ARB Holds Sarbanes-Oxley Act's Whistleblower Protections Apply to Employees of Contractors to Publicly Traded Companies, Rejects First Circuit Decision to the Contrary

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In yet another decision expanding whistleblower protection, the Administrative Review Board ("ARB") recently held that Section 806 of the Sarbanes-Oxley Act ("SOX") affords whistleblower protection to an employee of a contractor of a publicly traded company. *Spinner v. David Landau and Assocs., LLC*, ARB Nos. 10-111 and 10-115, ALJ No. 2010-SOX-029 (ARB May 31, 2012). Notably, the *Spinner* decision rejects the First Circuit's holding in *Lawson v. FRM, LLC*, 670 F.3d 61 (1st Cir. 2012) that Section 806 provides whistleblower protection to employees of publicly traded companies only. In *Spinner*, the ARB went to great lengths to argue that *Lawson* was incorrectly decided and to make clear that it will continue to interpret SOX whistleblower protections broadly.

Under the heading "Whistleblower Protection for Employees of Publicly Traded Companies," Section 806 provides that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)), or any officer employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manger discriminate against an ***employee***..." for engaging in protected activity. 18 U.S.C. ? 1514A(a)(Emphasis added). The statute, however, does not define the term "employee."

The statute's lack of definition of the term "employee" creates ambiguity as to the scope of protection[1] Additionally, the use of "Employees of Publicly Traded Companies" in the heading is not controlling in limiting the scope of the statute's coverage. Accordingly, the ARB turned to other means of statutory construction in providing the rationale for its holding.

First, the ARB concluded that the legislative history of Section 806 confirmed broad coverage. Section 806 was enacted as a response to the Enron scandal--in which outside contractors such as accounting firms and law firms were implicated. Thus, according to the ARB, "Congress plainly recognized that outside professionals--accountants, law firms, contractors, agents, and the like--were complicit in, if not integral to, the shareholder fraud and subsequent cover-up officers of the publicly traded Enron perpetrated." Therefore, the ARB stated that Congress necessarily intended to protect outside professionals, who are most likely to uncover evidence of potential wrongdoing, from retaliation.

Next, the ARB reasoned that the statutory framework of SOX supported its broad interpretation of "employee" coverage under Section 806. According to the ARB, SOX was designed to improve the quality of and transparency in financial reporting and auditing of public companies and to provide protection for investors. Consequently, "[a]n interpretation limiting protection of whistleblowers to those only employed by a publicly traded company would sabotage" that overriding purpose.

Third, the ARB analyzed Section 806 within the framework of analogous whistleblower statutes. In that regard, the ARB has long interpreted other whistleblower statutes delegated to DOL enforcement --such as the Energy Reorganization Act, the Pipeline Safety Improvement Act of 2002, and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century--to include employees of contractors and subcontractors within their whistleblower protection coverage. Accordingly, the ARB concluded that Section 806 should be analyzed consistently with those statutes and that its coverage should be extended to employees of outside contractors.

Finally, the ARB addressed concerns regarding the breadth of covering employees of any contractors, subcontractors, or agents without limitation. Specifically, the ARB stated that Section 806 contains built-in limitations to limit coverage, including 1) its specific criteria for employees to have a reasonable belief of violations of specific anti-fraud laws or SEC regulations and 2) its requirement that the protected activity was a causal factor in the alleged retaliation.

In sum, the ARB held that "accountants employed by private accounting firms who in turn provide SOX-compliance services to publicly traded companies are covered as employees of contractors, subcontractors, or agents under Section 806.[2]"

As we previously discussed, employers had reason to beware of becoming overly enthused over the First Circuit's *Lawson* decision; the *Spinner* decision confirms that warning. In rejecting *Lawson*, the ARB mandated that the Department of Labor, in investigating and adjudicating SOX whistleblower complaints outside the First Circuit (which has jurisdiction over employers in Maine, Massachusetts, New Hampshire, Puerto Rico and Rhode Island), ignore the *Lawson* decision and extend whistleblower coverage to employees of contractors of publicly traded companies. Accordingly, the *Lawson* decision offers no solace to employers outside the First Circuit. Moreover, the *Lawson* decision is subject to reconsideration or review by all members of the First Circuit, not just the three appellate judges who participated in the panel decision; and it is highly likely that plaintiffs will request such review. The *Spinner* decision provides great ammunition for the plaintiffs to argue for reversal.

The *Spinner* decision makes clear that contractors, subcontractors, or agents who provide professional services to publicly traded companies must be vigilant and must protect themselves from allegations of retaliation in violation of the SOX whistleblower provision.

[1] The ARB noted that the statute provides no express limitation of "employee" to employees of publicly traded companies only. According to the ARB, had Congress intended to limit Section 806's coverage, it would have done so by adding the words "of such company" after the term "employee." Nevertheless, it found the plain statutory language to be ambiguous.

[2] In his concurrence, Administrative Appeals Judge Brown expressed his opinion that Section 806's coverage would also extend to investment advisors to mutual funds--which are structured such that they have no employees of their own, and instead rely primarily upon employees of privately-held investment advisors to

function.

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