

PUBLICATION

Keep Your SOX On: DOL Rules Sarbanes-Oxley Covers Private Contractors of Public Companies

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The Department of Labor (DOL) recently broke ranks with the First Circuit Court of Appeals to hold that employees of contractors of public companies are protected by the Sarbanes-Oxley Act's (SOX) whistleblower provision, even if the contractor companies are not publicly traded.

Section 806 of SOX provides that "[n]o company with a class of securities registered under section 12 of the Securities Exchange Act of 1934, or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934, or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee...for engaging in protected activity."

The Act is notably silent on the definition of an "employee," leaving the term open to interpretation by both the courts and the DOL, each of which may hear cases under SOX.

Earlier this year, in *Lawson v. FMR, LLC*, the First Circuit ruled that only employees of publicly-traded companies enjoy SOX whistleblower protection. However, in *Spinner v. David Landau & Associates, LLC*, the DOL's Administrative Review Board declined to follow the First Circuit's lead.

In *Spinner*, the plaintiff, an accountant, alleged that he was fired from his position at an internal audit firm for reporting financial irregularities at his employer's publicly-traded client. After filing a complaint with the Occupational Safety and Health Administration, both that agency and an administrative law judge ruled in favor of employer, concluding that neither the employer nor the employee was covered by SOX's whistleblower provision because the employer was not a publicly-traded company.

However, on appeal the DOL's Administrative Review Board declined to follow *Lawson*, ruling instead that SOX covers employees like *Spinner*, who are employed by contractors to publicly-traded companies. According to the Board, an employee includes anyone "whose employment could be affected by a [covered] company or company representative," including but not limited to any "contractor, subcontractor, or agent of a [covered] company."

The DOL's decision in *Spinner*, if it stands, portends a significant increase in SOX claims against contractors. It also likely signifies that an increasing number of such complainants will opt to keep their cases before the DOL rather than seek a trial in federal court if the DOL does not reach a final decision on their claim within 180 days.

If you have questions about how this decision could affect your business, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.