WILMERHALE

Recent Rulings Increase Clarity on SOX Whistleblower Law

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During the four years since the enactment of the Sarbanes-Oxley Act, judges have disagreed on almost every key element of the law's whistleblower protections, including which employers are covered under the law; whether the law applies overseas; what whistleblower conduct is protected; and what employer conduct is prohibited. However, recent judicial and administrative decisions have brought greater clarity to certain issues.

Foreign Employees in Foreign Offices Exempt

The US Supreme Court, at the end of June, refused to hear a case regarding the application of SOX whistleblower protections outside the United States. That case, *Carnero v. Boston Scientific Corp.*, involved an Argentine citizen working for the Argentine and Brazilian subsidiaries of a US company. By denying *certiorari*, the Supreme Court left standing a ruling by the US Court of Appeals for the First Circuit that SOX does not protect foreign employees working for foreign subsidiaries of US companies. The First Circuit opinion, however, left open the possibility that SOX could apply to an employee based in the United States who is retaliated against for whistleblowing while on a temporary assignment overseas.

Liability for Private Subsidiaries

At the end of May, the Administrative Review Board (Review Board)—the appellate authority within the US Department of Labor—ruled that judges must use the common law theory of agency to determine liability of private subsidiaries. Prior to this ruling, administrative law judges had taken a variety of approaches to private subsidiaries. Using the common law of agency, the Review Board revived a whistleblower claim by a vice president of a private subsidiary, even though the publicly traded parent company was not named in the complaint. This is significant because in prior cases most judges had required that the parent company be named in the complaint in order to find the subsidiary liable.

Employees Must "Actually Blow the Whistle"

The Review Board now has ruled twice that a whistleblower must "actually express his concerns" or "actually blow the whistle" to be protected under the law. In a decision issued last month, a whistleblower who had refused to sign accounting documents but never explained why he refused

to sign them, and never reported the wrongdoing, was judged not to have given the employer sufficient notice to be deemed a whistleblower protected by law. The Review Board reached the same conclusion last summer in *Getman v. Southwest Securities, Inc.*, in which it rejected protection for an employee who never explained why she refused to change a stock rating in a meeting in which disagreements about stock ratings were relatively routine. In a third decision, released at the end of May, the Board also clarified that a whistleblower, having raised his allegations once, need not repeat them, even given multiple opportunities to do so.

SOX May Protect Employees for Reporting Shortcomings in Internal Controls

Turning to the substance of whistleblower allegations, the Review Board clarified that a whistleblower does not need to specify a particular law she believes is being violated, provided she is reporting "a general subject that [is] not clearly outside the realm covered by" SOX. Therefore, complaints about incompetence in internal controls that could affect the accuracy of financial statements were deemed sufficient. This interpretation is much broader than many judges had allowed previously. Some disagreement remains, however, as one federal district court ruled at the end of May that complaints about the structure of a company's legal compliance program were not sufficient to qualify as a warning of fraud. The court specified that a whistleblower's allegations must regard an actual or attempted violation of one of the laws enumerated in SOX.

Supreme Court Broadens Definition of "Retaliation"

At the end of June, the US Supreme Court resolved a split among the federal courts of appeals over what kinds of employer actions should be considered "retaliation" under Title VII. Administrative law judges often rely on Title VII case law in addressing retaliation in Sarbanes-Oxley cases. The Supreme Court, in *Burlington Northern & Santa Fe Railway Co. v. White*, ruled that retaliatory discrimination can include an employer's act of reassigning an employee to less desirable duties within the same job description, with the same salary and seniority. *The Court* concluded that "retaliation" can be read broadly to include any conduct that would be "likely to deter" a reasonable worker from complaining, and need not be limited to the "terms and conditions" of employment. The Court distinguished retaliation from "petty slights" and "minor annoyances," ruling that retaliation is characterized by materially adverse acts.

DOL Fights for Preliminary Reinstatement

On a procedural note, one issue that has gotten much attention has been whether the Department of Labor has the authority to order preliminary reinstatement of a whistleblower to her job prior to a full hearing and final agency ruling, and whether courts may enforce such orders. In June, in *Welch v. Cardinal Bankshares Corp.*, the Review Board denied the company's request for relief from a preliminary reinstatement order, ruling that such orders are immediately enforceable. The Board reasoned that if reinstatement did not become effective until after the conclusion of the administrative adjudication, it could cause a chill on whistleblowing activity. The Board, however, also gave employers some flexibility to assign the whistleblower different tasks or to pay the economic equivalent of reinstatement. The company has appealed to the federal district court in Virginia for relief, and the Department of Labor has moved to intervene in support of the

whistleblower. Meanwhile, a panel of the US Court of Appeals for the Second Circuit vacated a Department of Labor preliminary reinstatement order, but split on the issue of whether courts have the power to enforce a preliminary order of reinstatement, leaving no majority rule of law.

These rulings reinforce the importance of implementing effective non-retaliation policies and obtaining expert advice in handling employee allegations of corporate wrongdoing so as to avoid even the appearance of retaliation.

For more information on or assistance in reviewing existing non-retaliation policies, planning for how to handle any future employee complaints of corporate wrongdoing, or handling a current complaint by an alleged whistleblower, please contact:

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