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Department of Labor's Administrative Review Board Interprets Term "Adverse Action" Under SOX More Expansively Than It Is Interpreted Under Title VII

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The Department of Labor's Administrative Review Board ("ARB") recently held that the Sarbanes-Oxley Act ("SOX") provides greater protections to whistleblowers than Title VII provides to covered employees. Under this new decision, companies face a potential new risk from purported retaliatory actions that they may take towards their employees. Specifically, in *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003 (Sept. 13, 2011), the ARB found that a company's disclosure of the identity of an employee who reported alleged improper accounting practices could be deemed a breach of confidentiality and, thus, could constitute an "adverse action" under the whistleblower protections of SOX.

Under this reasoning, employers will need to be concerned about intangible actions as well as the traditional tangible actions. Previously, when asked to list the types of retaliatory actions that could not be taken against whistleblowers, employers typically would have identified actions such as discharge, demotion, loss of benefits, and decrease in wages. Failure to keep confidential a whistleblower's identity likely would not have been on that list. Well, things seem to have changed and employers now must take further care to avoid engaging in adverse actions.

In *Menendez*, the ARB applied a broad interpretation of the term “adverse action” under SOX to find that an employer potentially could be liable for its disclosure of a whistleblower’s identity. There, Complainant, the Director of Technical Accounting Research and Training at Halliburton, initially raised concerns about Halliburton’s revenue recognition practices to the company’s Chief Accounting Officer (“CAO”). Complainant’s concerns were dismissed by the CAO, as well as by the company and the company’s outside auditors after conducting a study of Halliburton’s accounting practices. Thereafter, Complainant filed a confidential complaint with the U.S. Securities and Exchange Commission (“SEC”) and, later, Halliburton’s Audit Committee. Subsequently, a document retention e-mail linking Complainant to the pending SEC investigation was circulated to company management officials and many of Complainant’s co workers. Additionally, notwithstanding the company’s confidentiality policy regarding whistleblower complaints, the complaint to the Audit Committee (including identifying information) was sent to the company’s General Counsel and Chief Financial Officer, as well as to the company’s outside auditors. Following the disclosure of his identity, many of Complainant’s co-workers and the company’s outside auditors (with whom Complainant often worked) would not communicate with him and, in turn, Complainant began taking off many days, leading to a six-month paid administrative leave. During this time, both the SEC and the Audit Committee found that there was no merit to the complaints. The day before he was scheduled to return to work, Complainant resigned.

Complainant then filed a whistleblower complaint with the Department of Labor. In the complaint, Complainant alleged that Halliburton violated Section 806 of SOX, which forbids a SOX-covered company from discharging, demoting, suspending, threatening, harassing, or discriminating against an employee in the terms and conditions of employment because the employee has provided information or assistance to an investigation regarding any conduct that the employee reasonably believes to be a violation of laws regarding fraud against shareholders or the rules and regulations of the SEC. To prevail on such a SOX

claim, the complainant must prove that: (1) he engaged in SOX-protected activity; (2) he suffered an adverse action; and (3) the protected activity was a contributing factor to the adverse action.

The ARB ultimately remanded the case in order to determine the issue of causation, specifically as to whether Complainant's reporting actually prompted the company to reveal his identity. Contrary to the Department of Labor Administrative Law Judge ("ALJ") who dismissed Complainant's complaint based on a finding that no adverse action had been taken by the company, the ARB found that the term "adverse action" under SOX has a much broader meaning than under Title VII. In overruling the ALJ's finding that adverse action should be interpreted under SOX in the same way as the term is interpreted under Title VII, the ARB – citing to the statutory language and legislative intent of SOX – held that, because SOX "explicitly prohibits non-tangible activity," the term should be construed to "prohibit a very broad spectrum of adverse action against SOX whistleblowers." Thus, the ARB adopted a definition from a previous ARB case: "[the] term adverse actions refers to unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged." Accordingly, the ARB found that a whistleblower's protection under Section 806 is "not limited to economic or employment-related activities," and, instead, a SOX whistleblower also is protected from having his identity exposed after he has made a confidential complaint to his employer's Audit Committee.

As a result, because of the ARB's expansive definition of the term "adverse action," this case could have major significance to employers throughout the country. In light of this decision, employers potentially could be liable for any intangible actions that they take against whistleblowers as well as the more traditional tangible actions, such as discharge and demotion. Although, in this case, Halliburton's actions did not rise to the level of what most traditionally consider to be adverse actions, revealing Complainant's identity seems to have had a negative impact on Complainant and his career. Accordingly, when

dealing with an employee who has filed a whistleblower complaint, employers must be cautious that they do not take any actions that could have a detrimental effect on the employee. Otherwise, the employer could be found to have engaged in actions considered adverse, even if those actions do not adversely affect the employee's wages, benefits, or status with the company. If the ARB (or other reviewing bodies) apply this broad definition hereafter, it is likely that an increasing number of intangible actions will be deemed to be adverse in the future and further open the door to even greater potential liability for employers throughout the United States.

If you have any questions about this decision or how it could impact your employment practices, Sheppard Mullin's labor and employment attorneys are able to assist you.