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| **Supreme Court extends SOX whistleblower protection to contractor employees**  On March 4, 2014, the U.S. Supreme Court issued its opinion in Lawson v. FMR LLC, No. 12-3 (Mar. 4, 2014). The decision came in an unusual 6-3 split for the court, with Justice Ginsberg’s majority opinion joined by Justices Breyer, Kagan, and Chief Justice Roberts, with Justices Scalia and Thomas concurring in principal part and concurring in the judgment, and Justice Sotomayor, along with Justices Kennedy and Alito, dissenting. The court ruled that Section 806 of the Sarbanes-Oxley Act (SOX), which bans retaliation against whistleblowers, applies not only to employees of public companies but also to employees of contractors and subcontractors who carry out work for public companies, significantly expanding the coverage of SOX.SOX provides that “[n]o public company . . . , or any officer, employee, contractor, subcontractor, or agent of such company” may retaliate against an employee because of whistleblowing activity. Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A(a) (emphasis added). Employees are protected from retaliation for “any lawful act . . . to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of . . . [federal criminal laws prohibiting mail, wire, radio, TV, bank, or securities fraud,] . . . any rule or regulation of the Securities and Exchange Commission [(SEC)], . . . [or] any provision of Federal law relating to fraud against shareholders . . . .” Id. Protected acts include filing an administrative action, testifying or otherwise assisting in an investigation, and, perhaps most important, reporting an alleged violation to a supervisor. Under SOX, unlawful retaliation may include any form of adverse action against whistleblowers in the terms and conditions of their employment, including discharge, demotion, suspension, threats, or harassment. An employee who believes he or she has suffered retaliation in violation of SOX may commence a private action to remedy the alleged violation by filing a complaint with the federal Occupational Safety and Health Administration (OSHA) within 180 days of either the violation or the date on which the employee became aware of the violation. A complainant whose claim is not addressed within 180 days of filing with OSHA can bring the complaint for adjudication in federal court. Notably, SOX has been expansively interpreted, particularly by the Administrative Review Board (ARB) of the Department of Labor, the agency responsible for enforcing SOX. | http://cecollect.com/tl/space.gif | http://f.datasrvr.com/f1/213/20869/shutterstock_105970766.jpg**Contacts**

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| Before Tuesday’s ruling, it was unclear whether SOX prohibited public company contractors from retaliating only against employees of the public company or also prohibited the contractor from retaliating against its own employees. In administrative proceedings, OSHA and the ARB had taken the position that SOX’s anti-retaliation protection extended to the employees of private contractors performing work for publicly traded companies. In Lawson, the plaintiffs were employees of private companies that advised publicly traded mutual funds; as is common for such mutual funds, the funds themselves had no employees. Instead, the funds retained private contractors to advise them. The employees of the contractor claimed they had suffered retaliation, including discharge, when they raised concerns about the mutual fund’s cost accounting methodologies. The First Circuit had embraced a narrow reading of the anti-retaliation ban of SOX, holding that it applied only to retaliation against the employees of public companies, as was suggested by the statutory caption. Under this interpretation, the First Circuit held that the Lawson plaintiffs, as employees of a private contractor, could not bring a claim under the whistleblower anti-retaliation provision of SOX.The Supreme Court took a broader view of the anti-retaliation provision of SOX, holding that an employee of a private contractor that provided services to a public company could bring a claim under SOX alleging that he or she had suffered retaliation at the hands of his or her employer for engaging in protected conduct. The court analyzed the legislative history of Section 806 — including the fact that the law arose out of the Enron scandal, when both employees of Enron and of its outside accounting firm, Arthur Andersen, faced retaliation when they attempted to report corporate misconduct. Analyzing the statutory language in light of that history, the court found that an interpretation of the law that covered retaliation by a private contractor only if it was committed against the employees of the public employer for whom the contractor was providing services “would shrink to insignificance the provision’s ban on retaliation by contractors.” Lawson at 10. The court stated that under such a construction, contractors’ employees would be vulnerable to retaliation by their employers for blowing the whistle on a scheme to defraud the public company’s investors — resulting in denial of protection not only to mutual fund advisers and managers but also to “legions” of accountants and lawyers. The majority stated that “[i]nstead of indulging in fanciful visions of whistleblowing babysitters and the like, the dissent might pause to consider whether a Congress prompted by the Enron debacle would exclude from whistleblower protection countless professionals equipped to bring fraud to a halt.” Id. at 14. This ruling dramatically expands the potential for whistleblower lawsuits. The court’s opinion specifically notes that law firms, investment advisers, and accounting firms may be among the contractors and subcontractors whose employees are covered by SOX, but the ruling sets no limits on the types of contractors who may be covered by the expanded interpretation of the anti-retaliation provision. (Notably, the law protects not just employees who detect corporate misconduct but also those who have a reasonable — even if erroneous — belief that such conduct occurred.) Despite the majority’s forceful rejection of Justice Sotomayor’s concerns about SOX actions brought by landscapers and babysitters, the outer limits of SOX anti-retaliation coverage remain to be explored and will likely lead to litigation. Suffice it to say at this point that any contractors who render services to a public company and whose employees will be in a position to raise concerns about the public company’s actions may well be covered. The Supreme Court’s decision means that law firms, accounting firms, and other contractors to publicly traded companies whose employees could raise issues relating to public company corporate misconduct must carefully evaluate their whistleblower policies and adopt procedures to protect their interests. It is imperative that such employers have effective procedures in place for receiving, processing, and investigating internal whistleblower claims, including claims of retaliation. Clear and understandable mechanisms for lodging complaints are especially important because while SOX does not require internal reporting, a large percentage of whistleblower claims hinge on whether the employee-plaintiff made protected internal complaints. Employers have a significant advantage if they can point to robust and accessible complaint procedures that the whistleblower failed to utilize.Whistleblower policies and procedures must also be coupled with intensive training of management, including training in handling the delicate situations that necessitate disciplinary action against alleged whistleblowers — for instance, in cases of poor performance or misconduct. Proper training of management and personnel responsible for intake, investigation, and resolution of whistleblower complaints could avoid costly litigation.Although whistleblowing claims are nothing new, the law governing such claims is in flux, and enforcement and private claims are on the rise. Contractors need to be prepared and vigilant to avoid becoming involved in costly litigation, which can severely damage a company’s reputation.We will continue to monitor court activity in this area of the law. For more information about the Lawson decision, other labor law developments, or other legal issues in the workplace, contact the authors of this Employment Alert or the Hogan Lovells lawyer with whom you work.

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