VENABLE® LLP

SEC Update

March 2014

A SOX in the Gut: Supreme Court Vastly Expands Workplace "Whistleblower" Law

AUTHORS

W. Warren Hamel

Todd J. Horn

Maggie T. Grace

RELATED PRACTICES

Securities Enforcement and Compliance

Investigations and White Collar Defense

Labor and Employment

Litigation

ARCHIVES

2014 2010 2006

2013 2009 2005

2012 2008 2004

2011 2007

Are your employees covered by the Sarbanes-Oxley Act's whistleblower protection simply because your company contracts with a public company? The Supreme Court made clear this week that the answer to that question is "yes," thus expanding protection to vast numbers of employees and contractors not previously thought to be covered. In general, the Sarbanes-Oxley Act protects covered employees from workplace retaliation, such as termination or demotion, because they have reported fraud, accounting abuses, or violations of the securities laws by publicly traded companies.

In *Lawson v. FMR LLC*, the Supreme Court addressed who is a covered employee under the Act and held that whistleblower protection extends not only to employees of the public company itself, but also to employees of private contractors and subcontractors retained by the public company. The plaintiffs in the case were former employees of privately held companies (collectively, FMR) that contracted to advise or manage the Fidelity family of mutual funds. They had sued their former employers alleging that, in violation of 18 U.S.C. § 1514A (the whistleblower provision), they reported suspected fraud relating to certain Fidelity mutual funds and, as a result, experienced retaliation. FMR moved to dismiss the lawsuits, arguing that § 1514A protects only employees of public companies who "blow the whistle." The district court denied the motions to dismiss, but a divided panel of the First Circuit **reversed on appeal**, agreeing with FMR that only employees of public companies were afforded protection by the Act.

In a 6-3 decision, the Supreme Court sided squarely with the former employees. The Court took a broad view of the Act's whistleblower protections, reasoning that many of the Act's provisions control the conduct of accountants, auditors, lawyers, and others who contract with public companies, and that Congress understood the need to prevent the fear of retaliation from deterring these external employees from reporting fraud. Reading § 1514A narrowly to exclude employees of contractors and others, the Court feared, would risk "another Enron debacle."

The dissenting Justices raised a number of hypothetical whistleblowing scenarios that underscore the dramatically expansive reach of the decision and should cause any employer significant concern. For example, they raised the possibility that a parent who is a checkout clerk for the local Wal-Mart (a public company) could face a retaliation suit if the parent fires his babysitter for alleging that the child she babysits is involved in Internet purchase fraud. The dissenting Justices also suggested that a cleaning company that contracts with Starbucks (a public company) could face liability under the Act if it demotes an employee who reports that another nonpublic company client mailed a fraudulent invoice to the cleaning company.

The Court dismissed this parade of horribles as "hypothetical." The Court, however, declined to provide any significant guidance as to how broadly its interpretation of the whistleblower provision might extend because the case at hand "f[e]ll squarely within Congress' aim in enacting § 1514A." In other words, the alleged fraud reported by the plaintiffs implicated the mutual funds' shareholders. Determining the limits to the broad reach of the Court's holding will have to wait for another day. Nevertheless, all companies should take the opportunity to review and tune up their anti-retaliation policies and training procedures to minimize the risk of liability under this new decision.

Venable attorneys in the **Securities Enforcement and Compliance**, **Investigations and White Collar Defense**, and **Labor and Employment** practice groups are well-positioned to provide legal counsel to companies facing the legal issues associated with the Court's decision.