# SO YOU THINK YOUR EMPLOYEES AREN'T PROTECTED WHISTLEBLOWERS UNDER THE *SARBANES-OXLEY ACT* BECAUSE YOU'RE NOT A PUBLICLY-TRADED COMPANY? THINK AGAIN!

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Section 1514A of the Sarbanes-Oxley Act states that:

> *"No [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.).

On March 4, 2014, the United States Supreme Court issued its decision in Lawson, et. al. v. FMR LLC, et. al. The case concerned the definition of the protected class under section 1514A and the Court framed the issue as follows: Does section 1514A shield only those employed by the public company itself, or does it shield as well employees of privately held contractors and subcontractors (for example, investment advisers, law firms, accounting firms, etc.) who perform work for the public company?

The Petitioners in the case were former employees of private companies that contract to advise or manage mutual funds. The mutual funds themselves are public companies that have no employees. Petitioner-Lawson worked for Fidelity Brokerage Services, LLC, a subsidiary of FMR Corp., which was succeeded by FMR LLC. Petitioner-Zang was employed by a different FMR LLC subsidiary, Fidelity Management & Research Co., and later by one of that company's subsidiaries, FMR Co., Inc. (All referred to collectively as "FMR"). Lawson alleged that, after she raised concerns about certain cost accounting methodologies, believing that they overstated expenses associated with operating the mutual funds, she suffered a series of adverse actions, ultimately amounting to constructive discharge. Zang alleged that he was fired in retaliation for raising concerns about inaccuracies in a draft SEC registration statement concerning certain Fidelity funds.

Lawson and Zang separately filed administrative complaints alleging retaliation proscribed by section 1514A. After expiration of the 180-day period specified in section 1514A(b)(1), they each filed suit in the U.S. District Court for the District of Massachusetts. Taking the allegations of the complaints as true, both plaintiffs blew the whistle on putative fraud relating to the mutual funds and, as a consequence, suffered adverse action by their employers.

Lawson and Zang argued that a strict reading of section 1514A means that "[n]o . . . contractor . . . may . . . discriminate against [its own] employee [for whistleblowing]." Respondent-FMR interpreted section 1514A differently and moved to dismiss the lawsuits. FMR argued that neither plaintiff has a claim for relief under section 1514A because FMR is privately held and section 1514A only protects employees of public companies – those being

companies that either have "a class of securities registered under section 12 of the Securities Exchange Act of 1934," or that are "required to file reports under section 15(d)" of that Act. In a joint order, the District Court rejected FMR's interpretation of section 1514A and denied the dismissal motions in both lawsuits. On interlocutory appeal, a divided panel of the First Circuit Court of Appeal reversed the District Court's ruling. The Court of Appeal's majority acknowledged that FMR is a "contractor" within the meaning of section 1514A(a), and thus among the actors prohibited from retaliating against "an employee" who engages in protected activity. However, the majority agreed with FMR that "an employee" refers only to employees of public companies and does not cover a contractor's own employees.

On review, the United States Supreme Court disagreed with the First Circuit and held that, "…based on the text of §1514A, the mischief to which Congress was responding [when enacting the Sarbanes-Oxley Act], and earlier legislation Congress drew upon, … the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors."

The Supreme Court explained that in the Enron scandal that prompted the Sarbanes-Oxley Act, contractors and subcontractors, including the accounting firm Arthur Andersen, participated in Enron's fraud and its cover-up. When employees of those contractors attempted to bring misconduct to light, they encountered retaliation by their employers. As such, the Sarbanes-Oxley Act contains numerous provisions aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies.

The Court said that its reading of section 1514A avoids insulating the entire mutual fund industry from section 1514A since virtually all mutual funds are structured so that they have no employees of their own but rather are managed by independent advisors. The Court held that "…[its] reading of §1514A, in contrast, protects the employees of investment advisors, who are often the only firsthand witnesses to shareholder fraud involving mutual funds."

Takeaway: While the facts of the case involved alleged shareholder fraud involving mutual funds, the Court's interpretation of the protections under section 1514A will apply to any other industry or business governed by the Sarbanes-Oxley Act. As such, if your company provides professional services to, or contracts with, a publicly-traded company, your employees likely fit within the protected class under section 1514A.