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ARB Significantly Broadens Scope Of "Protected Activity" Under SOX Whistleblower Provisions

On May 25, 2011, the same day that the Securities and Exchange Commission issued its final rules implementing the bounty provisions in Section 21F of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the United States Department of Labor's (DOL) Administrative Review Board (ARB) issued an *en banc* decision significantly broadening the scope of what constitutes protected activity under the whistleblower protection provisions in Section 806 of the Sarbanes-Oxley Act of 2002 (SOX). *Sylvester v. Parexel International LLC* (ARB No. 07-123).

The complainants in Sylvester filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that their employer, Parexel International LLC, violated Section 806 of SOX by discharging them in retaliation for engaging in protected activity. On August 31, 2007, an Administrative Law Judge (ALJ) dismissed the claims on the grounds that they failed to establish subject matter jurisdiction. Sitting *en banc*, the ARB reversed the ALJ and made several important holdings in the process:

Pleading standards. The ARB held that the pleadings standards articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), do not apply to SOX whistleblower claims initiated with the Occupational Safety and Health Administration (OSHA), because *Twombly* and *Iqbal* "involve[d] cases in which the procedural requirements are not analogous to cases arising under" Section 806 of SOX. Query whether plaintiffs will seek to extend this ruling in the context of pleading standards when cases are filed in federal district court. Federal courts have applied *Twombly* and *Iqbal* to SOX whistleblower claims.

Communicating the alleged fraud. The ARB further defined SOX's "reasonable belief" standard, holding that it requires an examination of the reasonableness of a complainant's beliefs, but not whether the complainant actually communicated the reasonableness of those beliefs to management or other authorities. Thus, complainants can be expected to rely on *Sylvester,* arguing that they need not explain the basis for their complaints at the time they are made, so long as they can justify it later.

Actual vs. future/potential violation. The ARB held that a complainant need not describe an "actual" violation of one of the categories of law in Section 806 of SOX to be protected (*i.e.*, that an illegal act that had already taken place). Rather, a complaint concerning a violation of law that is about to be committed is protected, so long as the employee reasonably believes that it is likely to occur. This belief must be grounded in facts known to the employee, but the employee need not wait until the law has actually been violated to have engaged in protected activity.

"Definitively and specifically" relating to fraud. The ARB held that its prior ruling in *Platone v. FLYi, Inc*., Case No. ARB No. 04-154 (Sept. 29, 2006), that an employee's complaint must "definitively and specifically" relate to the categories of fraud or securities violations listed in Section 806 "has evolved into an inappropriate test and is often applied too strictly." The ARB thus focused on whether the employee reported conduct that he or she reasonably believes constituted a violation of one of the categories of law enumerated in Section 806.

"**Fraud on shareholders.**" The ARB held that protected conduct under SOX is not limited to disclosures about shareholder fraud, but also includes disclosures about mail fraud, wire fraud, radio fraud, television fraud, and bank fraud. Notably, numerous federal courts have rejected this view, and it remains to be seen whether federal courts will embrace the ARB's holding.

Criminal fraud standard. The ARB held that a SOX whistleblower complainant need not establish the elements of criminal fraud to prevail on a Section 806 claim. In particular, the ARB stated: "we do not impose a materiality requirement on the communication that the complainants contend is protected activity." But, the ARB did note that: "[t]his is not to say that a triviality element would never be relevant to a complainant's allegations of misconduct by his or her employer. It may well be that a complainant's complaint concerns such a trivial matter that he or she did not engage in protected activity under Section 806."

In sum, the ARB's decision in *Sylvester* is consistent with the liberal approach it has taken to interpreting the whistleblower provisions in Section 806 of SOX in recent months. But federal courts may take a more conservative approach to the issues with which the ARB was confronted. Nevertheless, as a result of *Sylvester*, employers saddled with SOX whistleblower claims before the DOL will face a steeper climb in seeking dismissals through dispositive motions focused on the protected activity element. When considered in conjunction with the SEC's newly issues rules implementing Dodd-Frank's bounty provisions, it becomes clear that now is a key time for employers to step-up internal compliance programs.

For more information, please contact the Seyfarth attorney with whom you work or any member of our SOX Whistleblower Team.

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