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Warning to Rainmakers in Private Law Firms and Accounting Firms: SOX Now Says, 'Don't Shoot the Messenger'




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Yes, we understand how you may become upset if a colleague of yours, such as a servicing partner or junior associate, openly criticizes one of your publicly traded client's financial reporting or accounting practices—even if this occurs only within the walls of your firm. You may feel the colleague is being disloyal to the firm or to the client—a client for whom you and your firm have spent significant time and expense to retain and service against fierce competition from other professional services providers.

However, when your client is a publicly traded company governed under the 2002 Sarbanes-Oxley Act (SOX), be very careful how you and your firm respond to the criticizing colleague. This caution can even extend to your performance evaluations of the colleague. We explain why in this article.

Under the U.S. Supreme Court's game-changing decision in *Lawson v. FMR LLC*, the Court held that SOX provides broad whistleblower protection to employees of **contractors and subcontractors** to publicly held companies.[1] If your privately held law firm or accounting firm provides professional services to a SOX-governed publicly traded company, under *Lawson*, your firm becomes a SOX-covered contractor or subcontractor. As such, your firm's employees now have SOX

[1] *Lawson v. FMR LLC et al.*, 2014 BL 57958, U.S., No. 12-3, 3/4/14 (12 CARE 273, 3/7/14).

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whistleblower protection from your firm. This means that your employees are protected legally when they complain to you internally, or complain externally to the SEC or another federal regulatory agency, about your client's allegedly fraudulent public reporting or accounting conduct. Moreover, where the employee's complaint is SOX-protected, SOX's anti-retaliation provision prohibits you and your firm from taking adverse employment action against the complaining colleague because of his or her complaint. SOX broadly defines adverse employment action as:

- discharge;
- demotion;
- suspension;
- blacklisting;
- intimidating, threatening or harassing; and
- any other ''discrimination'' due to the complaint.

Shades of Gray

First, let's put aside complaints by your employees made outside your firm to the SEC or another federal enforcement agency.

In the professional services industry, such complaints, at least to date, have been uncommon. Such complaints also raise thorny issues such as breach of attorney-client privilege, and/or breach of contractual or ethical client confidentiality obligations. Instead, let's just focus on the types of ''internal'' complaints about your publicly traded clients' reporting or accounting practices that occur on a daily basis within the four walls of your firm.

What type of internal ''complaint'' may provide your employees with SOX whistleblower protection? Under *Lawson*, any employee of yours may gain SOX whistleblower protection by complaining to you, or to someone else within your firm who has ''supervisory authority'' over the employee, that your publicly traded client has engaged in financial reporting or accounting fraud.

The ''complaint'' need be nothing more than simply ''providing information'' about your client's conduct which the employee ''reasonably believes'' constitutes mail fraud, wire fraud, bank fraud, securities fraud, shareholder fraud or a violation of ''any rule or regulation of the SEC.'' But isn't that type of internal communication often the same type of communication that is a primary and expected job function of this employee?

Distinguishing a Protected SOX Complaint From Critical Analysis and Judgment About Your Client's Conduct

Lawson's broadening of SOX's whistleblower protection to employees of ''contractors and subcontractors'' of publicly traded companies presents an obvious and suddenly looming problem for private law firms and accounting firms. This is because of the type of professional services these firms provide. Publicly traded companies hire reputable law firms and accounting firms specifically to help the company comply with SEC reporting requirements and generally accepted accounting practices.

Daily, the lawyers and accountants providing these services are reviewing and analyzing critically, and then communicating internally about, the client's reporting or accounting practices. The publicly traded company has hired these lawyers and accountants to do exactly that. The lawyers' and accountants' criticisms and assessments often are then shared ''upward,'' orally and/or in emails or memos, with the firm's partners or shareholders with ''supervisory authority''—i.e., usually a manager, the client relationship partner and/or the originating rainmaker.

Sometimes, these more seasoned ''supervisors'' may strongly disagree with their colleagues' criticisms or assessments of the clients' conduct. Given the traditional culture of many law firms and accounting firms, the rainmaker or client relationship ''supervisor'' may on occasion even lash out at their colleagues—specifically, often junior colleagues—who provided ''information'' criticizing the client's conduct. They may question their colleague's analysis, judgment or even overall competence.

This lashing out also may carry over into written performance evaluations, or in oral comments to other ''supervisors.'' If the reaction ultimately results in adverse employment action (see above) taken against the criticizing employee, under *Lawson,* you and your firm may have given the criticizing employee sufficient grounds to assert a SOX whistleblower claim.

KEY PRACTICE POINTS: Why You Should Be Careful Not to 'Shoot the Messenger'

SOX whistleblower retaliation claims are simple—and free—to file with the U.S. Department of Labor. But, the facts are often complex. The administrative, judicial and appeals process also can drag on for years. A successful claimant can obtain at least two remedies that can also be very problematic to your firm: (1) reinstatement with payment of lost back pay and employee benefits and (2) your firm's payment of the claimant's attorneys' fees, litigation costs and expert witness fees. The claimant also may assert that you should be held liable individually.

So, be smart and careful out there. If your rainmaker, client-relationship partner or other managerial role requires you to evaluate the job performance of your colleagues, junior associates or even third-party consultants who are providing services to your publicly traded clients—and if your evaluation can result in adverse employment action for these individuals—try to avoid giving them a basis to assert a SOX-protected whistleblower retaliation claim.

Consider guidelines such as these when addressing the ''messenger'':

- avoid dismissing out-of-hand the individual's critical analysis, assessment or judgment about your client's financial reporting, accounting practices or other potentially ''fraudulent'' conduct;
- do not threaten adverse job or career consequences or otherwise harass or try to intimidate the individual, orally or in writing, based on the individual's analysis, assessment or judgment;

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- avoid ''blackballing'' the individual behind the individual's back;
- if you disagree with the individual, communicate your disagreement objectively, professionally and dispassionately;
- consider leading with a truthful statement like: ''We welcome and appreciate the concerns you have raised, but we disagree with your view for the following reason(s)'';
- consider providing the individual with contact information to a dedicated resource whom the person can feel free to contact if the person expresses a belief that her or his ''complaint'' may possibly cause the person to experience any form of retaliation or adverse action; and
- unless the individual's view is dead wrong, avoid communicating anything, orally or in writing, that suggests that adopting the individual's view could jeopardize your firm's relationship with the client.