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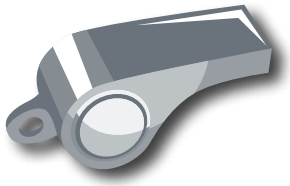
Whistleblower Team Management Alert



Supreme Court to Determine Whether SOX Applies to Contractors of Public Companies

Summary

In a surprise move, the Supreme Court agreed on May 20 to determine whether the whistle-blower provisions of Section 806 of the Sarbanes-Oxley Act of 2002 (SOX) apply to privately held employers that act as contractors to public companies. The Court's decision will resolve a disagreement between the Department of Labor's Administrative Review Board (which recently held that SOX applies to private contractors to public companies) and the First Circuit Court of Appeals (which held that SOX applies only to public companies). The Court's decision to hear the case is surprising because only the Department of Labor and two federal appellate courts have weighed in on the issue so far.

The Issue

In *Lawson v. FMR LLC*, 670 F.3d 61 (1st Cir. 2012), the First Circuit considered whistleblower claims brought by former employees of Fidelity. Fidelity is a privately held employer that acts as an investment advisor to public mutual funds that are covered by SOX. The alleged whistleblowers pointed to the operative language of Section 806 of SOX, which provides that no public company or "contractor . . . of [a public] company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for making a complaint protected by SOX. The alleged whistleblowers argued that because they were employed by a contractor (Fidelity) to a public company (the mutual fund), their complaints were protected activity.

The First Circuit rejected that argument, holding that the plain language of the statute makes clear that the whistleblower provision is only intended to cover employees of a public company. The First Circuit also noted (among other things) that the title of the whistleblower provision -- "Whistleblower Protection for Employees of Publicly Traded Companies" -- demonstrated that Congress did not intend to protect private contractors, and nothing in the legislative history of the statute suggested otherwise. The First Circuit also noted that Congress later attempted (and failed) to amend the statute to expressly cover investment advisers like Fidelity, suggesting that Congress was aware that the statute as originally worded failed to cover private contractors.

Several months later, in *Spinner v. David Landau & Assocs. LLC*, No. 10-111 (ARB May 31, 2012), the Department of Labor's Administrative Review Board (ARB) reached the opposite conclusion on the same question. In that case, an employee of a privately held auditing firm alleged that he was retaliated against after raising questions about the audit of a publicly traded client. The ARB held that the employee was covered by SOX, noting that Section 806 does not explicitly limit protection to employees of public companies, and stating 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.

Implications

The Court's decision to hear the case is unusual. Typically, the Court will not step in until a number of the appellate courts have considered an issue, so that it is fully developed by the time it has reached the Court. The Court's decision to hear the case when only the Department of Labor and two appellate courts have issued opinions signals the possibility that a number of the justices may feel that either the DOL or the First Circuit is on the wrong track. Some observers have suggested that the Supreme Court may want to rein in a Department of Labor that it feels has exceeded its powers to construe SOX.

The implications for privately held employers are significant. To date, most of the federal courts that have considered this issue have sided with the First Circuit and ruled that the plain language of SOX does not cover private employers. If the Supreme Court sides with the Department of Labor, under the language of the statute and the interpretation urged by the plaintiffs, any employer that does business with a public company could potentially become covered by SOX. In addition to requiring private employers to understand the rights that SOX provides to employees, a decision along these lines could also require private employers to understand the regulations governing public companies and when those regulations have been violated. We will report on this case when it is decided by the Court. Meanwhile, private employers should be prepared to familiarize themselves with the whistleblower provisions of SOX in the event the Court rules in favor of the employees.

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