



## DOL Confirms SOX Inapplicable To Most Employee Complaints

Sarbanes-Oxley section 806 protects employees who complain of financial or other specific wrongdoing related to shareholder fraud, and/or mail, wire, or bank fraud. Until recently, the plaintiffs' bar has had some success in arguing that complaints about certain alleged employment law violations are protected activities under SOX. As reported in our [February 2006 Management Alert](#), a Department of Labor (DOL) administrative law judge suggested in *Smith v. Hewlett-Packard* that an internal complaint of class-wide race discrimination could be protected activity under SOX. This decision built on an earlier ruling that a complaint of significant wage payment violations under the Fair Labor Standards Act could likewise be SOX-protected. The theory in both cases was that such employment law violations could create significant monetary exposure and/or negative publicity, and thus ultimately affect shareholder value. Another theory asserted is that an employer's failure to properly document employees' immigration status constitutes "mail or wire fraud" because such records are sent through the mail or by "wire."

A recent decision by the DOL's Administrative Review Board (ARB) – the highest level of SOX whistleblower review within DOL – curtails this expansive view. In *Platone v. FLYi, Inc.*, ARB Case No. 04-154 (Sept. 29, 2006), the ARB reversed an ALJ who had awarded a former employee nearly \$175,000 under section 806.

Platone was discharged after having communicated with management about payments between the employer (then Atlantic Coast Airlines Holdings) and the Air Line Pilots Association (ALPA). Before the DOL, Platone claimed she had been fired for informing the employer of ALPA's failure to reimburse the company for time misspent on union-related business. Platone argued, and the ALJ agreed, that Platone's complaint was SOX-protected because the payment scheme alleged could have ultimately defrauded shareholders, would have constituted mail and wire fraud, and violated securities laws.

The ARB resoundingly rejected this expansive view, holding that SOX "does not provide whistleblower protection for all employee complaints about how a company spends its money and pays its bills." Further, "when allegations of mail or wire fraud arise under ... [section 806], the alleged fraudulent conduct must at least be of a type that would be adverse to investors' interests." The ARB also emphasized that at the time she complained to her employer, Platone did not claim that her complaints were based on securities fraud. Rather, this gloss had been added later, once Platone brought the matter to DOL. It is an employee's report to her employer at the time she complains – not theories manufactured later – which forms the basis for assessing whether the employee engaged in SOX-protected activity.

The ARB's decision in *Platone* provides significant support for dismissing SOX claims that are based on employment law issues, such as race discrimination or wage and hour complaints, which are not directly related to shareholder or securities fraud. The decision also serves as a reminder to document the specifics of an employee's internal complaint at the time it is first made. Confirming the significance of *Platone* for all publicly-traded companies, both the U.S. Chamber of Commerce and the Equal Employment Advisory Council participated in the case as *amicus curiae*.

*If you have any questions regarding SOX section 806, please contact the Seyfarth Shaw attorney with whom you work or any Labor & Employment attorney on our website, [www.seyfarth.com](http://www.seyfarth.com).*

This Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.) Copyright© 2006 Seyfarth Shaw LLP. All rights reserved.