

## SCOTUS Expands Sarbanes-Oxley Whistleblowing Protections to Private Contractors of Publicly Traded Companies

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Corporate whistleblower protections provided to employees of publicly traded companies by the Sarbanes-Oxley Act also extend to employees of the companies' private contractors, the U.S. Supreme Court ruled on March 4, 2014. The decision exposes private companies that provide services to public companies, such as law firms, accounting firms, and investment advisors, to liability for retaliation allegedly arising from whistleblowing or other protected activity by any employee of the contractor.

The whistleblowing provision of the Sarbanes-Oxley Act prohibits publicly traded companies as well as their contractors, subcontractors, officers, employees, and agents from discriminating against an employee who has provided information or assisted in investigation of mail fraud, wire fraud, bank fraud, securities or commodities fraud, or a violation of any SEC rule or regulation or any provision of Federal law relating to fraud against shareholders. 18 U.S.C. § 1514A. The Act does not clearly state whether the protection afforded to employees of publicly traded companies extends to employees of the listed entities.

In *Lawson v. FMR LLC*, two former employees of privately held companies providing advisory and management services to the Fidelity family of mutual funds filed suit against their employers claiming that they were unlawfully discharged for engaging in activities protected by Sarbanes-Oxley. FMR sought dismissal of the suit, arguing that §1514 applies only to employees of publicly traded companies and, therefore, does not provide a cause of action for employees of private contractors. The Supreme Court ruled in favor of the employees, concluding that §1514 "shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors."

The Court majority noted that Congress enacted Sarbanes-Oxley in the aftermath of Enron and was therefore keenly aware of the role of outside contractors in facilitating fraud. Given "the mischief to which Congress was responding," the majority concluded that Congress was as focused on protecting lawyers, accountants, and other employees of private contractors from retaliation as it was on protecting employees within a publicly traded company. It further noted that its broad construction of the Sarbanes-Oxley whistleblower provision was necessary to "avoid[] insulating the entire mutual fund industry" from its protections given that most mutual funds are structured so that they have no employees of their own but are instead managed by independent contractors.

The dissent argued that the majority's interpretation of § 1514A would open the door to lawsuits by any employee of a private business that contracts to perform work for a public company, including cleaning staff and other employees with no connection to the shareholder fraud at which Sarbanes-Oxley is aimed, as well as the nannies, gardeners, and other personal employees of public company officers and employees. The majority expressed doubt that these fears would materialize but declined to determine the bounds of § 1514A because the employees' actions in this case were so clearly within the scope of the Act's protections. Nevertheless, the majority indicated that the whistleblower provision would likely protect contractor employees only to the extent that they are acting within the scope of their duties as a contractor to a public company. This issue will certainly be addressed by the lower federal courts as these types of claims likely increase.

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## What does this case mean for employers?

Private companies that provide services to publicly traded companies are subject to the whistleblower protections of Sarbanes-Oxley. Given the broad range of conduct protected by Sarbanes-Oxley, both publicly traded and private companies must be cognizant of the increased threat of litigation associated with employees' conduct relating to any of these activities.