THE EMPLOYMENT LAW AFTERMATH

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Supreme Court to Consider Scope of SOX Whistleblower Protections

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The Supreme Court recently agreed to hear for the first time a case involving the Sarbanes-Oxley Act's ("SOX") whistleblower provision. The Court granted a writ of certiorari to determine whether an employee of a privately-held contractor to a publicly traded company is protected from retaliation under SOX's whistleblower provision. The case is *Lawson v. FMR, LLC.*

The Facts of the Case

Jonathan Zang was an analyst for FMR LLC, a subcontractor of Fidelity Investments. In early 2005, Mr. Zang raised concerns that a draft registration statement for Fidelity funds was misleading as to how executives were compensated and that several funds labeled as active were in fact veiled inactive index funds. FMR terminated Mr. Zang's employment in June 2005.

FMR also employed Jackie Lawson. Ms. Lawson raised concerns relating to Fidelity's cost accounting methodologies for calculating expenses. In 2007, she resigned, claiming that FMR constructively discharged her because of her previous SOX complaints.

Both employees filed retaliation claims with the Occupational Safety and Health Administration ("OSHA"), alleging adverse actions in response to the complaints that they had made.

Section 1514A of SOX prohibits a publicly held company from retaliating against an employee after the employee provides information on possible SEC fraud.

Mr. Zang and Ms. Lawson filed separate suits with OSHA and then in the U.S. District Court for the District of Massachusetts. The court consolidated the cases.

FMR filed a motion to dismiss, arguing that Mr. Zang and Ms. Lawson were not covered employees under Section 1514A because they were not employees of a public company, but rather were employed by the privately held FMR.

Mr. Zang and Ms. Lawson contended that employees of those public companies' subcontractors should be covered under the SOX whistleblower provision.

The district court held that Section 1514A of SOX extends coverage to employees of private agents, contractors, and subcontractors of public companies. FMR asked the U.S. Court of Appeals for the First Circuit to certify an interpretation of the provision at issue. The divided First Circuit reversed applying the whistleblower provision only to publicly traded companies and their employees.

What the Court Said

In a case of statutory interpretation, the First Circuit determined that Congress did not intend the term "employee" to cover employees of privately owned companies serving as contractors to publicly held companies or mutual funds.

The First Circuit also stated that Congress had an opportunity to expand the provision's coverage, as it did under several other statutes with whistleblower provisions but chose not to do so.

Two months after the *Lawson* decision, the Administrative Review Board ("ARB") reached a conclusion opposite to the First Circuit in a similar case. In *Spinner v. David Landau and Associates*, the ARB held that contractors and subcontractors were protected employees under Section 1514A.

What Employers Should Do

In addition to the question of whether contractors and their employees are covered, the Supreme Court may also determine if the ARB may ignore existing federal appellate decisions when interpreting SOX.

Until the U.S. Supreme Court decides this matter, employers should consider the possibility that even privately held companies may be required to comply with the whistleblower provisions provided under SOX.

Employers should create channels for employees to register complaints, investigate complaints that merit further inquiry, and support adverse action decisions with evidence of a non-retaliatory motive.

Please contact us with questions. ◆