ASSOCIATION OF CORPORATE COUNSEL

TITLE: **SOX Whistleblower Claims: A Sixth Anniversary Survival Guide**

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PRESENTED BY: **ACC's Employment & Labor Committee**

SPONSORED BY: **Jackson Lewis, LLP**

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MODERATOR: **Greg Watchman**, Associate General Counsel, Freddie Mac & Vice-Chair, ACC Employment & Labor Committee

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Operator: Welcome to the ACC webcast. Greg, please go ahead.

Greg Watchman: Thanks very much, Megan.

Good afternoon, everybody. We're delighted to have you join us this afternoon for a webcast sponsored by the Association of Corporate Counsel addressing the Sarbanes-Oxley whistleblower provision and the case law that has developed under that provision. We will also be talking about best practices for companies to handle whistleblower complaints internally so that they don't become an external nightmare involving the media or agencies, or Congress for that matter.

We have a distinguished panel this afternoon and I will briefly describe each of our panelists.

Jim Beyer is Director of Employment Law at Accenture. He's got over 20 years experience as an employment attorney and ahs previously worked for IBM and Seyfarth Shaw. His current company, Accenture, is a global management consulting, technology services and outsourcing company, with over 178,000 employees in 49 countries. Jim is an Adjunct Professor of Law at Chicago-Kent College of Law in addition to his responsibilities at Accenture. And he has also written recently on whistleblower issues in the global context.

Richard Cino is a Partner at Jackson Lewis, one of the premier national employment law firms. He is also Co-Chair of that firm's Corporate Governance Practice Group, and he has over 18 years' experience in the field of employment law and has also got experience in handling SOX claims. He's handled roughly 30 to 35 cases under this relatively new provision.

Lastly, myself, I'm Greg Watchman, Associate General Counsel at Freddie Mac. I also serve as vice chair of the Association of Corporate Counsel's Employment and Labor Law Committee. I've been practicing employment law for about 23 years, and that has included nine years at Morgan, Lewis & Bockius and Paul Hastings, five years in the Senate and House as Committee Counsel for the Labor Committee and four years as a deputy at OSHA, during which time I had the opportunity to oversee and direct some of the whistleblower programs at that agency.

So, we're delighted to be here to walk you through some of the key issues around the SOX whistleblower provision and our agenda will cover such issues as the scope of coverage, defining protected activity, defining retaliatory action, procedural issues and remedies. And then we'll move on later in the hour to discuss best practices in the handling of SOX whistleblower claims internally, within the corporate environment.

Let me start by just noting that you have the opportunity to pose questions to the panel in writing by using the questions box at the lower left part of the screen and you can pose those questions to us at any time during the hour. To the extent we can, we will handle them during our discussion. We may save some questions for the end so that we can stay on schedule but, please feel free to pose those questions and if we don't get to them all in the hour we will likely be able to follow-up with you later as well.

I also want to highlight some of the links on the left side of the page and you will see there a number of useful materials. There are bios on the various speakers and also a number of papers – six, seven and eight represent papers on various aspects of the SOX whistleblower provision, the case law and whatnot. And then, number nine under the links column is the Web slides we're using for this presentation.

Lastly, I just wanted to note that at the end of this hour we will ask you to complete an evaluation and that is link number one under that list. You'll see webcast evaluation there. So, if you have to leave early for some reason, please take a moment to fill out that webcast evaluation. We would welcome your feedback.

So, the topic today is SOX section 806. This was a groundbreaking whistleblower provision enacted in 2002 in the wake of scandals that involved companies like Enron and Worldcom that shook investor confidence and created a perceived need for greater corporate governance oversight by the federal government. The new protections affect millions of corporate employees. I guess at this point I shouldn't call them new now that they're six years old, but SOX included a variety of corporate governance measures that many of our listeners will be familiar with.

Section 806 created a brand new exception to the at-will employment doctrine for employees at publicly traded companies who file complaints with OSHA within 90 days of perceived retaliation. During that process, if the complaint the individual files with OSHA is not resolved within 180 days, the individual then has an opportunity to go to federal court and have a de novo review the issues. This is a very unique provision, one that broke new ground for whistleblower laws in this country. And so, there's been a good deal of focus on how that mechanism has worked so far and we'll be talking about that today.

Six years after the enactment of SOX section 806 there have been upwards of a thousand claims and we're going to be talking about some of the more significant decisions but most of those claims have been found to have no merit by OSHA. Many of them have been settled and quite a few have actually reached the courts and resulted in some important decisions that have helped to shape the scope of protections and scope of remedies and other important issues under this new provision.

I would also note that the courts and the administrative law judges at the labor department have taken the position that since section 806 is remedial in nature, the courts are charged with broadly construing it to encourage employees to come forward to report wrong doing.

So, we'll start next with a discussion of the case law and we're going to lead off with the subject of the scope of coverage, and Richard and Jim are going to handle those issues, so I'll turn it over to Richard first.

Richard Cino: Thank you very much, Greg, and it's an honor to be here today and good afternoon to all the attendees. We have limited time and an aggressive schedule so I'm going to try and run through some of the issues rather quickly but certainly all questions are welcome through the box.

You know, cases now are beginning to work their way through the administrative process and up through the federal courts and as a result we are beginning to get more clarity of the scope of the law in a number or areas. One being what is a covered entity and another one of great importance is, defining protected activity, and Greg will be speaking on this later issue in a few moments.

But overall if I were to sum up the general experience at this point with the opinions, both the department of labor and the appellate reviewing courts have generally exercised restraint in remaining true to the intent of the act and resisting attempts to expand the application of the act beyond what its original intent was which really was to protect against shareholder and other inappropriate shareholder fraud that affected the investing public.

The first hit on our agenda here is private subsidiaries and that's been an issue that's been kicked around in a number of cases since the acts passage. And generally these nonpublic affiliates, or subsidiaries, have been held to not be covered entities, under the Sarbanes-Oxley Act. There are a number of tests, which are evaluated by the courts, and that relates to your general agency tests. Is the entity acting as an agent of the publicly traded entity?

And overall the agency issue really needs to be related to the employment Action toward the complainant. S, it's not necessarily enough to have common managers, common executives, common board members. The courts are really seeking to limit the scope of the covered entity to those which fit the definition under the act which is generally entities trading securities so that the parent is not automatically liable for the actions of the sub, and vice versa.

Similarly, the Sarbanes-Oxley act was defined with regard to prohibited activities as an employee of a publicly traded entity or any contractor or subcontractor or agent of such company may not take adverse action for engaging in protected activity. Well, initially when that statute came out there was significant concern regarding the language because there seemed to be some vagueness, at least in the minds of most plaintiff's attorneys, as to how far this contractor, agent definition would expand.

There have been a number of cases which have been rejected, thankfully for employers, in which employees of entities that did business with publicly traded entities sought Sarbanes protection. One particular case I recall is an employee of an HVAC servicing company that provided services to publicly traded entities seeking Sarbanes protection and that was rejected. And what the courts have said is, look – we don't want publicly traded entities to be able to use a non-publicly traded entity to engage in wrongful conduct under the act. But, that's really what we're seeking to protect, not throw a blanket over any employee who does any business with a publicly traded entity.

And, then finally, briefly, and then I'll turn it over to Jim – the arbitration agreements have generally been held. Private arbitration agreements between organizations employers and their employees, be that an individual arbitration agreement or one which is more standard, a group type arbitration agreement. Sarbanes cases have been held in a number of federal cases to be covered under those arbitration agreements forcing arbitration which was again, an issue when the act came out. That was of some confusion to employers and their counsel.

So, we'll be glad to take questions on these but at this point I'm going to turn the matter over to Jim.

Jim Beyer: Thanks, Rich.

I am just going to talk about the issue of extraterritorial application of the whistleblower provisions of SOX. Unfortunately, I'm in the category of why me. My company has a SOX case in this area that has made headlines and of course when anything makes headlines it's the employment attorney's fault. So, I've been shielding bullets from my general counsel et cetera and I must say I probably received over a thousand e-mails about this from various colleagues and law firms around the world really. So, I guess that was fun, but anyway it's probably one of those where bad facts, make bad law in the sense that our case which is O'Mahoney versus Accenture decided by the southern district of New York on February 5th, 2008.

You know, it's on a motion to dismiss. The department of labor had already dismissed the matter on this ground relying of course on the first circuit case of (Canero) versus Boston Scientific. But the judge in this case felt that (Canero) was distinguishable from our case and he relied on one of the allegations in the complaint of course, which he had to assuming those to be true. The significance of our case is it's the first one to extend its jurisdictional scope of the SOX legislation and the whistleblower protections to overseas employees of non-U.S. companies.

So, it seems like, at least for this opinion, the focus shifted from the jurisdiction in which the detrimental impact is felt, to the jurisdiction in which the decision having a detrimental impact on an employee overseas is taken. And so here, according to the facts pled that was in the U.S. Now, we believe that the facts will show that the decision was not taken in the United States and the decision makers were not in the United States and that it should be enough, if the judge follows the same logic, to grant a motion for summary judgment. But, of course, it's going to be a question of whether there's a material factual issue.

But, that's really all I have to say about the O'Mahoney case at this point but happy to answer any questions. And hopefully, the next time you hear from me on this subject it will be crowing about a victory instead of a defeat.

Greg Watchman: Well, thanks very much, Jim.

Jim Beyer: Sure.

Greg Watchman: We're going to move next to defining protected activity and you know, I just mention for our audience that many of the cases that we're talking about are described in the paper that I put together, which is at link number eight. And, if you open that paper, I'm now at pages eight to 10 of that paper, describing some of the case law around the definition of protected activity. What is it that will get an employees complaint covered under the Sarbanes-Oxley whistleblower provision?

Generally the statute provides that protected activity includes participating in an internal investigation or filing an internal complaint. It also includes external complaints that congress or agencies, as well as participation in external investigations. Now section 806 protects internal and external complaints when the complainant has a reasonable belief that the conduct in question constitutes shareholder fraud or a violation of securities laws, and interpreting that language has been the subject of many decisions so far under this 2002 law.

First, under the requirement of shareholder fraud, there have been a couple of significant circuit court decisions. The fifth circuit in this year, earlier in, I believe. January, in the Allen case, basically held that the complainant has to demonstrate an objective reasonable belief that the employer acted with a mental state embracing an intent to deceive or manipulate or defraud shareholders. So, it's an elevated state. It's not just that mistakes were made that would have been relevant to a shareholders decision as to whether to invest in the company, but an actual intent to deceive, manipulate or defraud has to be shown.

Similar holdings, in the fourth circuit, in the Livingston versus Wyeth Pharmaceuticals case that was also this year in March. There, basically the court said there was no valid claim here

because the complainant failed to show that the company either misrepresented information to shareholders or concealed information or had otherwise an intent to mislead shareholders. In that absence of that kind of showing of intent, the SOX complaint will fail.

Secondly, in terms of the specificity of the complaint, basically the courts and the ALJs have suggested that in order to have a valid complaint the complainant must allege specific enough conduct that the fact finder, or OSHA, will be able to determine precisely what is the activity that is alleged to violate securities laws or otherwise constitute shareholder fraud.

The complainant is not required on the other hand to allege violation of a specific provision of law. So, a complainant doesn't necessarily have to be an expert in securities laws or be able to recite chapter and verse but rather to be more specific about the actual conduct in question.

The third point here addresses the reasonable belief standard and this is an important one. The complainant does not have to show that the conduct in question was actually illegal. The complainant only needs to show that he or she had a reasonable belief that it was illegal or represented shareholder fraud and basically that includes both objective reasonableness and subjective reasonableness.

Obviously, if he person doesn't subjectively, reasonably believe that's a violation, it won't be a valid complaint. But, also on the basis of objective reasonableness, if the court concludes that an objective, reasonable person wouldn't have found a reasonable belief that the conduct was a violation, then the complaint will fail as well.

Lastly is the issue of materiality. You know, the securities laws incorporate the concept of materiality and it's basically defined to mean that information is material. If a reasonable person's judgment would be changed by the information. And that's usually looked at in the context of an investor decision as to whether to invest in a company's stock or not.

Most of the administrative law judges that have handled SOX claims, and have looked at protective activity, have looked at this issue of materiality and really incorporated it into their assessment as to whether the belief that the employee had, was reasonable that there was a violation. So, similar to securities laws if there's a small accounting error made, it's not likely that's going to be material enough, to create a reasonable belief or support a reasonable belief.

In addition, a number of ALJs have looked at SOX complaints that are based on a reasonable belief that employment law violations or environmental law violations should have been disclosed to shareholders and constitute unlawful shareholder fraud by the failure to disclose them. Most of the ALJs have said simple violations of employment laws or environment laws or other laws, are not going to support a SOX complaint unless they're of such a scope and size and potential liability, that it could really affect the company in a significant way and potentially affect the stock price.

But for the most part the ALJs and the courts as well have rejected complainant's efforts to characterize a failure to disclose these types of violations as shareholder fraud.

Rich Cino: Greg, Rich.

Greg Watchman: Yes?

Rich Cino: Before we move on to the next topic, I think there's an important point to be made with protected activity and the courts have done a very good job of identifying and holding employees to the obligation of actually blowing the whistle, as opposed to doing their job, and perhaps after some unrelated adverse employment action, then post hoc claiming it was engaging in protected activity.

A key case to review is Platone versus FLYI, Inc., and the individual was in the human resources department and she uncovered what she believed to be inappropriate use of comp time under a union collective bargaining agreement and brought the issue to the attention of her supervisor, essentially to seek advice on how to handle the situation. Shortly after this conversation, the employer found she engaged in other inappropriate conduct and was terminated. It was violation of a conflict of interest policy.

He then filed a SOX whistleblower complaint stating that she was a whistleblower under SOX based upon the allegations that she had raised or the advice she had sought from her supervisor. And the court clearly and effectively rejected that notion and the Platone decision has been sited in many cases including federal court decisions stating that look, it's not what you tell OSHA at the time that you've had a chance to speak to a lawyer or speak to OSHA and file your complaint. The question is would it be reasonable for the employer to have assumed, based on what you were telling it, that you were engaging in whistle blowing activity under SOX specifically, complaining about fraud among the shareholders.

So, I think that's an important distinction and something to bring into practice in your organization when you're training your supervisors that they're aware of when someone brings up a complaint you need to peel back the layers of the onion to get to the bottom of it. We're going to talk a little more about that towards the end on best practices.

Thanks, Greg.

Greg Watchman: Yes, thank you very much. That was a great addition.

We're now going to move to defining retaliatory action. You can see some discussion of this at pages 11 and 12 of the paper at, I think, its link number seven that I put together.

Jim, go ahead. You're going to lead this discussion.

Jim Beyer: Thanks, Greg. I wanted to point out that Greg's paper's just fantastic in this whole area. It's really a great resource to have and I'm very impressed that he is able to put something like that together. And certainly Burlington Northern is a Title VII case decided by the Supreme Court but the significance under SOX is determining what constituted retaliation under Section 806.

And before Burlington, of course, the courts looked to other Title VII cases about what was an adverse employment action and some courts had held that those had to be such things as termination, demotions and other employment actions that actually had an adverse economic impact, while others took a broader view that SOX prohibited any retaliatory employment action that is reasonably likely to deter employees from making protected disclosures. The latter standard was of course the standard adopted by the Supreme Court in the Burlington case in 2006 where the court held that retaliation includes any action which would dissuade the reasonable worker from brining a complaint.

Now, the subsequent SOX cases have of course adopted that standard now and there's a Web site to the department of justice that Richard found for me and it's very helpful and I'll put that link in the box after I'm done talking on this section but there have been a couple federal court decisions since Burlington under SOX. Allen versus Administrative Review Board is one from the fifth circuit. Myles versus Wal-Mart from western district of Arkansas and again, both those applied to Burlington-Northern lower standard to determine whether or not the worker was dissuaded from engaging in a protected activity.

And I thought it was also important to point out, you know, we're of course seeing this in SOX as well as all areas that now, almost every case under Title VII, you know, in addition to the discrimination allegation there's always an allegation of retaliation.

The EOC has reported a significant increase in retaliation charges. You know, often it's just a retaliation charge so, you know, we're continuing to see that in the SOX cases as well where, you know, you're going to have these retaliation claims. So, Burlington certainly has been the important decision both under Title VII but certainly under SOX as well.

So, that's really all I had to say about that issue.

Greg Watchman: Thanks very much Jim. We're now going to move to the next slide which involves procedural issues and Richard is going to lead this discussion.

Richard Cino: OK, very simply, the statute of limitations for bringing a SOX claim is 90 days from the date of the adverse action and there's even some communication of some cases that call 90 days from the time the complainant becomes aware that adverse action will be taken. It's a very short time limit and the way these regs were designed; remember the fury when this legislation was put together over the various corporate scandals that it evolved from, was that everything was going to happen very quickly.

You're going to have 90 days to sue. We're going to have 180 days to go through a three part department of labor process which is an initial OSHA investigation, any subsequent appeal which would be an ALJ trial; Federal Department of Labor ALJ and an appeal of that to the administrative review board. If it is accepted then a final order would ultimately be issued by Administrative Review Board. That's all supposed to happen in 180 days.

Gentlemen on the panel can correct me if I'm wrong. The last statistics I saw I think was that the first prong was taking about 160 days, and not through OSHA sitting on its hands either, these are just very complex, fact sensitive cases. And it's just very difficult to get through this process in 180 days.

Why do I harp on this so much is because the ((inaudible)) implies that in the event a final decision has not been issued within 180 days from the date of filing, the complainant has the ability to withdraw the complaint and file in federal court.

So, you can have a situation that it takes 160 days for the initial decision to come down from OSHA and it's in favor of the employer. Exceptions are filed and a request for a hearing with ALJ by the complainant and then once that 180 days passes the complainant essentially gets a second bite of the apple by filing in federal Court. So, you really kind of have to win the case twice with a complete de novo review. So, while the cases have come down pretty favorably for employers, that 180-day second bite of the apple, as I've called it, provision is troubling.

Greg Beyer: Richard?

Richard Cino: Yes, sir.

Greg Beyer: This is Greg, and I just wanted to jump in with another point on this same subject. You know, I think what's happening, you know congress I think intended that the DOL administrative process would really be the primary process through which these complaints were resolved. But what's really happening is, first as you say, The process at DOL takes much longer than 180 days, so very few of them that actually get litigated and contested are getting completed in that time frame.

And, then secondly, my understanding is that the administrative law judges are actually asking the parties early on in the process, do you intend to go to district court.

And, if the parties say yes, oftentimes the case is stayed or activity is not pursued in the case because they recognize that the 180-day threshold will not be met and therefore they just wait

until a 180 days and then the person has the opportunity to go to court. So, I think the administrative process is going to be used less and less as we go forward with this statute.

Richard Cino: Yes, I think that's correct. Interesting and something that if not well known, with this short 90-day statute of limitations, I told Greg and Jim before, I seem to be specializing in the receipt of the 82nd day from termination demand letter for immediate mediation from counsel who are threatening to bring a Sarbanes complaint. And, often times, the approach is you're going very quickly and then there's a suggestion that the statute of limitations be told among the parties.

And, there is actual case law, the (Szymonik) versus (Tymetric), Inc. It's a 2006 case, ALJ decision which states that the parties can not agree to toll the 90-day statute of limitations. That the intent of congress was to provide a prompt 90-day statue of limitations or with the understanding that reinstatement and preliminary reinstatement was a remedy to be provided and that the parties can not thwart, through agreement, congresses intent. So, those tolling statutes, those tolling agreements likely are not going to be accepted by the Department of Labor, at least until a federal court rules the other way in appellate court.

So that's a very important issue and the burdens of proof, in these cases, are quite limited for the employer, are stacked well in the employees favor when you look at these things. Basically to make out a key case an employee must prove by a preponderance of the evidence that he or she engaged in protected activity, the employer knew of the activity, that the employee suffered an unfavorable personnel action and we've already heard the discussion of Burlington Northern by Jim. And, that the protected activity was a contributing factor to the unfavorable action; just a contributing factor, not the sole factor, not the only factor, a contributing factor. So, a basic timeline is very helpful there for plaintiffs often times with approximate causation.

Once those elements are established, the employer must prove by clear and convincing evidence a much higher standard than the preponderance of evidence standard that the employee has. That it would have taken the same unfavorable personnel action in the absence of the protected behavior. OK? So, the burden clearly favors the employee and if I were to give one tip here, is that you really have to go back to basics in defending any retaliation cases.

These cases don't lend themselves to summary judgment, particularly if you get into court. And, if you're company is not employing the basics of appropriate, constructive, progressive discipline practices, documentation of issues, you can walk yourself right into a timeline completely unknowingly for a Sarbanes claim. So, it's extremely important.

Finally, with regard to availability of jury trials, there have been a number of federal cases that have indicated that a jury trial is not available under Sarbanes. I'm not going to get into the legal aspect behind it. It has to do with the remedies and the scope of the equitable remedies. However, I think that's something to keep an eye on because I think that will work its way up through the courts and perhaps up to the U.S. Supreme Court at some point, so I'm not sure at the end of the day where that will go.

Greg Beyer: Richard?

Richard Cino: Yes, Greg?

Greg Beyer: Yes, I just wanted to pipe in on that as well. You know, I think that frankly when the Murray case came out several years ago with the first district court to hold that there was no jury trial right under Section 806. I was quite surprised. When I looked at the legislative history, the actual text of the law, I think there is a fairly strong argument that the provision was intended to allow jury trials. Obviously it's was helpful from the employer context to the extent the Murray court and other courts since have held that there is no jury trial right. But, I totally agree with you. This is an issue that I think will percolate up to the circuit courts and potentially to the Supreme Court.

Richard Cino: I think that's fair to say. I would agree. So, it's going to be, you know, that's going to be something to keep your eyes on I think. Greg did you want to take over on remedies?

Greg Beyer: Sure, yes. Let me advance the slide for our listeners and let me talk about remedies. If you're looking at the paper I did at link number seven, I'm going to be talking about cases on pages 13 to 15. I also wanted to put in a plug for Richard's materials which are absolutely terrific. I think link number six is an article that appeared in the New Jersey Lawyer magazine and link number eight is called Whistle While you Work, or maybe that's the article.

Is that the article from New Jersey Magazine, Richard?

Richard Cino: Yes, it is.

Greg Beyer: OK, so I guess link number six is the paper that you prepared for the New Jersey Corporate Counsel Association entitled How to Deal Effectively with Whistleblowers. I would encourage our listeners to look at both of those as they're both terrific.

So, I'm going to talk briefly about remedies and start with reinstatement orders. This was one of the more pro employee provisions under section 806. When OSHA is investigating the complaint, even before there's a hearing, OSHA can order an employer to reinstate an individual who has been terminated. Now, a lot of the time, you know, obviously these cases, some have merit and some don't, but in many cases the agency has attempted to order reinstatement where there were significant issues that lead to the removal of the individual and it can pose a very substantial problem for employers.

There are a couple of things though that do provide some relief on this issue. First, it is possible to work out an arrangement where you essentially provide economic reinstatement rather than actual reinstatement. And that simply means rather than have the person come back in and actually do their job, you just continue to pay them until the matter is resolved. In addition to that the courts and the DOL zone our administrative review board have limited the use of this tool.

The second circuit in a 2006 case held that if an employer ignores an OSHA preliminary reinstatement order, the agency can not go to federal district courts to get enforcement of that order, because the district courts do not have any authority under SOX to enforce it. In addition to that, in some cases the administrative law judges have imposed sanctions on companies who have refused to reinstate a complainant.

And the Department of Labor's administrative review board last year held that the administrative law judges do not have authority to issue sanctions against companies for noncompliance with a preliminary reinstatement order. So, these orders will still be issued from time to time but there are some limitations that have been helpful to employers.

Secondly front pay, this is pay designed to basically designed to compensate the complainant for the loss of future earnings. And, it has been utilized, for example, where the ALJ has determined that reinstatement of the individual is impractical. And that's often the case with whistleblowers because this type of whistleblowing tends to generate some fairly hostile feelings back and forth between the whistleblower or complainant and the company they work for. So, in many circumstances it's very difficult to the person back and pretend that nothing happened.

In 2006, for example, there in the Hagman decision, an administrative law judge said that there was so much hostility between the company and the individual complainant that reinstatement was not practical and that ALJ actually awarded 10 years' worth of front pay. I think the total amount was approximately $640,000 or something to that affect. So, front pay can be significant part of the remedies that an ALJ can order or a court for that matter.

Loss of reputation pain and suffering damages, here the courts really have been split on the administrative law judges to some degree too. Section 806 authorizes actions at law or equity which ought to include legal damages, such as loss of reputation, in some people's eyes. But other courts have found that the language is not express enough to create those remedies under section 806. And, that includes the Murray case in the northern district of Texas in 2005 which was the first district court to hold that there's no jury trial right under section 806. So, this is one that also may percolate up to the courts of appeals because of the split in the authorities. On the other hand punitive damages are clearly not available under this law. I'm not aware of any authority to the contrary on that subject.

Lastly, you know, obviously in many contexts of resolving employment issues we resolve it through a settlement agreement that provides that the individual is not going to be rehired and not going to apply to be rehired by the company. That's a way of ensuring that the individual complainant doesn't come back and apply for a job and then file a failure to rehire claim if they're not hired.

The department of labor has taken the position that some of these, in some instances, these clauses can be seen as retaliatory themselves and that's really following the lead of the EEOC which has taken a very hostile position towards no rehire clauses in settlement agreements.

So DOL says they will scrutinize these provisions and settlement agreements on a case by case basis. They say they will review the scope of the waiver, the amount of money the complainant is getting in settlement, the strength of the employers case and whether the employee had counsel during the settlement discussion.

Let me move on next to SOX best practices and this is really the second part of our presentation today. You know, obviously Sarbanes-Oxley section 806 imposes a mandate on companies not to retaliate and to investigate whistleblower complaints in good faith. And that, obviously, is something a lot of companies have struggled with in figuring out how to handle these issues in a way that steers clear of any violations.

But I would also say that SOX section 806 does present an opportunity for companies to utilize whistleblowers, at those that operate in good faith, as an early warning system.

Obviously, a lot of whistleblowers are acting for their own personal agenda or because they think their termination is imminent. But some of these whistleblowers are really acting in good faith because they really are seeing harm coming to the company.

And paying attention to them, looking into their concerns in good faith is a way of potentially avoiding that harm or that wrongdoing that might be about to occur. But it also allows the company to try to keep that issue as one that will be resolved internally within the company rather than forcing that person to go externally to the media or to congress or to one of the whistleblower groups or to a federal agency.

You know, along these lines I would just point out that in 2002 when Sarbanes-Oxley was enacted, Time Magazine put on its cover as the persons of the year, three whistleblowers. That included Sherron Watkins of Enron, Cynthia Cooper of Worldcom and Colleen Rowley of the FBI. And, it's worth pointing out that these three whistleblowers initially did not blow the whistle externally. They each went to their superiors to raise significant issues of wrongdoing. They were not seeking the limelight.

They were not seeking money. They just wanted to have the problems addressed and the illegal conduct stopped. But, because they were rejected in those efforts, they ended up having to go externally to raise those issues. And so, my point is really that through the use of best practices it's quite possible to take good faith whistle blowers and resolve their complaints internally.

So, that's what we're going to talk about in the remainder of the hour. And Jim's going to lead in with a discussion of a non-retaliation policy.

Jim Beyer: Thanks, Greg. You know, you're right. It will only work if you have an effective warning system, if whistleblowers will come forward and they will come forward if there's sufficient guarantee against reprisal. And it's certainly, you know, a couple of other things, is simply other than having a non-retaliation policy but you know, you have to have credibility in the first place as an organization and so to do that you've got to demonstrate that disclosure will led to elimination of illegal conduct and will not result in retaliation.

Obviously methods of building trust can include setting the ground rules up front. Listening, handling the disclosure in a responsive, reliable, timely manner. The issue of whether the whistleblower can be anonymous and keeping any promises made. The next thing obviously is having very visible personal leadership. You know, it's like a lot of things that we deal with as employment lawyers. You have to have support from the top down. And, the CEO and the leadership team has to show that they're really committed to it as opposed to just something that they do because they have to for legal compliance.

And finally, you know, I think again the broad prohibition gets retaliation. You've got to prohibit all forms of discrimination against and harassment of whistleblowers. As we talked about, you know, with Burlington-Northern, many things could constitute retaliation. They may not constitute tangible job action, but if that kind of thing is allowed, in addition to the possible legal liability it certainly sends a message of discouragement to employees from stepping forward to bring forth claims.

And so, I think those are things that you really want to look at to make sure your non-retaliation policy is a living and breathing policy as opposed as to one that's again, you just slap on the door or the handbook or wherever you put it to comply with your legal obligations.

So, Greg, I think that will cover that point.

Greg Watchman: Great, thanks. And we'll move on now to talk about complaint mechanisms. And, this discussion really is focused in pages 15 to 17 of my paper which is link number seven.

So, complaint mechanisms, you know there are a variety of different things that can work here. It's important to give employees multiple avenues for reporting. The same reason we do that in a sexual harassment context. You don't want to force somebody to go complaining about the very person they're having to report it to. So, you want to give them a variety of options. And obviously Sarbanes-Oxley the statute requires corporate audit committees that boards have to set up. It also requires some type of mechanism for anonymous reporting.

Many companies in addition to their corporate audit committees on their boards have also established 1-800 numbers with third party vendors receiving the complaints so that they are truly anonymous or, a corporate ombudsman office can be set up or a corporate ethics office. Here at Freddie Mac we have an anonymous toll free line and we also have a compliance office that handles these types of complaints.

Obviously if you are a company of significant size the boards audit committee can't really look into every allegation that comes up. So, it is important to have some of these other mechanisms.

A key part of this is that you want to give the individual some element of independence and the entity that's going to investigate their complaint. Having a neutral forum is a way of building significant trust with the individual.

Other ways of doing that are to protect the confidentiality to the extent you can, recognizing obviously that's not possible 100 percent. And, also to provide relief to the individual if retaliation

or reprisals do occur in the workplace as times they do. You know, you may have lower level managers who really don't get it about the non-retaliation policy and you have to be prepared to try to remedy that as best you can if it does occur.

Lastly, expediting the response is important. Both, because it can help minimize any harm from wrongdoing, but also because you want to get that employee engaged in your internal process so they don't feel forced to go external to the media or to an agency or to congress.

Next we'll move on to investigations and Jim's got some comments on that subject. Or rather, Richard does.

Richard Cino: Thank you very much.

You want to take that, Jim?

Jim Beyer: Yes, very briefly if you want to leave sometime ((inaudible)).

Greg Watchman: A brief panic there.

Richard Cino: Look, I think what's been said is very important and I think it's also important to understand no organization became ethical or compliant because it was mandated by legislation to do so. There needs to be an understanding from the top of the organization. That's a clear message with regard to compliance.

And with regard to investigations, training of supervisors of your front line people that are dealing with the employees every day is vital. They need to be able to recognize and properly elevate issues that are raised to them, perhaps in casual conversation things may be revealed that needs to be looked into. So, that's extremely important.

When a complaint comes in and there's a decision to investigate, the next decision is, well who should conduct the investigation? Should it be handled in-house? Should it be handled externally? Should it be handled by a lawyer externally? Should it be the lawyer that does all your work?

There are a variety of questions but what I always try to counsel clients on is to look, you know, two years from now. You're going through this time and effort to go through an investigation and it may be an enormous undertaking, it may be a very simple matter. It might take an hour and you meet with a couple of witnesses.

The key is don't go through that process and spoil it or taint the results due to not looking at how the investigation will be perceived or more importantly how it will be attacked by plaintiff's counsel for efficiency and effectiveness. So, it's very important to keep that paramount in mind.

And then another issue that I think should not be just a rote decision, and I have to say that one of the papers that Greg mentioned that I wrote is from a 2005 presentation and we've changed gears a little bit as experience continues and there we were recommending, you know, written reports and doing this more and discussing it and conducting investigations. A written report isn't always what is required or appropriate in a particular circumstance.

It may be an oral or verbal report to the audit committee or the board of directors or a group. So, the question, don't just automatically consider a written report to be required. There's a lot of consideration.

And then finally, I know we want to leave time for questions and we have some already. You want to be caring about privilege, protecting privilege. Not assuming just because you have an attorney conducting the investigation that it will be privileged, understanding what hat you're

wearing, if you're an attorney and if you're engaged in the role of fact finder, chances are that is not going to be privileged. Separate out your communications. Those which would fall into the counseling pile should be separated from those that would be a fact finding pile.

Be very, very careful and frankly at that point you assume everything that you're writing will be eventually subject to discovery or scrutiny by a governmental agency. OK, thank you.

Greg Watchman: Thanks very much, Richard.

And we're ready now to move to questions. So, let me advance the slides here to the question slide and we will start looking at the questions that folks have provided.

So, one question is, let's see, regarding section 1107. Here it is. The question was; are any cases brought under SOX section 1107 as an alternative to 806?

Now, section 1107, as I understand it, is a criminal provision and basically I think that provision – I've got something in my paper which addresses it – basically says, it's a criminal violation for a company to retaliate against a whistleblower who provides truthful information to a law enforcement officer about violations of federal law.

I should note that this can be a significant provision. It is not limited in its applicability just to publicly traded companies. It applies to any company whether it's privately held, or publicly traded. Now, that said, I am not aware of any prosecutions under section 1107 since this law was enacted and I would just ask Jim and Richard. Have you become aware of any prosecutions under this section?

Richard Cino: This is Richard, and it will illustrate the point very well. There is one and I'm not sure how successful it's been. But, an attorney in Connecticut who and this will emphasize the point you just made, Greg.

An attorney in Connecticut – his actions with regard to allegations that an employee of his church had inappropriate materials on a work issued computer and the role he played in allegedly obstructing the investigation, he was indicted under section 1107. Or, at least charges were brought, whether the indictment went through or not. So, there is an individual who was involved in a church activity and really, I think he was indicted under section 1107. I may be inaccurate on that but that's what I believe.

Jim Beyer: I'm not aware of anything else, Greg.

Greg Watchman: OK. And so, to the question, are any cases brought under 1107, there's no private cause of action under this provision. It's really just criminal so the department of justice would have to pursue a prosecution under that section.

Next let me ask a question of Richard. You know, we've spent this hour talking about the Sarbanes-Oxley provision but I'm curious as to, in your view, what other options a complainant has that employers should be wary about? What other kinds of claims can somebody file? For example, if they're passed the 90 days under SOX, or if they simply don't want to wait 180 days in order to be able to get to court. What are the other options that complainants might have?

Richard Cino: Well, there are multiple options for complainants. State whistleblower statues for example in New Jersey, there are not nearly as many – I see many more New Jersey CEPA, Conscientious Employee Protection Act claims. That clearly could fit within the Sarbanes framework but that they are – people just decide to go right directly to that whistleblower statute.

There are federal false claim act claims. There are common-law, public policy actions in violation to public policy claims. There are claims – I believe there is a case out in California that uses the

Sarbanes whistleblower protection as a basis to establish a public policy that was violated to bring an action under California wrongful termination statute.

So, once that 90 days passes after the termination doesn't necessarily mean you're out of the woods with regard to a potential claim.

Greg Watchman: Right, well that's good advice for folks to keep that in mind that there may well be some either federal or state alternatives for folks who wish to pursue retaliation complaints. And many states do have whistleblower laws or other mechanisms that would allow folks to file claims.

As we start to wrap up here I wanted to just remind everyone to go to link number one to fill out the webcast evaluation. We really would appreciate your feedback so that we can always look for ways of improving these webcasts in the future.

Another question that is often raised is how settlements are treated by OSHA in terms of confidentiality. In order to settle a complaint that's been filed with OSHA, the employer and the complainant have to provide the settlement agreement and have it reviewed by the department of labor. But once they do that, if subsequently someone wants to get a hold of that confidential settlement agreement, they potentially could file a FOIA request under the freedom of information act and potentially get that agreement.

And I wondered whether Richard in your experience, or Jim, you've had any exposure to this issue and whether to your knowledge OSHA's been able to address it at all for employers.

Jim Beyer: You know, I have not had, with regard to the FOIA request aspect, I haven't had a tremendous amount of experience with that issue. There has been – you know, the regs actually state that if a withdrawal is made during the OSHA investigative process, the regs suggest the assistant secretary must be part of the settlement. So, there is involvement.

There are, in the ALGA process, there has been some instances in which a settlement was reached and a complainant can submit a request to withdraw the complaint and the ALJ will typically enter an order to show cause and the matter will be withdrawn and entry order dismissed.

So, there may be ways but with regard to – I'm unaware at this point of OSHA position, whether they will siphon off into another file or redact the amount of a settlement in the event of a public records act request or FOIA request.

Greg Watchman: Right, thanks very much. We have another question that I'll read as we start to close up here. This will probably be our last question. And this question reads, with regards to the written reports issue, to be clear, would it be appropriate for the investigator to prepare a report for the attorney in order to keep it as part of the deliberative process but then stop short of turning that written report over to the board of directors or the audit committee and brief them orally. Richard, do you want to field that one?

Richard Cino: Yes Jim, do you want to try …

Jim Beyer: Well, I mean, go ahead there are lots of issues. I don't know how I can summarize it very fast. So, go ahead.

Richard Cino: Yes, I think you run into – I mean whether it's appropriate – You know, an investigation is what you make of it. You're procedure is whatever you make. I don't think just simply by – if the investigator is providing a report to the attorney, I don't think you're going to avoid discoverability, just simply in that process.

If a report's provided, it's going to be in a file somewhere and if you're relying upon you're remedial actions, its likely going to be subject to discovery. Now, there may be and analysis done with regard to what portions of the report relate to fact-finding and what portions relate to the provision of legal advice. But, I can't say it's inappropriate. I don't know if it gets you to where it where you may want to be in asking the question.

Greg Watchman: All right. Well, thanks very much. Well, I'll just make a closing observation here. From one of our listeners, they mention that notion of employees getting a second bite of the apple by virtue of administrative and the potential district court process, may be somewhat over stated in the sense that the OSHA process is quite difficult for an employee to win.

That may be true. It's certainly true that the substantial majority of complaints are determined to lack merit by OSHA. And the listener makes the point that the real litigation takes place when the case goes to the district court and I think that we will see that increasingly be the case as this law goes forward.

Richard Cino: Yes, importantly though, until the ALJ issues its opinion and there's no appeal from it or the arb rejects the appeal, that 180-day rule still kicks in. So, you could litigate half the case before the ALJ and still the complainant could withdraw it. So it's all the way until a final order is issued by the department of labor which theoretically goes right through – not theoretically, actually goes right through arb process.

Greg Watchman: Yes, yes. Well, we're just about out of time here and I want to thank our panelist very much. Richard and Jim thanks a lot for your insights and wisdom. And again, I want to encourage all of our attendees, thanks very much for joining us and I want to encourage you please, to fill out that Web link evaluation form.

Jim Beyer: And one more thing. There is another employment labor law webcast on Thursday, May 22nd, 2:00 p.m. Eastern on the systemic discrimination revolution confronting the rising number of class based OFCCP and EEOC claims. So, hope you can join that one.

Greg Watchman: Thanks everyone for attending. Good afternoon.

Richard Cino: Thank you very much.

Jim Beyer: Bye-bye.

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