BARNES & THORNBURG LLP

DOL Decision Supports Expansion Of SOX Whistleblower Protections To Contractors Of Publicly Traded Companies

June 18, 2012 | | Employment Discrimination,Labor And Employment

The Administrative Review Board (Board) for the U.S. Department of Labor (DOL) recently issued a decision, expanding the scope of the whistleblower protections under Sarbanes-Oxley Act of 2002 (SOX). In *Spinner v. David Landau and Associates, LLC*., the Board specifically rejected an earlier decision issued by the U.S. Court of Appeals for the First Circuit and, instead, found that SOX's whistleblower protections extend to the employees of contractors and subcontractors of publicly traded companies.

In the *Spinner* case, Thomas Spinner was a Certified Public Accountant, working for David Landau and Associates, LLC (DLA). According to Spinner, DLA provided internal audit, forensics, and advisory and management consulting services, including SOX audit and compliance services. Spinner alleged that DLA performed audit services for a publicly traded company, and Spinner alleged to have worked on this account. In the litigation, Spinner alleged that he had reported he had discovered problems with reconciliation and internal controls at that publicly traded company. Spinner claimed that following this report, DLA removed Spinner from the account and terminated him.

Spinner filed a whistleblower complaint with the Occupational Safety and Health Administration (OSHA), which concluded that DLA would have terminated Spinner even if Spinner had not reported fraud at that publicly traded company. Spinner appealed the case to an administrative law judge. The Administrative Law Judge granted summary judgment to DLA on the grounds that because DLA itself was not a publicly traded company, Spinner was not protected by the SOX whistleblower protection. Spinner then appealed the ALJ's decision to the Board.

The Board stated that the issue in this matter was whether the scope of whistleblower protections of SOX extended to an employee of a contractor of a publicly traded company "when the employee reports activity that he reasonably believes constitutes a violation of the laws or SEC regulations identified under [SOX]." Under SOX, the regulations define an employee as "an individual presently or formerly working for a company or company representative … or an individual whose employment could be affected by a company or company representative." The regulations also define a "company representative" as "any officer, employee, contractor, subcontractor, or agent of a company." Although these definitions are fairly straightforward, earlier this year, in *Lawson v. FMR, LLC*, the U.S. Court of Appeals for the First Circuit ruled that employees of a contractor or subcontractor to a publicly traded company are not entitled to SOX whistleblower protections.

In the *Spinner* matter, the Board declared that the *Lawson* ruling was not controlling, as federal agencies are not bound by the decision of a circuit court in litigation arising in other circuits. The Board also stated it was "imperative to fully explain the basis for [its] holding that accountants

RELATED PRACTICE AREAS

Arbitration and Grievances
EEO Compliance
Labor and Employment
Sarbanes-Oxley and Dodd-Frank Acts
Workplace Culture 2.0

RELATED TOPICS

Department of Labor (DOL)
Whistleblower Protection

employed by private accounting firms, who in turn provide SOX compliance services to publicly traded corporations, are covered as employees of contractors under Section 806." The Board found that the statutory definition of "employee" did not create a limitation on that term and the Board refused to impose such limitation. The Board also refused to limit the scope of the statutory section entitled, "Employees of Publicly Traded Companies."

The Board then reviewed the legislative history of SOX. Specifically, the Board declared that "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. … Congress was clearly concerned about the role Arthur Anderson played in the Enron 'debacle' and the retaliation exercised against one of its partners who attempted to blow the whistle."

Finally, the Board stated that the whistleblower protections of SOX were analogous to other statutes with whistleblower protections such as Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, the Energy Reorganization Act, and the Pipeline Safety Improvement Act of 2002. According to the Board, these statutes have long case histories supporting the holding that the employees of contractors of covered employers are also offered legal protections from whistleblower retaliation. Based on those reasons, the Board rejected the *Lawson* decision and held that the SOX's whistleblower protections extend to the employees of contractors and subcontractors of publicly traded companies.