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DOL Administrative Review Board Holds that Breach of a SOX Complainant's Confidentiality Is Retaliation Under SOX

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In a decision falling somewhere between surprising and alarming, the U.S. Department of Labor's Administrative Review Board (ARB) held recently that section 806 of the Sarbanes Oxley Act (SOX), 18 U.S.C. § 1514A, protects a whistleblower against a breach of the confidentiality obligation in the internal reporting system of a publicly traded company. The decision, *Menendez v. Halliburton, Inc.*, ARB Case Nos. 09-002 and 09-003 (Sept. 13, 2011), is surprising because the ARB expressly held that the words "in the terms and conditions of employment" that appear in section 806 to describe the scope of prohibited retaliation are "not significantly limiting words and should be construed broadly." That is, the presumed application of SOX to *employment*-based retaliation only may no longer be accurate. The sweeping language of the decision is alarming because it goes beyond the U.S. Supreme Court's retaliation threshold articulated in *Burlington Northern v. White*, 548 U.S. 53 (2006), to erase all standards for measuring retaliatory adverse actions except "non-triviality." In light of *Menendez*, employers must be more careful than ever before taking any actions – employment or otherwise – in the course of a whistleblower complaint situation, because they might later be deemed retaliatory.

The Facts

Menendez was an accountant in the Halliburton Finance and Accounting organization. He reported to the Chief Accounting Officer (CAO), and his duties included monitoring and researching technical accounting issues.

After about three months of employment, the employee raised specific concerns about the company's revenue recognition practices. He reported to the CAO perceived defects in those practices, claiming they could have a major impact on the company's financial statements. He then circulated a memorandum taking the same position. The CAO called the employee into a meeting and, the employee alleged, said that his memorandum was good, but that he was not a team player, was insensitive to internal politics, and should work more collaboratively with his colleagues. The employee taped the meeting with the CAO, presumably surreptitiously. The employee also brought his objections to the corporate vice president of financial controls, who told him that, if he felt strongly about his opinions, he should contact the audit committee of the company's board of directors.

Instead of going to the audit committee, the employee went to the Securities and Exchange

Commission (SEC) and made what the ARB described as a confidential email complaint, which also named the company's outside auditors. After the employee learned that the SEC had initiated an investigation into his complaint, he sent an email directed to the company's audit committee raising essentially the same concerns he had previously raised with the CAO and the SEC. The assistant general counsel who received the email from the employee forwarded it to the audit committee as requested, but also sent it to the general counsel and the chief financial officer, who forwarded it to the CAO, the vice president for investor relations, and the company's outside auditors. A few days later, in an internal document retention communication resulting from the SEC investigation, the general counsel identified Menendez to a number of executives, including the CAO, as the employee who complained to the SEC.

Unhappy at having been "outed," the employee negotiated a six-month leave of absence, with pay, pending the SEC's investigation. While he was on leave, he obtained other employment. During his leave, the SEC and the audit committee completed their investigations and concluded that the company's revenue recognition policies complied fully with the law. The SEC closed its file. The company offered to reinstate the employee at the end of his leave, but he declined.

ARB's Disposition of the Whistleblower Retaliation Claims

The employee alleged five adverse actions as part of his retaliation claim: breach of confidentiality; isolation by coworkers; removal of duties; demotion; and constructive discharge. The Administrative Law Judge (ALJ) rejected all five.

The ARB reversed the ALJ's conclusion on the breach of confidentiality claim, holding that the procedures required by SOX for the confidential, anonymous submission of employee complaints are a "term and condition of employment" for employees in publicly traded companies. Section 301 is the provision requiring covered corporations to establish procedures for:

> (A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and
>
> (B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

According to the ARB, failure to preserve the confidentiality of a complainant who submits a complaint pursuant to section 301 is a per se violation of SOX, regardless of whether other terms and conditions of employment are implicated and regardless of whether the breach of confidentiality has economic or career consequences.

The ARB treated the next three claims – isolation, removal of duties, and the alleged demotion – as "indicia of harm" resulting from the section 301 violation rather than independently actionable adverse actions. The ARB remanded the case to the ALJ for further proceedings on that point.

The ARB upheld the ALJ's factual determination that the employee quit his job for reasons unrelated to the company's alleged retaliation and, accordingly, rejected his claim for constructive discharge. Since he actually obtained other employment halfway through his paid leave and insisted that the company was violating the law even after the SEC had cleared the company, it would have been difficult for the ARB to reach any other conclusion.

Implications

Employers should note two aspects of the *Menendez* decision. First, it sets the threshold for retaliation so low that it is now difficult to identify actions an employer can take in response to a claim of financial misconduct that the ARB would not later deem retaliatory. For example, the employee negotiated a leave with pay, which the ARB acknowledged was a good thing once Menendez had been identified as a whistleblower. Would the ARB have taken the same position if the leave with pay had been involuntary? Would the ARB find it "non-trivial" if the company had removed Menendez from responsibility for projects or areas about which he had made complaints to the SEC?

Second, the ARB showed an alarming willingness to read the phrase "in the terms and conditions of employment" out of the text of section 1514A, implying that the apparent application of SOX to employment-based retaliation can be disregarded. Arguably, a breach of confidentiality is "a term or condition of employment," although it is not usually thought of in that way. To cavalierly characterize that statutory language

as "not significantly limiting words," however, goes much further. The broad language of the decision goes beyond the *Burlington Northern* retaliation threshold to erase all standards for measuring retaliatory adverse action except "non-triviality." The "non-triviality" standard comes from *Williams v. American Airlines*, ARB Case No. 09-918 (Dec. 10, 2010), which arose under the Aviation Investment and Reform Act for the 21st Century. After *Menendez*, employers dealing with sensitive internal whistleblower situations have little to guide them in deciding what actions – employment or otherwise – might be deemed retaliatory by the Department of Labor. The extent to which courts will embrace the ARB's conclusion, as the courts of appeals begin to review more SOX cases, remains to be seen.

To avoid unintentional SOX violations, covered employers should train their executives and in-house attorneys on their internal complaint procedures and ensure those procedures – particularly those requiring confidentiality – are followed scrupulously. Routine internal communications, like litigation holds, should likewise be scrutinized for potential, unintended consequences.

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