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Sarbanes-Oxley Whistleblower Coverage Expanded by Department of Labor to Private Firms Serving Publicly Traded Companies—Accountants, Lawyers, Consultants, and Advisors, Beware!

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By Frank C. Morris, Jr., and Allen B. Roberts

The U.S. Department of Labor ("DOL") Administrative Review Board ("ARB") has sounded an alarm that needs to be heard by accounting firms, law firms, and other consultants, advisors, and providers of services to publicly traded companies. With its recent decision in *Spinner v. David Landau & Associates, LLC*, ARB Case Nos. 10-111, 10-115 (May 31, 2012), the ARB continued its expansion of whistleblower protection, holding that Sarbanes-Oxley ("SOX") whistleblower protections extend to employees of privately held businesses that merely contract with publicly traded companies. The ARB's decision significantly expands the number and type of organizations whose employees it says are covered by SOX whistleblower protections. But the result was accomplished by direct rejection of the opposite conclusion reached by the U.S. Court of Appeals for the First Circuit in its well-reasoned recent decision in *Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012). While this is not the first instance of contrasting administrative and judicial interpretations of the definition and reach of SOX protections, it clearly indicates the current climate in which a wide swath of employers need to reassess their compliance programs, provisions for receipt of whistleblower reports, and procedures for addressing claims and avoiding retaliation.

This case is only the latest, albeit typical, example of the tension existing between ARB decisions issued since 2010 and the prior mainstream interpretation of SOX by administrative law judges ("ALJs"), a differently constituted ARB, and the courts. It highlights two issues unique to the statutory scheme of SOX and certain other whistleblower laws. First, there is dual jurisdiction of the DOL and federal courts to adjudicate cases. A case must commence in the DOL administrative forum (initiated by a complaint filed with the Occupational Safety and Health Administration ("OSHA")), but it may be placed in federal court after 180 days – if the *complainant* wishes. That means federal district courts share co-equal primary jurisdiction with an administrative agency for any cases that are taken out of administrative litigation into a federal court. Also, federal appellate courts have review authority over final administrative determinations by the ARB. Second, the ARB has upset and reinterpreted core elements on which SOX claims are predicated. It has shifted – and in many instances reversed – its own

course and precedent-following decisions of DOL ALJs, as new ARB members, serving at the will of the Secretary of Labor, have been installed to displace others.

With a standoff between federal district courts and the ARB percolating, employee and employer stakeholders are left to cope with the dilemma of which of the divergent views of district courts or the ARB will prevail after review by a Circuit Court of Appeals, or ultimately the Supreme Court of the United States.

Background of the Underlying Case

Complainant David Spinner, a certified public accountant, worked for Respondent David Landau & Associates ("DLA") as an internal auditor. DLA provides internal audit and other services, including SOX audit and compliance services, under contract to S.L. Green Realty Corp. ("S.L. Green"), a publicly traded company. About six months after the start of his employment, Spinner was assigned to perform full-time auditing services for S.L. Green, but, within a month, DLA removed him from the assignment and terminated his employment. Spinner filed a complaint with OSHA alleging that he was terminated because he reported alleged internal control and reconciliation problems at S.L. Green. In its investigative role, OSHA found that DLA was a covered entity under SOX Section 806 as a contractor of S.L. Green and that Spinner was a covered employee who had engaged in protected activity, but OSHA further concluded that DLA had demonstrated by clear and convincing evidence that it would have taken the same adverse action in the absence of the alleged protected activity. Spinner then filed objections to the OSHA findings, bringing the matter before an ALJ. DLA moved for summary decision on the ground, *inter alia*, that it was not a covered entity. The ALJ granted DLA's motion, concluding DLA was not a covered entity and thus that its employee, Spinner, was not a covered employee. (The ALJ therefore did not reach the basis for Spinner's termination.) Spinner appealed to the ARB, arguing that the ALJ erred and that he was covered as an employee of DLA because DLA was a contractor, subcontractor, or agent of S.L. Green.

The ARB'S Decision

The ARB reversed and remanded, concluding that the language of Section 806 extends protection to employees of privately held contractors or subcontractors of public companies. Section 806 bars companies with registered securities or Securities and Exchange Commission ("SEC") reporting obligations and "any officer, employee, contractor, subcontractor, or agent of such company" from retaliating against "an employee" who engages in specified protected activity of providing information, assisting an investigation, or participating in a proceeding concerning any conduct that the employee reasonably believes constitutes mail fraud, wire fraud, bank fraud, securities fraud, or a violation of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.

Citing three of its decisions, all issued during 2011, the ARB first noted that it had "repeatedly" held that coverage was not limited to employees of public companies,[1] but that, in light of the contrary holding in *Lawson,* it would explain its rationale in detail. The ARB interpreted Section 806's language to find that privately held contractors of a public company are covered entities. It then held that the term "employee," although undefined, is not limited to employees of a public company. In so doing, the ARB first found that the statute itself contains no such limitation. The ARB then applied various tools of statutory construction to support a broad reading of the term, arguing that this fit the definition of "employee" in the applicable regulations, 29. C.F.R. §1980.101, and that a narrow construction would lead to an implausible reading of the statute; that the statutory caption referring to "employees of publicly traded companies" was not determinative; that legislative history confirmed broad coverage, pointing in particular to concerns expressed that employees of Enron's accounting firm, Arthur Andersen, had not been protected from retaliation; that coverage of employees of privately held contactors was necessary to support the overall statutory framework; and that Section 806 followed the framework of analogous whistleblower statutes, such as the Energy Reorganization Act, the Pipeline Safety Improvement Act of 2002, and the Wendell H. Ford Aviation Investment and Reform Act, that protect employees of contractors of covered entities (but ignoring more explicit statutory language in those statutes). In so doing, the ARB's majority opinion, as well as a lengthy concurrence, took great pains to reject the recent decision in *Lawson*, where the First Circuit majority, after careful analysis, essentially found each of these factors to favor the opposite conclusion (although a dissent disagreed).

Significance of *Spinner*

Spinner continues the current ARB's trend of expansively reading whistleblower statutes, including recent decisions that: (a) extend SOX whistleblower protection beyond allegations of securities fraud, *see, Zinn v. American Commercial Lines, Inc.*, ARB No. 10-029 (March 28, 2012), and *Sylvester v. Parexel Int'l LLC*, ARB No. 07-123 (May 25, 2011); (b) hold protected activity under SOX does not require a showing of fraud against shareholders, *Brown v. Lockheed Martin Corp*., ARB No. 10-050 (Feb. 28, 2011); and (c) hold that protection under the Consumer Product Safety Improvement Act of 2008 extends beyond raising concerns about a "consumer product" to include raising concerns about any matter falling within the jurisdiction of the Consumer Product Safety Commission, *Saporito v. Publix Super Markets, Inc.,* ARB No. 10-073 (March 28, 2012); all of which we have discussed in recent postings on Epstein Becker Green's Whistleblowing & Compliance Law Blog.

What Employers Should Do Now

The ARB's express rejection of the *Lawson* decision means that complainants, especially those asserting whistleblower claims against their private employers, can be

[1] *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071 (Dec. 16, 2011); *Funke v. Federal Express Corp*., ARB No. 09-004 (July 8, 2011); and *Johnson v. Siemens Building Techs*., ARB No. 08-032 (Mar. 31, 2011).

expected to pursue their claims through the DOL's administrative process – rather than moving them to federal court – whenever coverage and/or the existence of protected activity may be unclear. However, as ARB decisions are subject to review by the federal appellate courts, employers must be prepared to preserve for an eventual appeal their arguments supporting a narrower view and rebutting the road map that *Spinner* provides to complainants to argue that *Lawson* should not be followed. As *Lawson* shows, the agenda of the ARB to stretch the interpretation of whistleblower statutory language may well be rejected by the courts.

Until the legal issue is finally resolved in federal appellate courts, however, all contractors, subcontractors, or agents who provide services to publicly traded companies must be alert to the ARB's new welcome to whistleblowers and take precautions to protect themselves from allegations of retaliation in violation of SOX's whistleblower protections. Such precautions include:

- promptly addressing any complaints that an employee might make of improper actions by publicly traded companies, including their non-publicly traded subsidiaries;

- properly documenting any adverse action taken against such an employee for performance or other reasons unrelated to any arguably protected activity;

- adopting certain best practices of publicly traded companies with which they contract, including making sure they have in place:

    - robust ethics, conduct, and compliance policies;

    - mechanisms for receiving and responding appropriately to employee reports of fraud or other improper actions; and

    - procedures for prompt investigation and resolution of claims of:

        - a compliance breach; and

        - any companion issue of adverse employment action alleged to be in reprisal for protected activity;

- assessing policies and procedures periodically to assure that they match current interpretations of the law and that their importance to organizational objectives is appreciated and respected throughout the workforce; and

- accompanying publication of policies with:

    - effective orientation and training; and

- periodic individual acknowledgments that these important policies and procedures are understood.

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