

Supreme Court Expands Sarbanes-Oxley Whistleblower Protection

Labor & Employment Law Update

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The U.S. Supreme Court ruled that the whistleblower protections of the Sarbanes Oxley Act (SOX) reach beyond publicly traded companies. In a split decision, the Court held that employees of privately held companies that contract or subcontract with a publicly traded company covered by SOX are also protected by SOX's whistleblower provision.

The case involved two employees of a private company that contracted to advise and manage mutual funds for a publicly traded company subject to SOX. Both employees alleged they blew the whistle on putative fraud relating to the mutual funds and suffered retaliation as a result. The employees filed suit alleging violations of the whistleblower provision of SOX.

The contractor (i.e. the employer of the two plaintiffs) argued that SOX whistleblower protections applied only to employees of publicly traded companies. The 1st Circuit agreed that the plain text and the title of the whistleblower section – “Whistleblower Protection for Employees of Publicly Traded Companies” – established that the provision did not apply to employees of private companies. The employees convinced the U.S. Supreme Court to take the appeal.

The Supreme Court disagreed and ruled that the language of the whistleblower provision and the legislative intent made it clear that employees of entities that contract with publicly traded companies are protected if they blow the whistle on certain types of purported fraud or securities violations. The Court acknowledged that further limiting instructions might be necessary in the future, but saw no need to address concerns that whistleblower protection would be unreasonably extended based on the ruling. For example, the dissent believes the ruling will mean that the SOX whistleblower provision will now apply to employment relationships between individual officers of publicly traded companies and their nannies, housekeepers, gardeners, etc. That is, if the nanny reported alleged fraud he/she would be protected by the whistleblower provision of SOX.

The actual reach of the Court's decision is yet to be determined, but companies that contract with publicly traded companies are likely subject to the whistleblower protections of SOX. The Court's ruling will certainly increase the

volume of SOX whistleblower claims. Employers should immediately examine whether they contract with publicly traded companies. If they do, now is the time to update internal reporting and compliance procedures. In addition, human resources personnel and appropriate members of management should be trained in appropriately handling and responding to whistleblower complaints.

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