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BNA, Inc.

# Daily Labor®

REPORT

No. 71

Thursday, April 13, 2006

ISSN 1522-5968

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## News

### Whistleblowers

## Uncertainty About Parameters of SOX Claims Creates Challenges for Lawyers on Both Sides

The evolving case law regarding Sarbanes-Oxley Act whistleblower claims has raised more questions about the meaning of the law than they have answered, a panel of attorneys said April 11.

With cases being resolved by both the Labor Department's administrative process and the federal courts, management and plaintiffs attorneys said during an American Bar Association teleconference that attorneys litigating SOX cases are still dealing with a great deal of uncertainty and creating new law.

The Sarbanes-Oxley Act, passed in 2002, protects whistleblowers who work for publicly traded companies and who allege corporate actions that violate various provisions of the Securities and Exchange Act. Employees alleging violations of SOX have their claims investigated by DOL's Occupational Safety and Health Administration, and their claims can be adjudicated by administrative law judges and in federal court.

"What we've seen is that ALJs are all over the map with key elements of the claim," said plaintiffs attorney Jason M. Zuckerman. "The [DOL Administrative Review Board] will hopefully clear up a few of these key elements."

Zuckerman, in Washington, D.C., said that despite almost four years of cases being adjudicated by DOL and the federal courts, there is still not a clear picture on basic questions like what is the basis of a SOX claim and what is considered an adverse employment action.

One of the areas of concern, Zuckerman said, is the uncertainty of what constitutes a prima facie case under SOX. Defense attorneys--and some ALJs--have argued that only when an employee alleges financial fraud can the complaints be the basis of a SOX claim, he explained. Plaintiffs lawyers, he added, see it differently.

### Meaning of SOX

Pointing to one decision by an ALJ where "mere accounting regularities" without fraud involved were not considered the basis of a SOX claim by an employee, Zuckerman said such a narrow view of the law was potentially harmful.

"I believe this ruling is contrary to the plain meaning of SOX," Zuckerman said. "Any conduct which the employee reasonably believes constitutes a violation should satisfy the law's requirements."

He said that other ALJs have held a more expansive view of what constitutes a SOX violation, but said he feared that if the ARB ruled for the limited view of what constitutes a violation, it would "significantly undermine this aspect of SOX."

Plaintiffs attorney Debra Katz agreed that there is uncertainty about what constitutes a claim and added that there is also some question about what is considered a "reasonable belief" that a violation has taken place.

"SOX doesn't define what a reasonable belief is, so judges are finding that both a subjective and objective belief meet the good-faith requirement," said Katz, of Katz, Marshall & Banks in Washington D.C.

Katz said that it was "very important" to get expert testimony to show the employee's belief was reasonable, and emphasized that the employee did not have to prove that the belief was correct, only that it was reasonable.

### **Adverse Employment Action**

For management attorneys, Ronald W. Taylor said, one of the main areas of confusion is over what activity constitutes an adverse action under SOX. Because the law appears to have a much broader view of an adverse employment action, management attorneys have had to move beyond the traditional definitions in Title VII of the 1964 Civil Rights Act to determine what counts.

"While most employment laws require a tangible job action to show adverse effect, it appears that under SOX, it can be broader and go beyond immediate action," said Taylor, who is with the Venable firm in Baltimore.

He said that the standard appears to be more similar to the adverse action provisions under the National Labor Relations Act and can include any act "that is likely to diminish the likelihood of discouraging disclosing behavior."

Katz agreed the standard is much broader than in other laws and said that even intimidation or threats would satisfy the requirement. It would then be up to the employee to show a nexus between the protected activity and the adverse action.

Another source of concern, the attorneys said, was the relationship between the Labor Department administrative process and the unique "kick-out" provisions that allow employees to go to federal court if DOL has failed to resolve the case in 180 days.

### **DOL Versus Federal Court**

Taylor said he believes OSHA--which investigates whistleblower claims--is doing a "good job" of handling the investigations, and that there is no question the unique characteristics of the law have made investigators quite vigilant in their investigations.

Although expressing some concern that SOX could influence how OSHA handles other whistleblower and safety cases, Taylor said there is general confidence in how the claims are being handled.

That confidence, Zuckerman suggested, could come from the fact that 85 percent of the claims investigated by OSHA have been found in favor of the employers, although he said a number of those cases involved untimely filed claims by employees.

"I sense there is some reluctance on the part of OSHA to find for employees because they have to be absolutely sure they have evidence because they are requiring employers to reinstate," Zuckerman said.

Katz said she preferred to skip the DOL process entirely, and instead encourages clients to take their claims to federal court as soon as they can.

"I prefer to litigate before a federal district court. Unless there is some mitigating factor to stay

before DOL, we prefer to move to federal district court," Katz said

She pointed to the ability to subpoena witnesses and the broader discovery available as an incentive to go to federal court. She also said federal court litigation allows employees to bring other claims at the same time.


In addition, Katz added that it is easier to "mount pressure on a defendant because you have more of a chance for press and public scrutiny."

### Employers Anxious to Settle

Even with the initial case being brought to DOL, Katz said the best cases settle quickly and that many claims can be handled through the demand letter process.

"Employers are a lot more eager to offer reasonable settlement in SOX claims early on because there is a lot more at stake," Zuckerman said, agreeing with Katz.

He explained that because a copy of the SOX complaint is routinely sent to the Securities and Exchange Commission and thus available to investors and stockholders, "a SOX claim can create a wide variety of problems for the employer."

Taylor agreed that settlements are probably limiting the number of "good" cases getting to the Labor Department. He said employers have a clear incentive to settle the cases before entering the DOL process and that the kinds of complaints lodged by whistleblowers and the often-high-level positions held by the whistleblower within the company create an added incentive to settle. 

*By Michael R. Triplett*

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ISSN 1522-5968

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