The Basics: Sarbanes-Oxley and Dodd-Frank Whistleblower Law[1]

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	Sarbanes-Oxley (a/k/a SOX or Sarbox)	**Dodd-Frank**
What's the whistleblower protection law?	The Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A	The Dodd-Frank Wall Street and Consumer Protection Act, 15 U.S.C. § 78u-6 *et seq.*
When was the law passed?	Sarbanes-Oxley was signed into law on July 30, 2002. Pub. L. 107-204	Dodd-Frank was signed into law on July 21, 2010. Pub. L. 111-203
Who qualifies as a whistleblower under the law, and who can sue and be sued under it?	Sarbanes-Oxley prohibits any public company, or "any officer, employee, contractor, subcontractor, or agent of such company," from retaliating against "an employee." 18 U.S.C. § 1514A(a). A public company under Sarbanes-Oxley includes any company with securities registered under section 12 of the Securities Exchange Act of 1934 (the "SEA"), or that is required to file reports under section 15(d) of the SEA, "including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company," or "nationally recognized statistical rating organization (as defined in section 3(a) of the	Dodd-Frank added whistleblower provisions to federal securities and commodities trading law. The securities provision defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the [Securities & Exchange] Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6(a)(6). The commodities provision includes a similar definition for whistleblowers who report misconduct to the Commodity Futures Trading Commission. *See* 7 U.S.C. § 26(a)(7). In the securities context, Dodd-Frank prohibits retaliation against a "whistleblower . . . because of any

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	SEA)." 18 U.S.C. § 1514A(a). A "person" who alleges retaliation "by any person" in violation of § 1514A(a) "may seek relief" by enforcement action. 18 U.S.C. § 1514A(a). At minimum, Sarbanes-Oxley allows employees of public companies to sue their employers for retaliation. Whether Sarbanes-Oxley permits claims by employees of private companies against their employers is in dispute. On November 12, 2013, the Supreme Court is set to hear argument in *Lawson v. FMR LLC*, in which a Fidelity-affiliated privately-held company argues that it cannot be sued for retaliation under Sarbanes-Oxley by one of its employees. The Fidelity affiliate contends that the term "employee" in Section 1514A(a) refers only to employees of public companies.	lawful act done by the whistleblower" in providing information to the SEC, initiating, testifying in, or assisting in related investigations or actions, or in making disclosures required or protected by Sarbanes-Oxley, the Securities Exchange Act of 1934, or other laws, rules, or regulations subject to SEC jurisdiction. 15 U.S.C. § 78u-6(h)(1)(A). Federal courts are divided as to whether a "whistleblower" under this provision can be someone who makes otherwise protected disclosures but *does not* provide information to the SEC about violations of the securities laws. *See, e.g.*, *Asadi v. GE Energy (USA), L.L.C.* (5th Cir. 2013) (holding that "whistleblower" must provide information to SEC in order to be protected, but citing other authority to contrary). Auditors, attorneys, and other specialized employees or contractors can qualify as whistleblowers in certain circumstances.
What whistleblowing activity is protected from retaliation?	Section 1514A(a), as set forth above, describes the whistleblowing conduct that SOX protects. However, there is significant debate about the scope and meaning of the language. Generally speaking, everyone appears to agree that SOX prohibits retaliation against an employee for disclosures related to fraud against shareholders. Beyond that, some federal courts and the Department of Labor's Administrative Review	Dodd-Frank's securities whistleblower provision protects against retaliation for the following conduct: providing information to the SEC, helping out with related investigations or actions, and/or making disclosures that are required or protected by Sarbanes-Oxley, the Securities Exchange Act, or other laws, regulations, or rules subject to SEC jurisdiction. *See* 15 U.S.C. § 78u-6(h)(1)(A). According to the Fifth Circuit in *Asadi v. GE Energy (USA), L.L.C.* (5th Cir. 2013), a whistleblower will be

	Board (ARB) have ruled that SOX also protects an employee against retaliation for disclosing information related to other violations of federal criminal laws listed in the statute (such as mail fraud or wire fraud), or information related to violations of SEC rules or regulations, even if the violations disclosed by the employee don't involve fraud against shareholders. *See, e.g.* *Lockheed Martin Corp. v. ARB* (10th Cir. 2013); *Sylvester v. Parexel Int'l, LLC* (DOL ARB 2011); *Reyna v. ConAgra Foods* (M.D. Ga. 2007). Prior to the *Sylvester* decision, some administrative law judges in the Department of Labor disagreed and required reporting to relate to shareholder fraud. *See* *Wengender v. Robert Half Int'l* (DOL ALJ 2006). According to Section 1514A(a)(1), an employee must "reasonably believe[]" that conduct is a violation in order to engage in protected whistleblowing conduct. Courts have held that an employee's reasonable belief must be "scrutinized under a subjective and objective standard." *See, e.g.*, *Allen v. ARB* (5th Cir. 2008). Further, other courts have imposed a pleading standard that requires an employee to show that reporting conduct "definitively and specifically" related to violations of law in order to successfully allege a Sarbanes-Oxley claim. *See, e.g.*, *Day v. Staples* (1st Cir. 2009). However, the Third Circuit recently rejected that view. *Wiest v. Lynch* (3d Cir. 2013).	protected from retaliation for this type of conduct so long as he or she had also reported information to the SEC, even if the employer did not retaliate against that employee because the employee reported to the SEC. Another federal court has held that an employee can bring a Dodd-Frank retaliation claim so long as he "reasonably believed" that there was a "possible" violation of the securities law, and reported that information to his supervisors or the SEC, even if the SEC didn't approve of the manner in which the information was conveyed (which can disqualify an employee from receiving a bounty award, as discussed below). *Kramer v. Trans-Lux Corp.* (D. Conn. 2012). The commodities whistleblower provision only protects against retaliation for disclosing information to the CFTC or assisting in investigations or actions related to that information. *See* 7 U.S.C. § 26(h)(1)(A).

What constitutes retaliation?	To "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" lawful whistleblowing conduct as defined in the statute. 18 U.S.C. § 1514A(a).	To "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment" because of lawful whistleblowing conduct as defined in the statute. 15 USC § 78u–6(h)(1)(A); 7 U.S.C. § 26(h)(1)(A).
What are a whistleblower's remedies in an enforcement action?	An employee who prevails in a Sarbanes-Oxley enforcement action "shall be entitled to all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c). This relief "shall include": • reinstatement with the same seniority status that the employee would have had, but for the discrimination; • the amount of back pay, with interest; • and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.	Under Dodd-Frank's securities provision, relief for an individual who prevails in an enforcement action "shall include": • reinstatement with the same seniority status that the individual would have had, but for the discrimination; • 2 times the amount of back pay otherwise owed to the individual, with interest; and • compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. 15 USC § 78u–6(h)(1)(C). The commodities provision includes the same remedies but only allows for a recovery of back pay, without doubling but with interest. 7 U.S.C. § 26(h)(1)(C).
How long does a whistleblower have to pursue a claim?	An action under Sarbanes-Oxley "shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation." 18 U.S.C. § 1514A(b)(2)(D). The statute of limitations for Sarbanes-Oxley claims was previously 90 days, before Dodd-Frank	A securities whistleblower action "may not be brought" more than 6 years after the retaliation occurred or more than 3 years after facts material to the right of action were "known or reasonably should have been known by the employee" alleging the retaliation. Further, in no event can a claim be brought "more than 10 years after the date on which the violation occurs." 15 U.S.C. §

	amended it.	78u–6(h)(1)(B)(iii). Under the commodities whistleblower provision, claims must be brought within 2 years of the date of the violation that the whistleblower reported. 7 U.S.C. § 26(h)(1)(B)(iii).
Where does a whistleblower have to file a retaliation claim?	Under Sarbanes-Oxley, an employee who alleges retaliation must first file his or her claim with the Secretary of Labor. 18 U.S.C. § 1514A(b)(1). If the Secretary "has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant," the claimant may then bring a claim "for de novo review in the appropriate district court of the United States." *Id.* Before the claimant may seek this review, however, he or she must give 15 days' notice to the Department of Labor. *See* 29 C.F.R. § 1980.114(b).	Dodd-Frank does not require employee to go to Department of Labor first. Instead, an enforcement action may be brought "in the appropriate district court of the United States." 15 U.S.C. § 78u–6(h)(1)(B)(i); 7 U.S.C. § 26(h)(1)(B)(i). However, a whistleblower in a commodities case who is an employee of the federal government shall only bring an action before the Merit Systems Protection Board. 7 U.S.C. § 26(h)(1)(B)(i).
Can a whistleblower earn compensation (also called a bounty) for blowing the whistle to the government?	No.	Yes. *See* 15 U.S.C. § 78u–6(b) (allowing awards of 10-30% of government recovery to "whistleblowers" who "voluntarily provided original information to the [SEC] that led to . . . successful enforcement" action resulting in monetary sanctions that are more than $1,000,000); 7 U.S.C. § 26(c) (same for CFTC). Internal reporting can be a plus under SEC regulations, but is not required before submitting a report directly to the SEC. To qualify for an award, a whistleblower must provide information to the SEC through the proper channels, either online or by filling out and faxing or mailing a

		"Form TCR." *See* http://www.sec.gov/about/offices/owb/owb-tips.shtml. Once the SEC has posted a "Notice of Covered Action," stating that a final judgment has resulted in a monetary sanction, individuals have 90 calendar days to apply for an award by submitting a completed Form WB-APP to the Office of the Whistleblower by midnight on the claim due date listed for that action. *See* http://www.sec.gov/about/offices/owb/owb-awards.shtml. To date, the SEC has awarded six bounties, including one $14 million award.