

Corporate & Financial Weekly Digest

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Department of Labor Panel Adopts Liberal Pleading Standard for SOX Whistleblower Cases

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The U.S. Department of Labor's Administrative Review Board (ARB) adopted a liberal pleading standard for whistleblower retaliation cases under the Sarbanes-Oxley Act (SOX).

Two former employees of Parexel International LLC filed whistleblower complaints alleging that Parexel terminated their employment in violation of SOX's anti-retaliation provisions. Both former employees had complained to their superiors after discovering that other company employees were falsifying drug-testing data in violation of Food and Drug Administration rules. Parexel allegedly failed to investigate the falsification, and over the next several months both complainants were allegedly subjected to various forms of retaliation and finally terminated.

The lawsuits were first dismissed by the Occupational Safety and Health Administration, a determination that was affirmed by an Administrative Law Judge (ALJ). The ALJ dismissed the retaliation claims for lack of subject matter jurisdiction. In reaching that conclusion, the ALJ determined that the former employees' complaints: (1) did not relate "definitively and specifically" to a violation of any laws covered by the whistleblower provisions of SOX Section 806; (2) did not involve an actual violation by Parexel of any of the laws enumerated in SOX Section 806; and (3) did not plead the elements of either a securities fraud claim or common law fraud claim.

The ARB reversed the ALJ's dismissal order on the ground that subject matter jurisdiction "clearly existed." The ARB held that the burden of establishing subject matter jurisdiction in a SOX retaliation case was "not particularly onerous" and that claimants met the jurisdiction test simply by filing a complaint that alleged that Parexel terminated their employment in retaliation for reporting on potentially fraudulent misconduct.

The ARB proceeded to examine and reject the ALJ's substantive determination that the allegations of the consolidated complaints failed to demonstrate that the former employees engaged in SOX-protected whistleblower activity. The ARB first determined that the stricter pleadings standards governing ordinary federal complaints do not apply to SOX retaliation cases. The ARB emphasized that motions to dismiss SOX complaints on insufficient pleading grounds should only be granted as "a last resort."

The ARB further concluded that SOX complainants need only allege a "reasonable belief" that the complained of conduct constituted mail fraud, wire fraud, bank fraud, securities fraud, or violated any federal law relating to fraud against stockholders. A whistleblower need not allege that one of the applicable laws was violated; he or she will be protected for reporting a violation "about to be committed" as long as he or she "reasonably believes that the violation is likely to happen." Moreover, the ARB rejected the ALJ's requirement that claimants plead that the misconduct at issue "definitively and specifically" related to the statutes and rules covered by SOX.

The ARB also made clear that the misconduct need not be related to fraud against stockholders and that mail, wire or bank fraud not involving stockholders would be sufficient.

Finally, the ARB held that the complainant is not required to plead or establish each of the elements of a securities fraud claim. (*Sylvester v. Parexel Int'l LLC*, ARB No. 07-123, ALJ Nos 2007-SOX-39,042 (Dep't of Labor ARB May 25, 2011))

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