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Labor and Employment Law

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Supreme Court Widens Sarbanes-Oxley Whistleblower Net

On March 4, 2014, the U.S. Supreme Court significantly expanded the Sarbanes-Oxley anti-retaliation law to cover employees of private contractors who perform services for publicly-traded companies. Passed in 2002 in the wake of the Enron scandal, the Sarbanes-Oxley Act (SOX) establishes strict standards for financial behavior by publicly-traded companies and protects “employees” from retaliation for blowing the whistle on a number of specific types of violations. In *Lawson v. FMR LLC*, the Court concluded in a 6-3 decision that not only are employees of the publicly-traded company protected from retaliation, but employees of contractors and subcontractors of the company are also similarly protected.

Although it is not clear how wide the net will be expanded, millions of workers who provide almost any type of service to a publicly-traded company (e.g., cleaning, daycare, lawn service, as well as tax and audit and many others) will likely have the right to file a complaint with the Department of Labor and proceed to court if they suffer an adverse employment action after they have filed a complaint involving the publicly-traded company.

What does the Lawson decision mean for most employers? First, employers need to take inventory of whether they provide services to publicly-traded companies in order to determine if SOX’s whistleblower provision applies to their employees. Second, employers must be sure to establish properly worded anti-retaliation policies that are broad enough in scope to cover reports of alleged fraudulent activity, including reports of alleged Securities and Exchange Act violations. Third, even well-written policies will not be sufficient if managers and supervisors are not properly trained to deal with employee complaints covered by the policy. Managers must be aware that adverse actions against whistleblowers (not only terminations, but also lesser actions such as job reassignments, shift changes, and below-average merit increases) can create serious liability for their employer.

A well-publicized internal complaint procedure is crucial; otherwise, employees will likely turn to a private attorney or a government agency to raise their complaints. All complaints must be taken seriously, followed by reassurance to the complaining employee that he/she will not be retaliated against in any manner. If an internal complaint of retaliation is made, the employer must conduct a thorough and comprehensive investigation, and take corrective action if necessary. The investigation and corrective action must be properly documented. Solid documentation will help the company assess whether the complaint falls under SOX and will lock in the scope of the employee’s complaint. A well-documented investigation, followed by an appropriate response to the facts uncovered, will also show a court that the company took the complaint seriously, and may help to avoid unnecessary litigation.

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