KIRKLAND **ALERT**

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The Supreme Court Gives SOX Anti-Retaliation Remedies to Lawyers and Accountants (and Others) Who Advise Public Companies

The Sarbanes-Oxley Act (SOX), enacted in 2002 in response to the Enron financial scandal, provided that "[n]o [public] company . . . , or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" whistleblowing or other protected activity. 18 U.S.C. § 1514A(a) (2006 ed.).[1] In *Lawson v. FMR LLC*, No. 12-3, slip op. (Mar. 4, 2014), the Supreme Court addressed the scope of the protected class of whistleblowers under § 1514A. In a 6-3 opinion written by Justice Ginsburg, the Court held that § 1514A, in addition to protecting employees of public companies, affords protection to employees of *privately* held contractors and subcontractors who perform work for public companies.

The Court's holding makes available government-enforced remedies for retaliation—administered through the U.S. Department of Labor and/or the federal courts—to significant numbers of employees of private companies. Law firms and accounting firms that no doubt regularly (and correctly) advise their public clients that good corporate governance requires encouraging internal reporting of potential misconduct and policies protecting whistleblowers from retaliation, could now in certain circumstances find themselves facing the same federal oversight of their employment actions as their public clients. That is also true, of course, for those firms' privately held clients, who are working as contractors and subcontractors performing work for public companies.

Background on SOX Whistleblower Retaliation Suits

In at-will employment arrangements, employers can discipline or discharge an employee for any reason within the bounds of the anti-discrimination laws. In 2002, SOX provided an additional layer of protection to employees who claimed they were retaliated against for raising concerns about certain fraudulent activity by public companies. SOX gave employees the opportunity to file a retaliation complaint with the Secretary of Labor within 90 days of the alleged retaliation (the Dodd-Frank Act has since extended the deadline to file to 180 days). Employees can seek review of final decisions of the Department of Labor's Administrative Review Board (ARB) in federal court or can proceed to federal court for *de novo* review if the ARB does not issue a final decision within 180 days of the filing of the complaint. Remedies include "make-whole" compensation, reinstatement, back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and attorney fees.

The Court's decision in *Lawson* addressed the question of who can bring whistleblower retaliation claims under SOX. Notably, while the Court mentioned the whistleblower provision of the Dodd-Frank Act in dicta, it did not define the term whistleblower as used in that statute; accordingly, the scope of protection afforded under the Dodd-Frank Act will continue to be the subject of dispute in lower courts.[2]

The Court's Holding

In *Lawson*, plaintiffs Jackie Hosang Lawson and Jonathan M. Zang filed administrative complaints, and later filed suits in the U.S. District Court for the District of Massachusetts, against their former employers—privately held com-

panies that provide advisory and management services to Fidelity mutual funds (collectively, FMR)—alleging that they were retaliated against for reporting fraud related to the Fidelity funds. Specifically, Lawson alleged that she was constructively discharged for raising concerns about accounting methods that overstated expenses related to Fidelity mutual funds, and Zang alleged that he was fired for expressing concerns about inaccuracies in a draft SEC registration statement related to Fidelity funds. FMR moved to dismiss the suits, arguing that § 1514A's anti-retaliation provisions protect only employees of public companies and not employees of privately held contractors and subcontractors who are engaged to work for public companies.

The district court denied FMR's motion to dismiss. On interlocutory appeal, a divided panel of the First Circuit reversed, holding that "an employee" in § 1514A refers only to employees of public companies. The Supreme Court reversed, concluding that the statutory text of § 1514A, the Enron scandal to which Congress was responding when it drafted SOX, and earlier legislation that Congress relied upon in drafting SOX, all support a conclusion that § 1514A protects employees of private contractors and subcontractors who perform work for public companies.

Regarding the statutory text, the Court concluded that the ordinary meaning of "an employee" in the phrase "no . . . contractor . . . may discharge . . . an employee" refers to the contractor's own employee. The Court rejected FMR's limited interpretation: it stated that § 1514A does not include any language limiting whistleblower protection to only employees of public companies, and further suggested that FMR's interpretation would leave a "huge hole" in SOX.

The Court explained that its textual interpretation was bolstered by the purpose of SOX, noting that the Senate Report shows that when Congress passed the Act in response to the Enron scandal, it was concerned with the actions of Enron's outside accountants, lawyers and consulting firms in perpetrating fraud, in addition to the actions of Enron's employees. The Court pointed out practical problems with FMR's interpretation, and suggested that it would insulate the entire mutual fund industry from § 1514A, because most mutual funds do not have their own employees; rather they are managed by independent investment advisers. The Court also rejected FMR's argument that subsequent amendments to § 1514A from the Dodd-Frank Act support a more limited interpretation.

Finally, the Court explained that its interpretation was supported by the parallel text and purpose of the whistleblower protection provision of the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121, which Congress used as a model for § 1514A and which has been interpreted to protect employees of contractors and subcontractors.

Scope of Anti-Retaliation Protection

In dissent, Justice Sotomayor, joined by Justices Kennedy and Alito, criticized the "stunning reach" of the holding, arguing that the majority opinion turns § 1514A into a "sweeping source of litigation" that protects nannies, housekeepers, and caretakers of anyone who works for a public company. A significant and practical limitation of SOX, however, is that, to be entitled to the protection of the anti-retaliation provisions, the whistleblower's allegations generally must concern criminal fraud (i.e. wire, mail, securities or bank fraud), SEC rules and regulations, or any federal law related to fraud against shareholders, which could include the Foreign Corrupt Practices Act.

In any event, the majority did not address the ultimate scope of §1514A, noting that the allegations at issue in this case clearly implicate the type of fraud that Congress intended to protect investors from when it enacted SOX. That holding, though, places private companies, like law firms and accounting firms, which may not have thought they were subject to SOX anti-retaliation provisions, at risk of such anti-retaliation suits. Many such companies likely already have anti-retaliation provisions, but the Court's decision provides an opportunity to consider steps to mitigate the risk of these suits, including revisiting, strengthening or implementing anti-retaliation policies and conducting relevant training.

1 The 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) subsequently amended the protections in SOX to include employees of public company subsidiaries and nationally recognized statistical rating organizations (NRSROs). *See* 18 U.S.C. § 1514A(a) (2012 ed.).

2 *Compare Asadi v. G.E. Energy (USA), LLC*, 720 F.3d 620 (5th Cir. 2013) (holding that Dodd-Frank whistleblower protection applies only to those who have disclosed violations to the SEC) *with Ellington v. Giacoumakis,* No. 13-11791-RGS, 2013 WL 5631046 (D. Mass. Oct. 16, 2013) (rejecting *Asadi* and following other district courts that have held that Dodd-Frank whistleblower protection can apply to individuals who have not disclosed violations to the SEC, including individuals who have disclosed violations internally pursuant to SOX).

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

Mark Filip, P.C.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
www.kirkland.com/mfilip
+1 (312) 862-2192

Robert Khuzami
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/rkhuzami
+1 (202) 879-5055

Henry J. DePippo
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/hdepippo
+1 (212) 446-4780

W. Neil Eggleston
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/neggleston
+1 (202) 879-5016

John F. Hartmann, P.C.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
www.kirkland.com/jhartmann
+1 (312) 862-2215

Kenneth R. Lench
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/klench
+1 (202) 879-5270

Mark Holscher
Kirkland & Ellis LLP
333 South Hope Street
Los Angeles, CA 90071
www.kirkland.com/mholscher
+1 (213) 680-8190

Michael J. Garcia
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/mgarcia
+1 (212) 446-4810

Samuel G. Williamson
Kirkland & Ellis LLP
11th Floor, HSBC Building, Shanghai IFC
8 Century Avenue, Pudong New District
200120 Shanghai
P.R. China
www.kirkland.com/sgwilliamson
+8621-3857-6300

Brigham Q. Cannon
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/bcannon
+1 (202) 879-5977

Elizabeth S. Hess
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
www.kirkland.com/ehess
+1 (312) 862-3253

Edward Liva
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
www.kirkland.com/eliva
+1 (202) 879-5275