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Richard E. Moberly

University of Nebraska, rmoberly2@unl.edu

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SOX and Whistleblowing: The Concerns

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Richard Moberly (University of Nebraska)

Yesterday, I reviewed the Whistleblowing provisions in SOX. Whether these provisions actually will reduce corporate fraud remains to be seen. Despite the Act's strong anti-retaliation protections, during the first three years of SOX few whistleblowers actually won retaliation claims. In a recent study I completed of whistleblower claims (a draft can be found [here](#)), only 3.6% of employees won relief through the initial administrative process that adjudicates SOX claims, and only 6.5% of whistleblowers won appeals through the process.

The study's results demonstrate that employees rarely won because administrative decision-makers strictly interpreted the Act's legal boundaries and tended to misapply the Act's employee-friendly burden of proof. As for the criminal penalties, they appear under-utilized: no one has been publicly investigated or prosecuted under this provision. Even the whistleblower hotline may not be effective because there is little regulatory control or monitoring of the structure and use of a company's disclosure channel.

In short, SOX provides a better approach to encouraging whistleblowers than existed prior to 2002; however, without administrative support and company buy-in for SOX's whistleblower protections, these improvements may not be enough to permit employees to achieve their potential as effective corporate monitors.

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