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Whistleblower Rules Extend to Private Companies

U.S. Supreme Court decision broadens reach of Sarbanes-Oxley beyond publicly held corporations.

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The U.S. Supreme Court issued a ruling on March 4 that expanded whistleblower protections in a way that will have a significant impact on private companies. In *Lawson v. FMR LLC*, the Supreme Court held that the antiretaliation protections of the Sarbanes-Oxley Act apply not only to public companies, but also to employee whistleblowers of private companies that contract with public companies.

This ruling has immediate implications for employers in a range of industries, such as legal services, accounting, public relations and investment advisers.

The antiretaliation provisions of Sarbanes-Oxley are well known to public companies; they essentially prohibit a public company from demoting, firing, threatening or otherwise retaliating against an employee for reporting improper conduct.

The relevant language of the statute reads: "No [public] company …, or any … contractor [or] subcontractor … [may retaliate] against an employee … because of [whistleblowing activity]." These antiretaliation measures were passed as part of the act in 2002 in response to the wave of accounting scandals at public companies such as Enron Corp.

In *Lawson*, the Supreme Court was presented with a straightforward issue that had not been decided in more than a decade since Sarbanes-Oxley had been passed: Do the antiretaliation provisions also apply to employees of a private contractor of a public company?

In short, the court answered the question: Yes. It held that the term "employee" in the antiretaliation provision refers to both public *and private* employees. The majority opinion went on to explain that the ruling was consistent with the original purpose of the statute, which was to prevent another Enron scandal. That scandal was perceived to have been enabled in part by the failure of its private contractors, accountants and lawyers to report improper conduct.

IMPACT ON PRIVATE COMPANIES

The U.S. Supreme Court's expansive interpretation of Sarbanes-Oxley's whistleblower protections likely will impact many private com-

panies that have not historically believed they were subject to such provisions, and are not as familiar with them. The court declined to place any limitation on the type of private company whose employees could fall under the law, and likewise did not narrowly construe the types of claims that would warrant whistleblower protection.

The unlimited reach of the court's ruling creates uncertainty and increased exposure across public and private industries. For example, as noted in the dissenting opinion, the principle set forth in the majority opinion would lead to bizarre results, such as allowing a babysitter who works for an employee of a public company to file a federal lawsuit claiming retaliation under Sarbanes-Oxley in certain circumstances. Although the majority opinion dismissed such concerns as "fanciful," it will be important to monitor how future whistleblower suits will test the limits of the Lawson decision.

Steps to Take. There are certain measures that private companies can take to address *Lawson*, including the following:

Private companies should ensure that they are aware of whether and to what extent they contract with public companies and thus are subject to the Sarbanes-Oxley antiretaliation protections under *Lawson*.

Private companies should review their internal whistleblower complaint and investigative policies (or develop such policies if they do not have any) to ensure that they are prepared to address whistleblower complaints;

In addition, private companies potentially subject to Sarbanes-Oxley should ensure that their human resources and compliance personnel are up to speed on the issues surrounding the law's whistleblower provisions, reinforced with adequate training on antiretaliation issues.

Also, compliance and human resources departments should ensure that all adverse personnel decisions are documented, including exit interviews in the case of terminations, and thoroughly investigate and document steps taken to address complaints regarding improper conduct or whistleblower retaliation.

Public companies would also be wise to take heed of the potential impact of the Lawson decision, which raises considerations such as the following:

Can public companies be expected to learn of or adequately investigate whistleblower complaints made to private contractors, given that there may be limits on the oversight or access to witnesses or documents, and difficult issues regarding privilege?

ADDITIONAL CONSIDERATIONS

How might *Lawson* affect a public company's efforts regarding "corporate cooperation" in the eyes of enforcement or regulatory officials—is there a responsibility for public companies to monitor private contractors' whistleblower policies for effectiveness?

How might the increased whistleblower protections extended to private contractors impact the often difficult decision regarding voluntary disclosure by a public company to enforcement authorities?

At a minimum, *Lawson* provides arguments that may be used in whistleblower litigation by employees of private companies. In-house compliance and human resources personnel, as well as outside counsel practicing in this area, would be wise to monitor such retaliation cases as they work their way through the court system. It is still to be seen whether decisions in such cases will apply some limiting principles to the broad Lawson decision or, if not, whether Congress may be compelled to clarify the statute in accordance with its originally understood intent—to address public company wrongdoing and protect the shareholding public.


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