged. This is to avoid any future claim that the understandings surrounding the transfer constitute a contractual obligation of some sort.
4. The new position, as we discussed, should have responsibilities and compensation comparable to the current one, to avoid any claim of constructive discharge.
5. As we discussed, to the extent practicable, the fact that she made the report should be treated as confidential.
6. The individual or individuals who are implicated by her allegations should be advised to treat the matter confidentially and to use discretion regarding any comments to or about the complaining employee. They should be advised that she is not to be treated adversely in any way for having expressed her concern.
7. You indicated that the officer in charge of the area to which the employee may be reassigned would probably need to be advised of the circumstances. I suggest he be advised at the same time that it is important that she not be treated adversely or differently because she made the report. And that the circumstances of the transfer are confidential and should not be shared with others.

You also asked that I include in this communication a summary of the possible risks associated with discharging (or constructively discharging) employees who report allegations of improper accounting practices.

1. Texas law does not currently protect corporate whistleblowers. The supreme court has twice declined to create a cause of action for whistleblowers who are discharged; however, there were special factors present in both cases that weighed against the plaintiffs and the court implied that it might reach a different conclusion under other circumstances.
2. Regardless of the whistleblower issue, there is often a risk of a Sabine Pilot claim (i.e., allegation of discharge for refusing to participate in an illegal act). Whistleblower cases in Texas commonly are pleaded as Sabine Pilot claims - it is often an easy leap for the plaintiff to make if she had any involvement in duties relating to the alleged improper conduct. For example, some cases say that if an employee's duties involve recording accounting data that she knows to be misleading onto records that are eventually reviewed by others in preparing reports to be submitted to a federal agency (e.g., SEC, IRS, etc.), then the employee should be subject to criminal prosecution even though she did not originate the misleading data and does not prepare the actual document submitted to the government. Under such circumstances, if the employee alleges that she was discharged for refusing to record (or continuing the practice of recording) the allegedly misleading data, then she has stated a claim under the Sabine Pilot doctrine.
3. As we discussed, there are a myriad of problems associated with Sabine Pilot claims, regardless of the merits, that involve allegations of illegal accounting or related practices. One is that the company's accounting practices and books and records are fair game during discovery - the opposition typically will request production of volumes of sensitive material. Another problem is that because accounting practices often involve judgments in gray areas, rather than non-judgmental applications of black-letter rules, there are often genuine disputes over whether a company's practice or a specific report was materially misleading or not. With some statutory or regulatory requirement. Third, these are typically jury cases - that means they are often decided by lay persons when the legal compliance issues are often confusing even to the lawyers and

8/26/01

experts. Fourth, because of the above factors, they are very expensive and time consuming to litigate. 4. In addition to the risk of a wrongful discharge claim, there is the risk that the discharged employee will try to convince some government oversight agency (e.g., IRS, SEC, etc.) that the corporation has engaged in materially misleading reporting or is otherwise non-compliant. As with wrongful discharge claims, this creates problems even tho the allegations have no merit whatsoever.

These are, of course, very general comments. I will be happy to discuss them in greater detail at your convenience.

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# PERSONNEL PROTECTED



- Protection applies to **all** employees of a publicly traded company **including contractor, subcontractor or agent of such company**





## PROHIBITED CONDUCT

- Prohibits **firing, demoting, suspending, threatening, harassing**, or any other manner **discriminating** against the whistleblower in the work place because of any lawful act done with protected conduct



# COMPLAINT PROCEDURE

- Must follow procedure of SOA
- Provides that a “person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief... by... filing a complaint with the Secretary of Labor”
- Whistleblower complaints to OSHA investigators-DOL

# STATUTE OF LIMITATIONS



- 90 days from date of alleged violation
- Employee must file complaint with DOL
- Date commences once employee is aware or reasonably should be aware of employers retaliation





# COMPLAINT FILING

- Filed with OSHA area director responsible for enforcement activities in geographical area where employee resides or was employed. Also may be filed with any DOL officer or employee.
- No particular form.

# INVESTIGATION

## Investigation Process



- DOL must notify employer in writing of complaint and allegations
- “Sanitized to protect the identity of any confidential informant”
- Employer has ten (10) days to submit to DOL written statement along with affidavit/documents sustaining position
- Employer may also request meeting with DOL to present position
- Within 60 days of receiving complaint, DOL **MUST** conduct investigation
- Investigation conducted in manner that protects confidentiality of persons other than complainant who provides information on confidential basis

## Completed Investigation



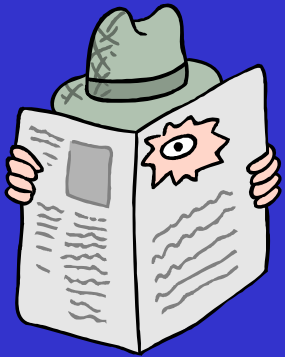
- After investigation, but prior to issuance of findings that employer violated Act, DOL will contact employer to give notice of substance of relevant evidence supporting allegations
- Evidence to include sanitized witness statements, to protect identity of confidential informant where information was given in confidence
- Employer given the opportunity to submit a written response, to meet with the investigators, to present statement from witnesses in support of position, and to present legal and factual arguments



## Completed Investigation



- Employer shall present evidence within ten (10) days of DOL notification
- After investigation, DOL will issue findings which are written that will detail whether reasonable cause exist to believe that the employer was subjected to unlawful discrimination
- If DOL concludes reasonable cause to believe a violation has occurred, they will issue a preliminary order providing appropriate relief
- If DOL finds a violation **did not** occur, DOL will notify parties of that finding



# REVIEW OF FINDINGS

- Any party who desires review of findings in the preliminary order must file objections and request a hearing on the record within thirty (30) days



# **JUDICIAL CAUSE OF ACTION SHOULD DOL FAIL TO TIMELY ACT**

- DOL has 180 days to issue a decision otherwise the employee may file suit in federal district court and obtain the same remedies that DOL can award
- Creates federal cause of action



# CREATING EFFECTIVE WHISTLEBLOWER POLICY



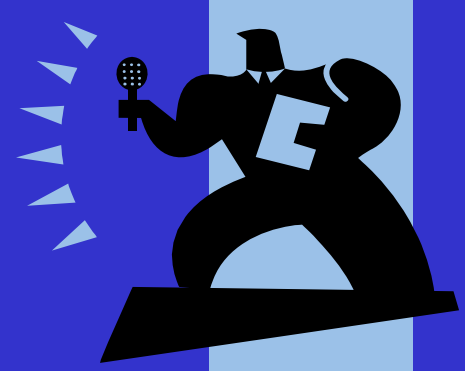
- It is anticipated that the number of wrongful termination lawsuits will rise because a new cause of action is created that previously did not exist
- May create bogus claims



# PROTECTED CONDUCT

- Protection is limited to disclosure made to, or investigation conducted by, federal authority including Congress or any member of Congress
- Employee is protected who provides information on an unsolicited basis even in the absence of a formal investigation

# IN HOUSE REPORTING



- Statute provides protection to employee only when employee reports to supervisor or such other person working for employer who has authority to investigate, discover and terminate misconduct
- Visible audit committee best to handle this in house reporting along with second outlet





# BURDEN OF PROOF

- Burden of Proof is not high for employee. Employee need only show whistleblowing was a “**contributing factor**” in an employer action
- Employer’s burden of “**clear and convincing evidence**” is higher
- Once prima facie case of retaliation is made burden of production shifts to employer to articulate a legitimate non-discriminatory reason for discharging the complainant

# BURDEN OF PROOF



- Not clear, but a **possible defense** may exist if an **individual** manager, officer, director, or supervisor harasses an employee in violation of SOA. The employer may be entitled to an affirmative defense if a policy is in place prohibiting harassment that was communicated to employees, and the employer took prompt remedial action to correct harassment.
- DOL **must** conduct an investigation after the employee makes a **prima facie** showing that whistleblowing was a contributing factor to unfavorable personnel action.
- Statute states that DOL “shall dismiss a complaint . . .and shall not conduct an investigation . . . unless the complaint makes a prima facie showing that [the protected conducted] was a **contributing factor** in the unfavorable personnel action alleged in the complaint.”

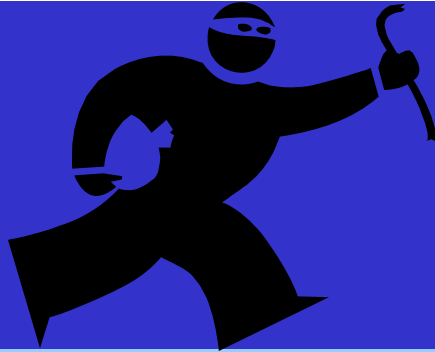


# PRIMA FACIE

1. Employee engaged in protected activity or conduct
2. Employer knew, actually or constructively, that employee engaged in the protective activity
3. Employee suffered an unfavorable personnel action
4. Circumstances were sufficient to raise the inference that the protected activity was likely a contributing factor
5. “Normally, the burden is satisfied, . . . if the complaint shows that the adverse personal action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action”
6. If employee fails showing, DOL “shall dismiss [the] complaint . . . and shall not conduct an investigation”



Also investigation will not be conducted if employer demonstrates by **clear and convincing** evidence that it would have taken same unfavorable personnel action in absence of complainant, protective behavior or conduct



## “CRIMINAL”

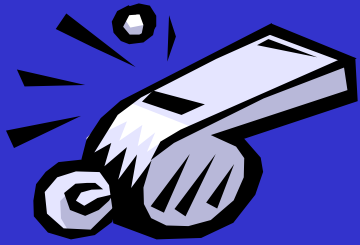


- Amends the obstruction of justice statute to clearly prohibit retaliation against whistleblowers
- Significant implications.
  - Covers disclosure for **any violation of federal law**
  - Not limited to employee reports of criminal corporate fraud
  - Employers who lose civil whistleblower cases may find themselves personally accountable in a subsequent criminal proceeding

***Text of SOA Section 1107***

**(a) IN GENERAL—**Section 1513 of title 18, United States Code, is amended by adding at the end the following:

**‘(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.’.**



# REMEDIES FOR WHISTLEBLOWERS WHO SUFFER ADVERSE ACTION

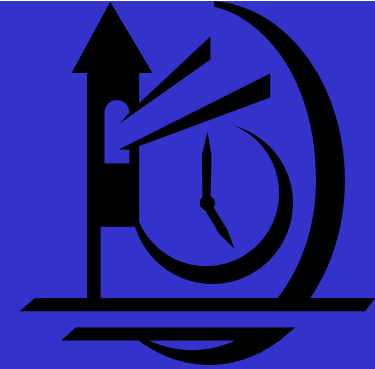
- Entitled to relief necessary to make the employee whole
- Remedies include:
  1. Reinstatement to same seniority status that employee would have had but for the adverse employment action
  2. Back pay
  3. Interest on back pay
  4. All compensatory damages to make the employee whole
  5. “Special damages” which include litigation costs, reasonable attorney fees and costs, expert witness fees, and “all relief necessary to make the employee whole”



- SOA does not provided for punitive damages because of availability of potential criminal penalties

- State statutory claims may allow for punitive damages if filed with federal action

# LIMITATION ON WHISTLEBLOWER PROTECTION



- Protects employee that “**reasonably believes**” he is providing information that constitutes a violation of federal securities law or federal law prohibiting fraud against shareholders
- For protection employee must reasonably believe that the conduct constitutes a violation of law
- If employee falsely or maliciously makes report about conduct he/she knew or should have known was not violation of law, employee has **no** protection under whistleblower provisions
- Employee need not correctly identify fraud to be protected, the threshold is intended to include all good faith and reasonable reporting of fraud



# INDIVIDUAL LIABILITY (CIVIL)

- SOA Applies to any officer, employee, contractor, sub-contractor, or agent of such company that retaliates against a whistleblower
- Language extends to corporate counsel, HR, executives, supervisors, managers

# INDIVIDUAL LIABILITY (CRIMINAL)



- Broader and provides protection for employees who provide information on any federal offense.
- Applies to “any person.”



# EMPLOYERS MAY RECOVER FOR FRIVOLOUS CLAIMS

- If DOL investigation finds the claim frivolous or brought in bad faith employer may obtain reasonable attorney fees not to exceed \$1,000.00 (ouch)



# ROLE OF AUDIT COMMITTEE

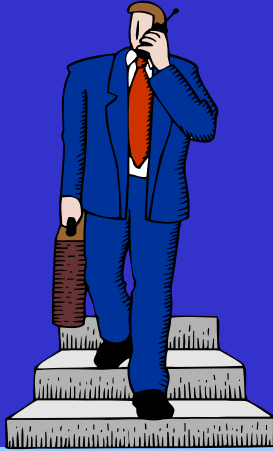


- SOA requires audit committee to establish procedures for investigation of complaints including confidential and anonymous information
- SOA does not specifically set forth audit committee's role

# ROLE OF AUDIT COMMITTEE



- SOA prohibits listing of securities for companies that fail to:
  1. Investigate complaints by whistleblower regarding auditing matters; and
  2. Treat as confidential anonymous submissions by employees of information regarding questionable accounting or auditing matters.
- This authority requires the audit committee to take an active role in oversight responsibilities



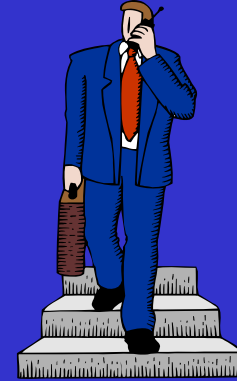
# STEPS TO MODIFY COMPANY POLICY PRACTICES

## 1. ESTABLISH OPEN DOOR POLICY FOR REPORTS OF CORPORATE FRAUD

- Review, revise or create policies that reflect SOA with regards to accounting and auditing matters or that will need confidential anonymous complaint procedure capable of receiving and acting on complaints
- SOA requires the establishment of the audit committee for employees to anonymously report concerns about questionable accounting or auditing matters
- This particular hotline should be dedicated and not a place where employees vent general complaints not dealing with corporate fraud

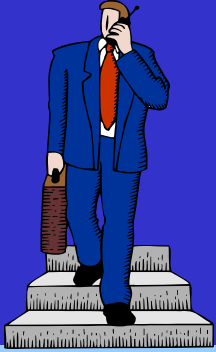


# STEPS TO MODIFY COMPANY POLICY PRACTICES



## 2. ESTABLISH COMPLAINT AND INVESTIGATION PROTOCOL TO ASSURE INDEPENDENT INVESTIGATION

- Avoid conflict of interest
- Do not ask employee to investigate own boss
- To ensure the person to whom report is made is not involved, needs to be second entity/person to whom reports can be made
- Report to audit committee or its designee which may be employee acting as ombudsman or third party

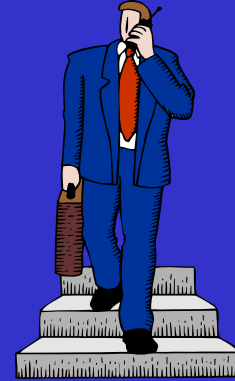


# STEPS TO MODIFY COMPANY POLICY PRACTICES

## 3. CREATE ETHICS AND CONFLICT OF INTEREST POLICY

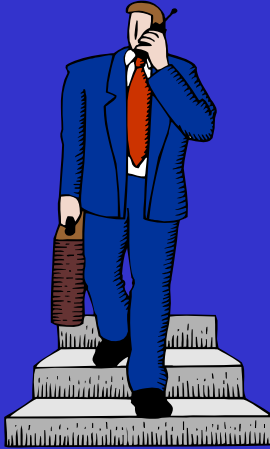
- SOA requires code of ethics for senior financial officers and code of ethics meant to promote the following:
  1. Honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships;
  2. Full, fair, accurate, timely, and understandable disclosure in reports and documents that a company files with or submits to the SEC and in other public communications made by the company;
  3. Compliance with applicable governmental laws, rules, and regulations;
  4. Prompt internal reporting of violations of the code to an appropriate person or person identified in the code.

# STEPS TO MODIFY COMPANY POLICY PRACTICES



## 4. COMMUNICATE POLICY PROHIBITING RETALIATION

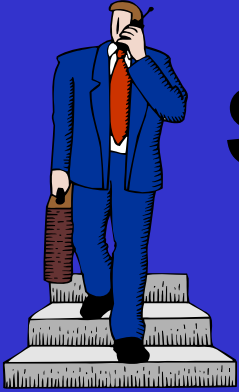
- Message to be communicated to employees in writing for training
- Amend or adopt code of conduct to indicate that all officers, directors and employees are **required** to report or cause to be reported information and assist in any investigation by regulatory or law enforcement agency, elected official, or others responsible for matters concerning fraud



# STEPS TO MODIFY COMPANY POLICY PRACTICES

## 4. COMMUNICATE POLICY PROHIBITING RETALIATION

- Code should spell out specifically what conduct is protected and prohibited
- Code should provide that company will not retaliate against an officer, director, or employee who files, causes to be filed, testifies, participate in, or otherwise assist in a proceeding filed or about to be filed regarding any matter concerning fraud
- Code should explain company will maintain, if employee desires, the anonymity of the employee and the confidentiality in the information reported



# STEPS TO MODIFY COMPANY POLICY PRACTICES

## 5. CREATE OR AMEND DOCUMENT RETENTION POLICY

- SOA makes it unlawful not only to destroy and conceal a document but to falsify or to make a false entry in a document
- Employers should exercise caution in creating documents that relate to an employee after whistleblowing has occurred because act makes it unlawful for employer to falsify or make a false entry in a document



# STEPS TO MODIFY COMPANY POLICY PRACTICES

## 6. TRAIN EMPLOYEES ON ANTI-RETALIATION COMMITMENT

- Employees need to understand stakes are high with criminal penalties
- Establish or re-issue policies pertaining to retaliation, communicate the policies to all employees, and train supervisors on the appropriate response to employee complaints
- Policies on harassment or retaliation includes prohibitions for harassment or retaliation against whistleblowers
- Educate officers, managers, supervisors and HR representatives about SOA
- Training of employees who have responsibility or authority to terminate, demote or reassign employees must be aware of whistleblower provisions

# **STEPS TO MODIFY COMPANY POLICY PRACTICES**

## **7. MONITOR COMPLIANCE**

- Designation of compliance officer responsible for implementing the program and over seeing matter

## **8. BACKGROUND CHECKS**

- Conduct due diligence to avoid hiring employees prone to fraud

## **9. INSURANCE**

- Determine if insurance policies covers officers, managers, and employees accused of violation of whistleblower provisions

# STEPS TO MODIFY COMPANY POLICY PRACTICES

## 10. SERIOUS INVESTIGATION

- Investigate all complaints seriously
- Be ready to prove by clear and convincing evidence that any employment action taken against whistleblowing employee will not have been taken in the absents of such conduct:
  - document performance
  - misconduct
  - other employment issues on an ongoing basis

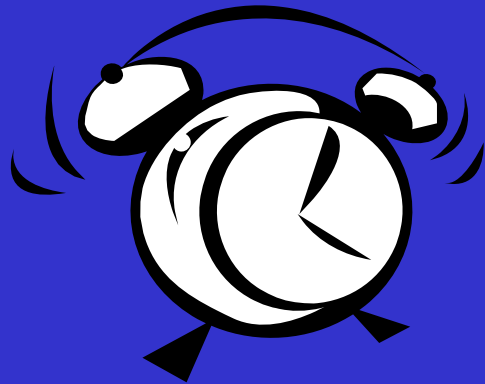
# **STEPS TO MODIFY COMPANY POLICY PRACTICES**

## **11. LOOK BEFORE YOU LEAP**

- Consult with counsel before terminating employee who has complained about securities fraud or other related matters and obtain legal advice before termination

## **12. CREATE OPEN CORPORATE CULTURE**

- Congress changes attitudes with carrot & stick approach

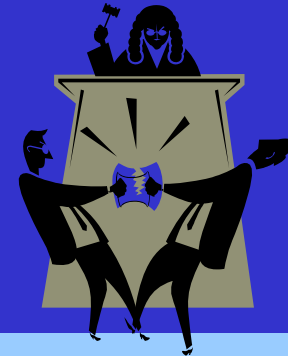


# UNRESOLVED ISSUES

- SOA creates powerful new weapon for employees of publicly traded companies but also leaves open issues that will be resolved in time

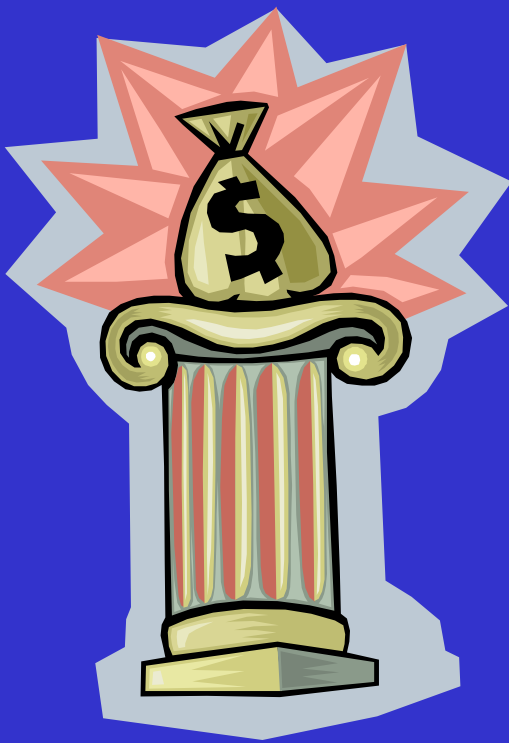


# ALLEGATIONS



- Question of “**reasonable belief**” in allegations of proper application of generally accepted accounting principals may be open for different interpretations. If “reasonable belief” provision is interpreted through case law to broadly, potentially honest disagreement between co-workers might be characterized as whistleblowing in order to support law suit for damages

# DAMAGE SCOPE



- Statute provides for “all relief necessary to make the employee whole”. Might be interpreted to include damages for emotional distress which would add unpredictability to employers exposure. Another issue is whether future lost earning may be award in lieu of reinstatement

# EMPLOYER DEFENSES



- No affirmative defense in statute. However the Supreme Court has created affirmative defense for employers in context of Title VII harassment claims. Employer may limit exposure by maintaining effective procedure

# CONCLUSION

- Corporate culture of openness will provide management with an early warning system of problems before outside regulators or law enforcement become involved.

