

NEW JERSEY CORPORATE COUNSEL ASSOCIATION

LEGAL EXPRESS SUPERCOURSE

**HOW TO EFFECTIVELY DEAL
WITH WHISTLEBLOWERS**

Presented by:

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Richard J. Cino is a partner located in the Morristown, New Jersey office of Jackson Lewis, LLP. Richard practices in the litigation department of the Morristown office. Richard handles all types of employment litigation, including retaliation and whistleblower claims under both Sarbanes-Oxley and the New Jersey Conscientious Employee Protection Act. In addition, he counsels employers on litigation avoidance and conducts training and seminars on issues pertaining to the workplace, particularly relating to the preservation of corporate assets and corporate governance.

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MINIMIZING THE RISK OF RETALIATION AND WHISTLEBLOWER CLAIMS

I. INTRODUCTION

Today, more than ever, the term “whistleblower” has become part of our common parlance. Around the clock news venues offer tales of courageous “Davids” taking on corporate “Goliaths,” by reporting alleged corporate wrongdoings. Anita Hill, Jeffrey Wigand, Sherron Watkins, and Cynthia Cooper are examples of numerous whistleblowers from past years whose stories have generated wide media attention.

Whistleblower statutes have become favorites of plaintiffs’ attorneys everywhere. Plaintiffs’ attorneys increasingly boast of the million dollar verdicts and settlements they have achieved for their whistleblower clients. Given the trend toward whistleblower claim protection, it has become extremely important for companies to understand the current state of whistleblower law, to protect themselves by setting standards for corporate responsibilities, effectively communicate policies designed to limit potential liability from whistleblower claims, and promptly and thoroughly investigate allegations of whistleblowing and, where appropriate, take effective remedial action.

Years of media coverage of corporate fraud or wrongdoing has had its effect -- a nationwide survey of over one thousand jury eligible adults conducted by Bowne DecisionQuest/MCCA, a jury consultant company, indicates a public distrust of corporations. The survey reveals that corporate dishonesty, coldness, and greed are now part of most jurors’ belief systems. Many potential jurors indicated their belief that upper-level management of even the largest corporations knows “everything” that happens at corporate facilities, including at every plant, dock, and shipping station. Of note, **80% of prospective jurors felt that**

corporations do not pay enough attention to employee opinions, and over 50% believe that complaining to senior management about work-related issues usually backfires.

II. LEGAL BACKGROUND

A. The Sarbanes-Oxley Act of 2002

In response to the corporate malfeasance of companies like Enron and Worldcom, Congress enacted the Sarbanes-Oxley Act of 2002 (“Sarbanes-Oxley”) to protect shareholders and to deter and punish corporate fraud and other wrongdoing, including retaliation against whistleblowers.

Sarbanes-Oxley requires the establishment of audit committees by publicly traded companies. It requires publicly traded companies to establish independent audit committees to establish procedures for: (1) the receipt, retention, and treatment of complaints received by the company regarding accounting, internal accounting controls, or auditing matters; and, (2) the confidential, anonymous submission by employees of the company of concerns regarding questionable accounting or auditing matters. There has also been a call for entities that do not fall within the purview of Sarbanes-Oxley to establish similar procedures, particularly non-profits.

1. Whistleblower Protection

Title VIII of Sarbanes-Oxley is also known as the “Corporate and Criminal Fraud Accountability Act.” Section 806 of Sarbanes-Oxley provides whistleblower protection for employees of publicly traded companies who provide evidence and information of fraud or violations of SEC rules and regulations. In particular, section 806 provides that:

No publicly-traded company or its officers, employees, contractors, subcontractors, and agents 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, or cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of an SEC rule or regulation, 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; or
 - (b) any Member of Congress or any committee of Congress; or
 - (c) person with supervisory authority over the employee or other person who has authority to investigate, discover, or terminate misconduct,or
- (2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding relating to an alleged violation of a SEC rule or regulation, or any provision of Federal law relating to fraud against shareholders.

A company also violates Sarbanes-Oxley if it threatens, restrains, coerces, blacklists, or in any other manner discriminates against an employee in the terms and conditions of employment because the employee engaged in the protected conduct.

The statute of limitations for filing a complaint with the Secretary of Labor for a violation of section 806 is 90 days from the date which the adverse employment action occurs. Additionally, one Administrative Law Judge recently concluded that this 90 day period is not tolled even if the employee believes he/she may find substitute employment with his/her employer. In Lawrence v. AT&T Labs, 2004-SOX-65 (ALJ Sept. 9, 2004), the Complainant received a letter from her employer informing her that she had been selected for involuntary termination unless she was placed in another position by a date certain. After that date passed, and Complainant was not placed in another job, she filed a Sarbanes-Oxley claim. More than 90

days had passed since Complainant's receipt of the initial letter informing her of her termination selection. The ALJ held that the complaint was untimely, reasoning that "[t]he fact that Complainant could have avoided termination if she found another job with [the employer] does not prevent the statute of limitations from running. The statute of limitations begins to run when the employee is made aware of the employer's decision to terminate him or her even when there is a possibility that the termination could be avoided."

Sarbanes-Oxley provides that if an employee prevails in an action under the whistleblower provision of the statute, he/she shall be entitled to all relief necessary to make the employee whole. Relief under the Act expressly includes reinstatement, back pay with interest, and compensation for any special damages sustained, including litigation costs, expert witness fees, and reasonable attorney fees. In addition, one federal court held that "damages for reputational injury that diminished [an employee's] future earning capacity" are also potentially recoverable under the Act. Hanna v. WCI Communities, Inc., 348 F.Supp. 2d 1332 (S.D. Fla. 2004).

2. Enforcement and Investigation Procedures

An employee alleging retaliation for a protected whistleblower activity may seek relief by:

- a. filing a complaint with the Secretary of Labor (within the requisite 90-day period); or
- b. if the Secretary has not issued a final decision within 180 days of the filing of the complaint, and if such delay is not due to the employee's bad faith, filing an action at law or equity for *de novo* review in the appropriate United States District Court.¹

¹Unlike other employment practices statutes, Sarbanes-Oxley does not allow an employee the option of filing a complaint with either an administrative agency or a court, or to withdraw his/her complaint with the Secretary during the investigatory period, to commence an action in federal court. A complaint must be initially filed with the Secretary, and the employee may only commence an action in court if the Secretary fails to complete her

The United States Department of Labor has delegated authority and assigned responsibility for investigation concerning, and enforcement of, section 806 (whistleblower protection) to the Assistant Secretary for Occupational Safety and Health.

With respect to enforcement, Sarbanes-Oxley first requires notification of the claims to the employer named in the complaint. Then, within a 60 day period after receipt of the Complaint, the Secretary must afford the employer an opportunity to submit a written response to the complaint together with an opportunity to meet with a representative from the Secretary's office to present statements from witnesses. During this same period, the Secretary must also conduct an investigation to determine if there is "reasonable cause" to believe that the complaint has merit, and notify the parties of her findings.

Typically, an OSHA investigator will notify the employer in writing that an administrative complaint has been filed, and may send a follow-up questionnaire to the employee and/or employer for specific information. Information sought may include documents and complaints related to prior whistleblower claims against the employer, and names of potential fact witnesses. As stated above, the employer is permitted to respond in writing and in person, with witnesses, to the allegations. If the investigator determines that the employee has presented a *prima facie* allegation of wrongdoing, the investigator will conduct a "field investigation," including individual personal and phone interviews, and document reviews when practical. After gathering all necessary evidence, the investigator will meet again with the employee to discuss his findings and determinations, and to allow the employee to offer any new evidence or witnesses to determine if further investigation is necessary.

investigation within 180 days and there is no showing that such delay was due to the bad faith of the person who wishes to file a lawsuit.

In order to avoid dismissal of his complaint during this early phase, the employee must show that his protected whistle-blowing activities were only a “**contributing factor**” to the unfavorable employment action alleged in the complaint. If the employee makes this showing, the employer may obtain dismissal of the complaint if it can demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of that alleged behavior.

There are not yet many court decisions analyzing the respective burdens of proof under Sarbanes-Oxley. However, one federal court, noting such a void, looked to other federal statutes for guidance, including the Energy Reorganization Act, and determined that an employee alleging wrongful conduct under Sarbanes-Oxley must show by a preponderance of the evidence that: (1) she engaged in protected activity; (2) the employer knew of the protected activity; (3) she suffered an unfavorable personnel decision; and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action. The court then held that an employer may avoid liability if it can demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected behavior. Collins v. Beazer Homes USA, Inc., 334 F.Supp. 2d 1365 (N.D. Ga. 2004). This is a different analytical framework than that applied to typical discrimination claims and appears to place a significant burden on employers once an employee is able to establish that her whistleblowing played a role in the ultimate decision at issue.

If the Secretary finds reasonable cause for a violation, she shall also issue a preliminary order providing relief to the employee, which may include reinstatement, back pay damages with interest, and compensation for any special damages (i.e. litigation costs, attorneys’ fees, and expert witness fees).

Not later than 30 days after notification of the Secretary's findings, whether or not a preliminary order has been issued, any party may file objections to the findings or preliminary order or both, and request a hearing on the record before an ALJ². If no objections are filed within this 30 day period, the preliminary order becomes a final order that is not subject to judicial review.

If a hearing proceeds, the Secretary must issue a final order within 120 days of the conclusion of the hearing, which should grant relief to the employee or deny the complaint.³

If a final order is issued after a hearing, any party may seek judicial review of the order by filing a Petition for Review with the appropriate United States Court of Appeals within 60 days after the date of issuance of the final order. The standard of judicial review of the final order is "substantial evidence on the record" to support the order.

3. Welch v. Cardinal Bankshares Corp. - Sarbanes-Oxley in Action

One highly publicized case involving a whistleblower claim under the Sarbanes-Oxley Act is Welch v. Cardinal Bankshares Corp., 2003-SOX-15 (ALJ Jan. 28, 2004). Welch, the CFO of Cardinal Bankshares, voiced his concerns to the bank CEO and the SEC about questionable transactions which he considered to be violations of financial regulations. The suspected violations included concerns about suspected insider trading, the bank's failure to comply with generally accepted accounting principles and the role played by the CEO and the bank's external auditors in these transactions. Following the passage of Sarbanes-Oxley, Welch continued to complain about the problems he saw, specifically relating his issues to the Act. In particular, Welch wrote memos to the bank's external auditors explaining how the problematic

² Such objections will not, however, stay reinstatement of an employee who has been awarded reinstatement in a preliminary order. The employee will then remain reinstated until a final disposition orders otherwise.

³ If at any time prior to issuance of a final order, the parties settle the matter, the Secretary must approve, and be a party to, any settlement.

transactions affected the bank's SEC filings, and why he could not therefore sign the CFO certification for the filings as required by Sarbanes-Oxley.

Cardinal terminated Welch six weeks after Sarbanes-Oxley became effective due to what it termed to be Welch's alleged insubordination. The insubordination stemmed from Welch's refusal to participate in an investigatory meeting with the bank's external auditor and attorneys without the opportunity to consult with or have his own attorney present. Cardinal refused this request based on the argument that the presence of an outside party during the investigation would destroy the attorney-client privilege.

Welch subsequently filed an administrative complaint with the Department of Labor alleging he was terminated in violation of Sarbanes-Oxley for reporting suspected violations. The ALJ found that despite Cardinal's contention it terminated Welch for refusing to participate in the investigation of his complaints without the presence of his attorney, Welch's complaints about the problematic transactions were at least a **contributing factor** to his termination, which constituted a violation of Sarbanes-Oxley.

In examining Welch's whistleblower claim, the ALJ reviewed caselaw interpreting other whistleblower statutes and held a complainant in a Sarbanes-Oxley whistleblowing case must prove: (1) he/she engaged in protected activity as defined by the Act; (2) his/her employer was aware of the protected activity; (3) he/she suffered an adverse employment action; and (4) the protected activity was likely a contributing factor to the adverse employment action. The ALJ noted that under the Act, an employee **must only have a reasonable belief** there has been a violation of one of the laws and regulations enumerated by Sarbanes-Oxley.

In finding the insubordination explanation to be pretextual, the ALJ noted Cardinal's reason for the exclusion of Welch's attorney from the investigatory meeting, namely, preservation of the attorney-client privilege, was unfounded. The ALJ reasoned Cardinal could have no expectation of confidentiality as the meeting was intended to obtain information from Welch about the problematic transactions, not to discuss information of which Welch was not already aware. Furthermore, as an officer of Cardinal, Welch had a fiduciary duty to maintain the confidentiality of any proprietary information. Significantly, the information to be discussed at the investigatory meeting was precisely the type of information which must be disclosed to the federal government or the corporation's management under Sarbanes-Oxley. The ALJ also noted Welch could waive Cardinal's confidentiality as he was an officer of the company.

The ALJ awarded Welch reinstatement, ordered his personnel file to be purged of all references to his having engaged in protected activity and the discipline resulting therefrom, and awarded him backpay with interest, and fees.

Cardinal fought vigorously to prevent the ALJ's decision from taking effect, first by filing appeals with the Administrative Review Board, and then a federal appeals court. Both held that the matter was not yet ripe for appeal. Cardinal then filed an opposition to Welch's motion for damages with the ALJ. Cardinal argued that it was inappropriate to order Welch's reinstatement because: (1) subsequent to Welch's discharge, the Company learned of mistakes Welch committed for which it would have fired him had they been known; (2) the Company's shareholders purportedly supported Welch's termination; (3) a high level of enmity and distrust had developed between Welch and Cardinal, making reinstatement unworkable; and (4) reinstating Welch would require Cardinal to displace the person who was hired to replace him, resulting in an unfair outcome to a person unrelated to the case. The ALJ summarily rejected all

of these arguments and held, in sum, that Sarbanes-Oxley is designed to make individuals who are retaliated against whole and that reinstatement would best achieve this result in this case. Cardinal also opposed Welch's claims for additional damages, including lost wages and attorney's fees. Ultimately, the ALJ awarded Welch nearly all of the damages he sought, and in addition to reinstatement, ordered Cardinal to pay Welch nearly \$64,000 in damages and Welch's attorneys \$108,000 in fees.

B. More Traditional Whistleblower Claims – Common Law Public Policy and State Statutory Claims

While the whistleblower protection of Sarbanes-Oxley specifically applies to whistleblowers complaining of securities law-related violations such as accounting irregularities and fraud upon shareholders, other whistleblowers are protected by more traditional common law and statutory protections.

1. At-Will Employment Doctrine

New Jersey is an at-will employment state. Absent an express or implied contract, an employee is presumed to be "at-will" and can be fired for good reason, bad reason, or no reason at all, as long as such reason is not unlawful (i.e. discriminatory based upon a protected characteristic). Through the years, the at-will doctrine has been whittled away by statutory and case law. The New Jersey Law Against Discrimination ("LAD"), enacted in 1945, prohibits employers from discriminating against employees based upon, among other things, age, ancestry, color, creed, gender, handicap, marital status, national origin, nationality, race and sexual orientation. The LAD also prohibits sexual and other forms of harassment in the workplace as long as such harassment is based upon a protected characteristic. Notably, in its own incorporated whistleblower protection, the LAD prohibits reprisals against employees complaining of violations of, or asserting their rights under, the LAD.

2. **Pierce Claims and the Public Policy Violation Exception to At-Will Employment**

In 1980, the New Jersey Supreme Court created a public policy exception, to the at-will employment doctrine in the case of Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58 (1980). In Pierce, the Court created a cause of action for wrongful discharge when an employment termination was contrary to a clear mandate of public policy. The precise definition of a clear mandate of public policy still remains unclear, however courts generally look to the federal and state constitutions, statutes, administrative rules and decisions, judicial decisions, and professional codes of ethics to determine whether specific, corrupt, illegal, fraudulent, or harmful activity violates a clear mandate of public policy (although this is not an exhaustive list). Mehlman v. Mobil Oil Corp., 153 N.J. 163, 188 (1998); Pierce, 84 N.J. at 72. A salutary limiting principle is that the complained of conduct must pose a threat of public harm, not merely private harm or harm only to the aggrieved employee. Mehlman, 153 N.J. at 188.

Pierce has been interpreted to protect traditional whistle blowing - - reporting improper or illegal activities of supervisors to outside authorities. Potter v. Village Bank of New Jersey, 225 N.J. Super. 547 (App. Div.) cert. denied, 113 N.J. 352 (1988). However, internal complaints made by an employee within a company about the activities of co-workers and supervisors are not protected under Pierce. Young v. Schering Corp., 141 N.J. 16, 27 (1995); Beck v. Tribert, 312 N.J. Super. 335 (App. Div. 1998).

3. **The Conscientious Employee Protection Act (“CEPA”)**

In 1986, the New Jersey legislature enacted CEPA. CEPA has been described as one of the most far reaching whistleblower statutes in the nation. It is designed to encourage employees to report illegal or unethical workplace activities. Regan v. City of New Brunswick, 305 N.J. Super. 342 (App. Div. 1997). CEPA protects both external complaints to governmental

entities and internal complaints by employees who disclose, object to, or refuse to participate in certain activities of the employer that the employee “reasonably believes” violates a law, rule, regulation, or clear mandate of public policy. More particularly, CEPA prohibits an employer from taking retaliatory action against an employee because the employee does the following:

- a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer ... that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law.
- b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer . . .
- c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes: (1) is in violation of a law, or a rule or regulation promulgated pursuant to law. . . ; (2) is fraudulent or criminal; or (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

N.J.S.A. 34:19-3; McCullough v. City of Atlantic City, 137 F. Supp. 2d 557, 572-73 (D.N.J. 2001); Higgins v. Pascack Valley Hospital, 158 N.J. 404, 419 (1999); McLelland v. Moore, 343 N.J. Super. 589, 599-600 (App. Div. 2001) cert. denied, 171 N.J. 43 (2002). Retaliatory action has been defined broadly as “discharge, suspension, or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.” N.J.S.A. 34:19-2d.

Despite this broad definition, not all actions taken by an employer with respect to an employee constitute retaliatory action under CEPA. In a recent decision, the New Jersey Appellate Division, Klein v. University of Medicine and Dentistry of New Jersey, A-3070-03T2 (April 20, 2005), an anesthesiologist argued UMDNJ had violated CEPA by changing his duties

after he made complaints about cramped working spaces for performing anesthesiology services at the hospital. Plaintiff recommended several changes to the hospital administration and refused to work in the radiology department until the changes were implemented. As a result of his refusal to work in the radiology department, plaintiff was temporarily removed from clinical duties and assigned to review anesthesia records. When the hospital restored plaintiff's clinical privileges four days later, it required plaintiff to be supervised by another member of the anesthesiology staff. The Appellate Division found that the minor sanctions imposed on plaintiff, absent evidence of adverse consequences as a result, were insufficient to constitute retaliatory action under CEPA. The court commented that while the plaintiff found the sanctions to be demeaning, they did not meet the statutory definition of retaliation under CEPA "merely because they result[ed] in a bruised ego or injured pride on the part of the employee."

Unlike Sarbanes-Oxley, which focuses on whistleblowers in the narrow realm of accounting irregularities and alleged violations of SEC rules and regulations, CEPA offers protection to a wide range of whistleblowers concerning allegations of financial and non-financial related wrongdoing. For example, in Hernandez v. Montville Twshp. Bd. of Educ., 354 N.J. Super. 467 (App. Div. 2002), a school custodian complained to his school district that toilets were clogged and overflowing at elementary schools in violation of health codes. He was soon thereafter fired for poor performance. His complaints concerning overflowing toilets were deemed sufficient to warrant whistleblower protection under CEPA because they involved conduct which the custodian reasonably believed violated a health code.

In Higgins v. Pascack Valley Hospital, 158 N.J. 404 (1999), an employee nurse complained that two paramedics filed incorrect forms after treating patients, and that one of the paramedics had stolen medication from a patient. Soon thereafter, several nurses and paramedics

asked not to be scheduled with the complaining employee nurse, and she was transferred to a *per diem* position in the hospital's Emergency Room for one day, and then to another position typically held by a trainee or observer. When the employee was finally transferred back to her original position, she claimed her hours were reduced and she "was working far less" than before. Her complaints were similarly deemed sufficient to warrant whistleblower protection under CEPA, even though they concerned conduct of co-employees and not of the employer itself.

The protections offered by CEPA are not, however, without limits. In the Klein decision, the Appellate Division noted that CEPA is not intended to shield a constant complainer who simply disagrees with the manner in which the employer operates its business, as long as the operation of the business is in accordance with lawful and ethical mandates. The plaintiff in Klein had complained on numerous occasions about the working conditions for anesthesiologists in the radiology department. Plaintiff alleged these conditions violated the long-established public policy in New Jersey favoring adequate health care. In affirming the dismissal of plaintiff's CEPA complaint, the Appellate Division held that "merely couching complaints in terms of a broad-brush allegation of a threat to patients' safety is insufficient to establish the first prong of a CEPA claim [that the plaintiff had a reasonable belief the employer's conduct was violating a law, rule, regulation or public policy]."

4. Other New Jersey Statutes with Whistleblower Protection

CEPA is the most used and broadest whistleblower statute in New Jersey, but other protections do exist. Like the LAD, many statutes contain whistleblower protection for individuals, including employees, who assert rights under those particular laws. Examples of such statutes include, but are not limited to, the Civil Service Act, the Casino Control Act, the

Conscience Law (providing protection to those doctors who refuse to perform abortions), the Worker Health and Safety Act, the Workers' Compensation Law, and the Family Leave Act.

C. Practical Difficulties Concerning Whistleblowers

1. Whistleblowers Do Not Have To Be Correct That The Complained-Of Activity Is Actually Illegal

One of the most widely misunderstood aspects of whistleblower laws in general is that a whistleblower generally does not have to be correct that the complained-of activity is actually illegal or a violation. The complaining employee need only have a "reasonable belief" that the complained-of activity is illegal or a violation. In such instances, an employee may erroneously accuse her employer of wrongdoing but still be entitled to whistleblower protection and damages if she can show she was retaliated against by her employer. The complaining employee need only identify a law, rule, regulation or policy violated if the facts as alleged are true, and show her beliefs were objectively reasonable. Mehlman, 153 N.J. at 193; McLelland v. Moore, 343 N.J. Super. at 599-600.

In addition, although the stated goal of Sarbanes-Oxley is to protect the investing public, at least one ALJ has held that a whistleblower who complains about an issue affecting a relatively modest amount of the overall revenue of her employer is still entitled to whistleblower protection. In Heinrich v. Ecolab, Inc., 2004-SOX-51 (ALJ Nov. 23, 2004), the Complainant raised an issue affecting approximately \$300,000 in inventory. The employer argued that because its overall revenue was \$4 to \$4.5 billion annually and because its minimum trigger for outside auditing was \$20 million, the complaint at issue was immaterial to the Company's overall accounting practices, and could not affect the investing public. The ALJ rejected this argument, holding that complainants need not satisfy a "materiality requirement" to qualify for whistleblower protection, but need only show that they have a reasonable belief that a law had

been violated and plead specific incidents and material facts that give rise to the alleged violation.

2. Investigating Supervisors And High-Level Officers

Often, the individual investigating a whistleblower complaint of misconduct will be investigating an accused who is not their supervisor. Sometimes, however, an accused is a high-level officer, or even the CEO of the company. In such instances, any employee designated to investigate the alleged wrongful conduct of the accused may necessarily be in the uncomfortable position of investigating his or her supervisor, possibly casting doubt on the effectiveness and impartiality of the investigation. In such situations, a subordinate should not investigate his superior. An outside third-party, such as an accounting firm in instances of alleged accounting fraud or irregularities, should be retained to conduct the investigation of the high-level officer. A lawyer or law firm, experienced in conducting similar workplace investigations, is also a possible option for investigation the allegations, with the caveat that such lawyer or law firm then likely becomes a fact witness in the event of subsequent litigation, and will likely be unable to serve as litigation counsel in any subsequent litigation. As such, a company which seeks to use one law firm for potential litigation, should use another firm for the investigation. Another caveat to using a lawyer for the investigation is that the findings may not be protected by the attorney-client privilege.

3. All Complaints Must Be Investigated

As discussed above, section 301 of Sarbanes-Oxley mandates the establishment of procedures for the receipt, retention, and treatment of complaints received by a reporting company regarding accounting, internal auditing controls, or auditing matters, and for the

confidential, anonymous submission by employees regarding questionable accounting or auditing matters.

We strongly recommend that all employee complaints, whether concerning accounting fraud, sexual harassment, or other alleged wrongdoing, be fully investigated. However, it is imperative that complaints arising under Sarbanes-Oxley be particularly investigated, as the implications of Sarbanes-Oxley extend well beyond whistleblower protection. Companies covered by Sarbanes-Oxley are subject to government investigations and criminal penalties for securities law violations separate and apart from any related whistleblower claim by an employee. As such, even if a complaint by a whistleblower is settled or resolved early, a complete investigation must still be conducted to ensure that the various reporting and internal control requirements of Sarbanes-Oxley are fully complied with.

III. EFFECTIVE IMPLEMENTATION AND COMMUNICATION OF WORKPLACE STANDARDS

One of the best ways for employers to prepare for, and hopefully reduce, potential employee lawsuits of almost any kind, including by whistleblowers, is to create corporate responsibility standards and effectively communicate those standards to employees of all levels. Additionally, a corporate compliance program should be developed and effectively implemented to ensure that the standards are met by all employees. Many employers have become increasingly proactive with regard to enacting and effectively implementing successful anti-harassment/anti-discrimination policies. The success of these policies lays the groundwork for establishing a corporate culture that is receptive and responsive to individuals who may be blowing the whistle on the actions of the employer.

As important as the policies themselves, it is important to develop procedures for receiving and responding to employee complaints. Under Sarbanes-Oxley, in particular, the

company's audit committee must establish procedures for receiving and responding to complaints regarding accounting, internal accounting control and audit matters. These procedures must be designed to encourage employees to come forward, to protect against retaliation, to allow for the lodging of anonymous complaints, to provide for prompt investigation, and to facilitate appropriate remedial action. The policies must also clearly indicate the audit committee is responsible for handling and responding to complaints regarding accounting and audit matters. The company must designate other management personnel responsible for handling and responding to complaints regarding other ethical standards. For example, complaints of discrimination should be directed to and investigated by the company's human resources department.

We recommend that every company have written policies and procedures which include, at a minimum, a mission statement, acceptable standards of conduct, a code of ethics, and a corporate compliance program. The goal is to create an ethical corporate environment which fosters compliance with all applicable laws and corporate standards of conduct. Below are suggestions for creating and implementing a compliance policy, as well as investigating and responding to complaints filed by purported whistleblowers. The below suggestions should be used only as a general outline for more specific, tailored policies and procedures.

A. Compliance Tips

1. Create Detailed Policies

- Examples of the types of activities that are prohibited (such as fraud and misrepresentation in financial records, or harassing e-mails, messages, lewd photographs and calendars, suggestive objects, crude jokes, unwanted touching, sexual graffiti, etc.), as well as the activities that are required (such as accurate reporting of financial matters, certifications, and internal controls mandated by Sarbanes-Oxley, and respectful, professional conduct toward all employees).
- These policies should describe the consequences employees will face for violating the policies. In drafting these policies, it is important to be specific with respect to the conduct to be prohibited and the consequences for engaging in such behavior. For example, a typical policy involving Internet and e-mail usage may prohibit employees from using company Internet and e-mail for personal purposes, with the discipline for violations being anything “up to and including termination.” However, such a policy could lead to problems if different discipline (or no discipline at all) is given to an employee who uses his or her work e-mail account to send baby pictures as opposed to the discipline given to an employee who downloads pornographic pictures. The difference in the disciplines imposed could be used as a basis for the downloader to argue he or she was the victim of discrimination since others who used the Internet or email for personal reasons were not disciplined, or were disciplined less severely.
- Language encouraging employees to report concerns regarding any violations or suspected violations in accordance with the procedures set forth in the policy, as well as language requiring management employees to report violations and suspected violations.

- A reporting procedure that is easy to use and that identifies the individuals by title who should receive such reports of suspected wrongdoing. The individuals designated to receive the reports must be management level and trained to ask appropriate questions and gather all information necessary to conduct a thorough investigation. The complaining employee should always have an option to complain to someone outside of his or her chain of command.
- Language assuring that investigations of Sarbanes-Oxley complaints will be undertaken by the audit committee, independent of company management.
- Alternative or multiple means of reporting complaints (Sarbanes-Oxley requires anonymous method, such as by telephone, e-mail, regular mail or a 24-hour telephone hotline). (Note: Employers may want to consider using an outside hotline for reporting purposes. There are many vendors of such services, and while this method may resolve the question of how to maintain anonymity, companies must research the options. It is advisable to obtain references that the firm is reputable, independent, and careful to document and forward all calls to the correct location and individuals, while maintaining confidentiality. The service, however, only receives the call, it does not investigate the complaint).
- Language assuring that all complaints will be taken seriously and investigated promptly and that corrective action will be taken where appropriate.

- Language assuring that, in those cases where a report is not made anonymously, the report will be kept confidential to the extent possible and in accordance with the law, but further advising that strict confidentiality cannot be guaranteed to the extent disclosure is required to conduct the investigation and to take corrective action.
- Language assuring that the company will not retaliate against an employee who makes a report or who assists in an investigation or claim regarding alleged violations. Reiterate that retaliation against an employee will not be tolerated by the company and that this includes retaliation by management, other employees, agents, contractors, or subcontractors of the company.
- The policy language should be unambiguous, and easily understandable by every employee.

2. Actively Disseminate the Policy

- The policy should ideally be a separate stand alone policy and be afforded its own chapter in every Employee Manual provided to every current and new employee.
- Employee receipt and understanding of the policy should be documented in writing and maintained by the Employer.
- The policy should be redistributed and reviewed at mandatory periodic training sessions (at least annually and more often if possible), where an attendance sheet should be signed by each attendee. The policy itself should be reviewed at these training sessions, as should what conduct is required and prohibited, and what behavior is appropriate and inappropriate.
- The policy should be prominently posted (preferably on a poster-size display) at high-traffic areas of the workplace (e.g., near a copy machine, in the kitchen, near the water cooler, etc.).

3. Enforce the Policy – Conducting Investigations

- Increasingly, Courts are requiring that, in order for anti-harassment or other compliance policies to be effective, the manner in which the Employer enacted and enforced the policies is vital.
- As indicated above, all employees should be trained to understand and recognize what activities are required and prohibited, and what behavior is appropriate and inappropriate, and how to handle complaints. With regard to alleged whistleblowing, company managers may need additional training to be able to identify complaints that may implicate Sarbanes-Oxley or other similar statutes and know who to route those issues to. Each offender must be informed immediately that such conduct is not appropriate or acceptable in the workplace.
- If inappropriate conduct is observed, corrective action should be applied even if no complaints have been received. The key is to stop the improper conduct before it becomes pervasive.
- Upon receipt of a complaint, it is imperative to conduct a prompt, impartial, fact-gathering investigation. Ask the complaining employee to put his complaint in writing and identify any and all individuals with relevant knowledge.
- Determine if interim action is necessary while the investigation is ongoing.
- No guarantee of confidentiality should be made.
- The investigator must not be a subordinate of the alleged harasser. The employer's attorney may be a poor choice for an investigator because such investigation may be ruled outside the scope of the attorney-client privilege, and the attorney may be called as a witness and disqualified as counsel. An employer may wish

to consider bringing in outside counsel or special counsel. If the complaint involves accounting or auditing practices, special counsel and/or expert consultants to the audit committee may be appropriate. However, as stated above, with regard to alleged whistleblowing, companies should be mindful that even if a complaint is not substantiated, legal protections are still available to the individual(s) who raised it.

- Document, in writing, any failure of the complainant to cooperate in the investigation.
- The investigation notes should summarize facts, and avoid editorializing and/or legal conclusions (e.g. “supervisor dropped the ball,” “manager engaged in fraud”).
- Once the investigation is completed, a conclusion must be made on the basis of the party statements, witness testimony, and physical evidence. Consideration should be given to whether the facts gathered are based on first-hand knowledge or hearsay, and whether there is any documentary evidence of the wrongdoing. If the evidence is inconclusive, the employer should document the reasons for its determination, and monitor the situation. If the employer concludes improper conduct occurred, immediate and appropriate corrective action must be taken to stop the improper conduct, correct the adverse effect on the complainant, and ensure similar improper conduct does not occur again. The corrective action should not adversely affect the complainant.
- Be careful that the severity of the corrective action fits the wrongful conduct. Overly punitive corrective action may subject the employer to a wrongful discharge or defamation claim by the alleged offender.

- Upon conclusion of any investigation, a thorough but concise report, setting forth the reasons for the determination, should be drafted and maintained.
- After the investigation is concluded, monitor the situation.

4. Other Precautions

- When hiring prospective employees, advise each new employee of the company's compliance policies, and provide an employee manual which sets forth the policies.
- Obtain each employee's signature that he or she has fully read and understood the policies.
- Screen each prospective employee to determine if he or she has a record of engaging in improper conduct. When contacting each of the applicant's former employers, obtain and record the name and title of the individual providing the information on behalf of the former employer.
- Keep a record of all complaints and investigations of wrongdoing. Such records can be used not only in establishing that the company has taken adequate preventive measures, but also to identify patterns of problem areas within the company which need to be addressed.
- At performance evaluations and exit interviews, ask employees about any improper conduct they may have suffered or witnessed.
- Analyze all employment decisions taken as a result of investigations of complaints to ensure the decisions are based on legitimate reasons.
- Be cognizant of potential retaliation claims. If an adverse employment decision is made against an employee shortly after the employee complains of alleged improper conduct, the

timing of these two events (complaint, adverse action) may, in and of itself, be sufficient evidence to show that the events were causally linked. See e.g. Collins v. Beazer Homer USA, Inc., 334 F.Supp. 2d 1365 (N.D. Ga. 2004). Therefore, before adverse action is taken against an employee who has complained of alleged improper conduct, it should be carefully reviewed.

B. Compliance Policies Have Practical Legal Effects Even If Not Required

As indicated above, it is essential that companies covered by Sarbanes-Oxley effectively establish procedures for the receipt, retention, and treatment of complaints received regarding accounting, internal auditing controls, or auditing matters, as a complete investigation must be conducted to ensure that the various reporting and internal control requirements of Sarbanes-Oxley are fully complied with. However, even where companies are not covered by Sarbanes-Oxley, we strongly recommend that companies nevertheless set standards, or codes of ethics, and then ensure those standards or codes are enforced through effective policies, as they nevertheless have practical legal effects.

IV. CONCLUSION

The creation, implementation, enforcement and monitoring of standards for corporate responsibilities through policies and compliance procedures is essential to any employer in minimizing risk. Every company should have a written code of conduct which reflects its ethics and values and is distributed to all employees. Management must demonstrate its commitment to this code by its actions from the top down. Companies must listen to employees and take their concerns, complaints, and comments seriously, and not leave an employee thinking that his or her concerns were ignored.

With respect to Sarbanes-Oxley compliance, companies must establish regular internal auditing procedures to detect fraud early. All employees should be educated that the company has a zero-tolerance policy for fraud as well as other violations of the law. Companies need to engage in on-going communication with employees about what is and is not acceptable and how to report inappropriate conduct.

Sarbanes-Oxley compliance and other company policies can provide the catalyst to create a corporate culture that encourages early internal reporting, prompt and thorough investigation, and constructive resolution of employee complaints, whether related to fraud or other inappropriate conduct. By developing such policies, identifying inappropriate conduct in its early stages, and taking prompt corrective action, employers can take a major step towards protecting themselves from the multimillion-dollar verdicts which are now commonplace in whistleblower and other employment lawsuits.