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SOX Whistleblowers May Now Claim a “Very Broad Spectrum of Adverse Action”

The whistleblower provision of the Sarbanes–Oxley Act (“SOX”) protects an employee who provides information regarding fraud and violations of rules or regulations of the SEC. Toward that end, Section 806 states that no company “may discharge, demote, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment” because of the protected activity. In the past few years, whistleblowers claiming they have been subjected to adverse employment actions for reporting violations under SOX have had to overcome a relatively high hurdle. Administrative law judges (“ALJ”) borrowed a standard of review that had been applied in Title VII cases, and required SOX whistleblowers to show that they experienced a significant, tangible employment action—such as demotion, discharge, or other unfavorable reassignment—as a result of their reporting. Citing a concern with the “incautious application of Title VII precedent to [SOX] whistleblower cases,” the Department of Labor Administrative Review Board (“ARB”) recently placed SOX whistleblowers firmly in their own category and clarified the standards applicable to adverse actions taken in SOX cases.

The case is *Menendez v. Halliburton, Inc.*, ARB No. 09-002 (Sept. 13, 2011), and represents an expansion of rights afforded to SOX whistleblowers. Pointing to the language of the statute, the ARB noted the “clear congressional intent to prohibit a very broad spectrum of adverse action against SOX whistleblowers.” The ARB held that adverse action in the context of a SOX case means “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged,” and that actionable conduct is not limited to economic or employment-related actions.

Employers should be aware that this new standard may capture conduct that, heretofore, would not give rise to a SOX whistleblower action.

What Happened – Or, The “Outing”

The adverse action in *Menendez* was the company’s outing of a whistleblower to his colleagues and superiors. Mr. Menendez raised questions about Halliburton’s accounting practices shortly after he was hired in March of 2005. The company and its outside auditor reviewed the accounting practices called into question, and determined that no changes were necessary. Not satisfied, Mr. Menendez filed a confidential complaint with the SEC in November of 2005, and later sent an email to the company’s Audit Committee raising the same issues and concerns. Relying on provisions of SOX and internal company policies, Mr. Menendez expected that the SEC investigation and his communication to the Audit Committee would remain confidential - but neither did.

Mr. Menendez’s Audit Committee email was immediately forwarded to several company executives, Mr. Menendez’s immediate superior, and the company’s outside auditors. Several days later, the company issued a document retention email to a number of company management officials, Mr. Menendez and his coworkers which was prefaced by the statement: “the SEC has opened an inquiry into the allegations of Mr. Menendez.” Mr. Menendez testified that the day his identity was revealed was “probably the worst day of his life.” The breaches of confidentiality immediately impacted Mr. Menendez’s employment. He was ostracized by his colleagues, lost key responsibilities and ultimately went on paid administrative leave as a result of the severe isolation to which he was subjected. Shortly before he was scheduled to return to work, Mr. Menendez resigned, and later filed a SOX whistleblower complaint.

Expanding the SOX Standard of Adverse Action

The ALJ, applying a Title VII “tangible consequences” standard, determined that the company took no “retaliatory adverse action” against Mr. Menendez. Under the “tangible consequences” standard, adverse actions are those which result in a “significant, tangible employment action, i.e., a significant change in employment status, such as discharge, demotion, or undesirable reassignment.”

On review, the ARB stated that the plain language of Section 806 compels a broader definition of adverse actions than Title VII since Section 806 expressly proscribes tangible and non-tangible activity. The ARB then adopted for SOX the adverse action standard applied in the AIR21 case *Williams v. American Airlines, Inc.*, ARB No. 09-018 (Dec. 29, 2010). Under *Williams*, the term adverse action refers to “unfavorable employment actions that are more than trivial, either as a single event or in combination with other deliberate employer actions alleged.”

The ARB rejected the company's argument that actionable adverse actions under SOX are limited by the "terms and conditions of employment" language of Section 806. Rather, the ARB determined that "terms and conditions of employment" are not significant limiting words, that they should be construed broadly within the remedial context of SOX, and expressly refused to limit SOX's whistleblower protection provision to economic or employment-related actions.

Applying the *Williams* standard, the ARB held that the disclosure of Mr. Menendez's identity constituted an adverse action as contemplated by SOX. SOX regulations required Halliburton, a publicly-traded company, to have procedures for employees to confidentially report concerns about the company's accounting and auditing procedures. Halliburton failed to comply with this mandate, and the breach of confidentiality was held to be a violation of one of Mr. Menendez's terms and conditions of employment.

What Does This Mean For You?

Employers should understand that the treatment of employees that have engaged in SOX protected activity will be given much closer scrutiny post-*Menendez*. Policies protecting the identity of whistleblowers should be examined and updated, if needed, and employees should be trained to carefully comply with the policies. Most importantly, employers should keep in mind that non-tangible actions taken against an employee, i.e., actions that do not directly implicate an employee's position or monetary benefits, may be considered adverse actions in the context of a SOX whistleblower complaint.

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