October 2005

CLIENT ALERTS

EPSTEIN BECKER & GREEN, P.C.

Resurgens Plaza
945 East Paces Ferry Road
Suite 2700
Atlanta, Georgia 30326-1380
404.923.9000

150 North Michigan Avenue
Suite 420
Chicago, Illinois 60601-7553
312.499.1400

Lincoln Plaza
500 N. Akard Street
Suite 2700
Dallas, Texas 75201-3306
214.397.4300

Wells Fargo Plaza
1000 Louisiana
Suite 5400
Houston, Texas 77002-5013
713.750.3100

1875 Century Park East
Suite 500
Los Angeles, California 90067-2506
310.556.8861

Wachovia Financial Center
200 South Biscayne Boulevard
Suite 2100
Miami, Florida 33131
305.982.1520

Two Gateway Center
12th Floor
Newark, New Jersey 07102-5003
973.642.1900

250 Park Avenue
New York, New York 10177-1211
212.351.4500

One California Street
26th Floor
San Francisco, California 94111-5427
415.398.3500

One Landmark Square
Suite 1800
Stamford, Connecticut 06901-2681
203.348.3737

1227 25th Street, N.W.
Suite 700
Washington, D.C. 20037-1175
202.861.0900

EBGLAW.COM

Recent Sarbanes-Oxley Whistleblower Cases Limit Employers Covered by SOX and Strictly Construe the Statute of Limitations for Filing Complaints

Two recent administrative decisions under the employee protection (whistleblower) provisions of the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. §1514A, highlight the continuing development of law under SOX and reflect positive developments for employers. In *Stevenson v. Neighborhood House Charter School*, No. 2005-SOX-00087 (Sept. 7, 2005), an Administrative Law Judge ("ALJ") rejected an attempt to extend coverage to a private company based on its dealings with public companies or reporting requirements under unrelated provisions of SOX. In *Halpern v. XL Capital Ltd.*, ARB Case No. 04-1120, ALJ Case No. 2004-SOX-00054 (ARB Aug. 31, 2005), the Department of Labor's Administrative Review Board ("ARB") clarified that the statute of limitations begins to run when an employee receives a "final, definitive, and unequivocal notice" of an adverse employment action, not when the action takes effect, and rejected attempts to suspend the running of the statute.

Stevenson v. Neighborhood House Charter School

A common issue in many SOX whistleblower cases is whether the employer actually is covered by SOX. SOX provides whistleblower protection only for employees of publicly traded companies, those with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. §781), or that are required to file reports under Section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. §78o(d)). However, many complainants have attempted to argue that certain activities of an otherwise private company bring it within the coverage of SOX. The ALJ's decision in *Stevenson v. Neighborhood House Charter School* suggests that the definition will be read strictly.

In *Stevenson*, the complainant argued that the employer, a private company, was nonetheless covered by the employee protection provisions of SOX because its pension plan was subject to the requirements of ERISA and the trustee of the pension plan (but not the company) was required to file periodic reports with the SEC under Section 15(d) of the Securities Exchange Act. He also argued that SOX protections applied because the employer was subject to other provisions of SOX and other rules promulgated under the

Securities Exchange Act. Finally, he argued that bond holders and private and public corporation donors to the employer were like the shareholders of a publicly traded company.

The ALJ firmly rejected all of these arguments and dismissed the case for lack of jurisdiction. First, he held that the requirements of ERISA were irrelevant in determining whether a company is covered by the employee protections of SOX, finding nothing to suggest that being subject to reporting requirements under one federal law, such as ERISA, automatically extended coverage of other federal legislation, such as SOX, to a company. Slip op. at 5. The contrary view would sweep numerous employers under SOX coverage. Similarly, he held that it was irrelevant that the employer might be subject to other provisions of SOX or rules promulgated under the Securities Exchange Act, because none of these subjected the employer to the reporting requirements of Section 15(d) of the Securities Exchange Act. *Id*. Finally, he held that there was no evidence that Congress intended a private company to be covered by the employee protection provisions of SOX simply because it received funds from private donors or public companies. In this regard he cited various prior decisions holding that non-public contractors or subcontractors of publicly traded companies, and non–publicly traded subsidiaries of unnamed publicly traded companies, are not covered by SOX. Slip op. at 6.

Halpern v. XL Capital Ltd.

Halpern v. XL Capital Ltd. addresses the date on which the statute of limitations for filing a complaint begins to run, as well as when the statute may be equitably tolled. Halpern, a vice president of technical services, was suspended on September 29, 2003, under circumstances that he felt indicated that he was going to be fired, and he stated this understanding in an October 1, 2003, email. However, on October 14, 2003, the company's General Counsel sent Halpern an email disavowing any final decision concerning his employment. On January 8, 2004, however, the company sent him a letter terminating him effective January 12, 2004, and also informed him of this decision in a telephone call that day. Halpern did not file his complaint until April 15, 2004.

Under SOX, an employee alleging retaliation for engaging in protected whistleblowing activity must file a complaint with OSHA within 90 days after the alleged violation occurred. 18 U.S.C. §1514A(b)(2)(D). The SOX regulations state that a violation occurs "when the discriminatory decision has been both made and communicated to the complainant." 29 C.F.R. §1980.103(d). In statutory employment discrimination cases, the courts long have held that a limitations period begins to run when the employee receives notification of the allegedly discriminatory act, not when the action actually takes effect or the consequences otherwise become apparent. *See Chardon v. Fernandez,* 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

The ARB had followed this principle in prior whistleblower cases arising out of other statutes, holding that the limitations period begins on the date an employee receives "final, definitive, and unequivocal notice" of the adverse employment action. *See*, *e.g.*, *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 14 (ARB Feb. 28, 2003).

In *Halpern*, the ARB applied this precedent to SOX cases as well, rejecting an ALJ's finding that the limitations period began on September 29, 2003, on the grounds that the October 14, 2003, email showed that Halpern had not yet received "final, definitive, and unequivocal notice" of his termination. However, it found that the verbal and written confirmation delivered on January 8, 2004, met this standard, and therefore his

April 15, 2004, filing was untimely. Slip op. at 4. The ARB also rejected any basis for equitable tolling of the 90-day filing period, specifically holding that it was irrelevant when Halpern may have acquired evidence of an unlawful motivation for his termination so long as he was aware of the termination. Slip op. at 5.

The ARB's willingness to dismiss an untimely filed case and not find a basis for equitable tolling indicates that the statute will be strictly construed. In light of the ARB's adoption of the traditional employment discrimination law standard for determining when a claim accrues and the short, 90-day statute of limitations for SOX claims, employers should take care to make sure that employees receive "final, definitive, and unequivocal notice" of any adverse employment actions, even if the effective date is later. Employees often seek internal reconsideration of actions and any response should in no way suggest that the original decision is not final, lest the limitations period be restarted. This is particularly true in light of the ARB's rejection of any tolling based on lack of knowledge of an alleged unlawful motivation. Employees often may not decide that there allegedly is evidence of such a motivation for some time, especially when the adverse action is something less than a termination.

These two decisions show that both the ARB and ALJ's are resisting the temptation to extend the coverage of the SOX retaliation provisions beyond the intent of Congress or to avoid the effect of this short statute of limitations. As the number of cases filed increases, the law concerning these provisions will continue to develop.

* * * *

Should you have any questions or wish to discuss other aspects of the SOX whistleblower provisions, or any other labor or employment questions, please call or contact **Frank C. Morris** at 202/861-1870, **fmorris@ebglaw.com**, or **Brian Steinbach**, 202/861-1870, **bsteinbach@ebglaw.com**, both in the firm's **Washington, D.C.** office.

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.