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ALERT

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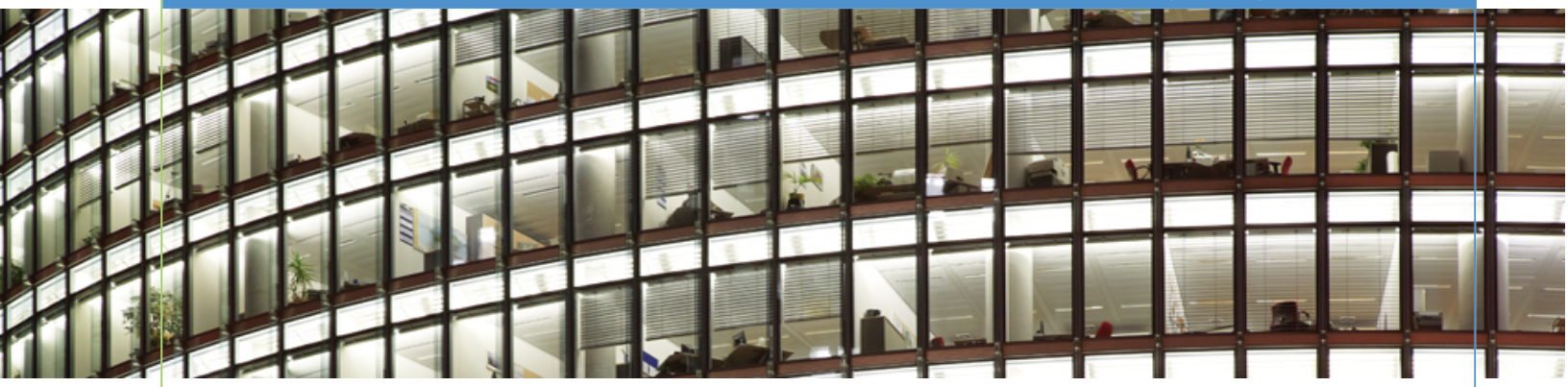

Will Your Company Be Wearing New SOX? – Supreme Court Expands Sarbanes-Oxley Whistleblower Protection to Employees of Privately-Held Companies

In a highly-anticipated decision having far-ranging impact for privately owned employers, the U.S. Supreme Court held that the whistleblower protections under § 1514A of the Sarbanes-Oxley Act of 2002 (SOX) extend not only to employees of publicly-held companies, but also to the employees of the privately-held "contractors" who provide services to public companies. *Lawson v. FMR LLC*, No. 12-3 (March 4, 2014). This means that privately owned companies face lawsuits from employees asserting claims of retaliation for having reported fraud or other wrongful conduct prohibited by SOX.

Plaintiffs in *Lawson* were employees of privately-held investment advisory and management firms that provided services to the Fidelity family of mutual funds, publicly-traded companies, which themselves had no employees. Plaintiff Jackie Lawson, a Senior Director of Finance, alleged that she was retaliated against for questioning whether certain cost accounting methodologies overstated expenses; plaintiff Jonathan Zang, a portfolio manager, alleged that he was terminated for questioning the accuracy of a draft SEC filing. Plaintiffs sued their former employer under SOX, and defendant moved to dismiss, arguing that SOX protects only employees of publicly-traded companies.

The Supreme Court disagreed, resting its decision principally on the text of § 1514A and what the Court called "the mischief to which Congress was responding" in passing it – the collapse of Enron Corporation. Writing for a 6-3 majority, Justice Ginsburg observed that "boiling [§ 1514A] down to its relevant syntactic elements, it provides that 'no … contractor … may discharge … an employee'" for whistleblowing activity. And noting that SOX entitles a successful plaintiff to reinstatement and back pay, the Court reasoned that "it is difficult, if not impossible, to see how a [private] contractor or subcontractor could provide those remedies to an employee of a public company." In sum, the majority held that "the most sensible reading of § 1514A's numerous references to an employer-employee relationship between the respondent and the claimant is that the provision's protections run between contractors and their own employees."

Turning to the "mischief" Congress sought to correct, the Court focused acutely on the specifics of the Enron scandal. The Court stressed Congressional perception that "outside professionals" such as accountants and attorneys "were complicit in, if not integral to" their client's misconduct. The Court further observed "that Congress was as focused on the role of Enron's outside contractors in facilitating the fraud as it was on the actions of Enron's own officers." Pointing to this history, the Court reasoned that "if the whistle is to be blown," it must frequently be blown by someone other than the employee of a public company.

Lawson is a shot across the bow for privately-held employers nationwide. SOX provides very robust remedies for whistleblowers and allows administrative complaints to be filed with the Department of Labor as well as private lawsuits in federal court. Even if the whistleblower's underlying allegation of fraudulent conduct has no merit whatsoever, the whistleblower can sue for retaliation if later terminated, or otherwise adversely affected. Plaintiffs' lawyers are aggressively pursuing these claims.

This much is clear: no longer is SOX a concern only for publicly-traded companies. Less clear is the precise breadth of *Lawson's* impact on whistleblower litigation under SOX. In particular, the majority's decision does not clarify what sorts of companies will qualify as "contractors" and thus, fall within the statute's ambit. The dissenting justices in *Lawson* expressed fear that liability could run as far as babysitters for executives at public companies. The Court suggested that "various limiting principles" might preclude expanding the definition of a "contractor" to "every fleeting business relationship." But as to where precisely the line will be drawn? – the Court did not say.

Action Items. There are a number of specific steps which private employers that provide any services to public companies need to take in response to *Lawson*. First, they should review their existing anti-retaliation policies and internal complaint procedures to make sure they address conduct regulated by SOX. Second, they should train managers and HR professionals to identify SOX complaints and refer them to responsible company officials for investigation. Third, they should ensure that individuals who are empowered to discipline and discharge employees are sensitive to SOX issues and do not unwittingly create liability when dealing with troublesome employees.

The Greenberg Traurig Global Labor and Employment Practice Group has a dedicated group of attorneys who have experience litigating SOX claims and who are available to assist clients in preventing and defending whistleblower claims.

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