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One Minute Memo®

DOL Rules That SOX Whistleblower Provision Covers Private Companies That Contract With Public Companies, Rejects Recent First Circuit Decision To The Contrary

The U.S. Department of Labor's Administrative Review Board (ARB) expanded the coverage of the whistleblower provisions in Section 806 of the Sarbanes-Oxley Act of 2002 (SOX) to apply to employees of private businesses that contract with publicly traded companies. *Spinner v. David Landau & Assocs. LLC*, No. 10-111 (ARB May 31, 2012). In doing so, it rejected the First Circuit's recent on-point decision in *Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012).

Background

Complainant Thomas Spinner (Complainant) was an internal auditor for David Landau & Associates (DLA), a private auditing firm. DLA contracted with S.L. Green Realty Corp. (S.L. Green), a publicly traded company, to provide auditing services. In September 2008, DLA assigned Complainant to perform full-time auditing services for S.L. Green, and terminated his employment around a month later.

Complainant filed a complaint with OSHA, claiming DLA violated Section 806 by discharging him for reporting "internal control and reconciliation problems" at S.L. Green to DLA. OSHA concluded that, as a contractor of S.L. Green, DLA was covered by Section 806, but that DLA established that it would have terminated Complainant's employment even if he had not engaged in protected activity. Complainant appealed to an Administrative Law Judge (ALJ), and DLA moved for summary decision, arguing it was not covered by Section 806 and it would have discharged Complainant regardless of his alleged protected activity. The ALJ granted DLA's motion, concluding it was not a covered entity, and Complaint appealed to the ARB.

The ARB's Decision

The ARB reversed and remanded, concluding DLA was covered by Section 806. In doing so, the ARB reviewed the relevant statutory language and the corresponding regulations. The ARB noted that Section 806 does not explicitly limit protection to employees of public companies, and stated that if Congress intended such a limitation, it could have defined "employee" accordingly or otherwise included language to make this limitation clear. The ARB further indicated that nothing in SOX's legislative history indicates that Section 806 should be limited to employees of public companies.

Significantly, the ARB declined to adopt the First Circuit's recent decision in *Lawson*, which held in a case of first impression that Section 806 did not apply to employees of private companies that contract with public companies. The ARB took the following positions: (i) the First Circuit's interpretation would result "in an entirely implausible reading" of Section 806 because, for example, Section 806 provides for reinstatement and a contractor could not reinstate an employee of the public company; (ii) the caption of Section 806, "employees of publicly traded companies," is not determinative; (iii) other

whistleblower protection statutes that do not define "employee" have been construed to cover employees of contractors; and (iv) employees of contractors fit within the definition of "employee" in the applicable regulations (29 C.F.R. 1980.101 defines "employee" as "an individual presently or formerly working for a company or company representative," and "company representative" is defined as "any officer, employee, contractor, subcontractor, or agent of a company").

Implications

When examined in light of *Lawson, Spinner* illustrates and deepens the divide that has emerged between the DOL and numerous federal courts in interpreting the scope of Section 806. Indeed, with the exception of a recent decision holding that Section 806 has no extraterritorial application, the ARB has continued to take an expansive view of the types of entities and individuals to which Section 806 applies and the scope of protected activity. This is in contrast to the restrictive view that many federal courts have taken. As a result, complainants can be expected to pursue their claims through the DOL's adjudicative regime, rather than remove them to federal district courts (even though jury trials are now guaranteed in that forum as a result of Dodd-Frank's recent amendments to Section 806 of SOX) in cases where coverage and/or protected activity are questionable. Still, employers ultimately will be able to appeal ARB decisions to federal circuit courts, and thus should focus on developing long-term litigation strategies and ensuring that they preserve their arguments for all stages of appeal.

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