The Continuing Legacy of Enron: Whistleblowing under the Sarbanes-Oxley Act after Lawson v. FMR LLC

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I. INTRODUCTION

Just as the Securities Act of 1933 followed the United States Great Depression\(^1\) and the recent Dodd-Frank legislation followed the subprime mortgage crisis,\(^2\) so did the Sarbanes-Oxley Act (“Sox”) follow the scandals of Enron, MCI/WorldCom, and other large corporations at the turn of the new millennium.\(^3\) By January 2001, “Enron Corporation was the seventh largest company in America with over 21,000 employees and operations in more than 30 countries” around the world.\(^4\) Before its collapse, Enron was fraudulently boasting revenues of U.S. $138.7 billion.\(^5\) By December of that same year, Enron had declared bankruptcy.\(^6\) The widespread and large-scale fraud Enron had engaged in shocked its investors and the country alike.\(^7\)

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1. See A Brief History of Securities Regulation, St. of Wis. Dep’t of Fin. Institutions, https://www.wdfi.org/lt/securities/regexemp/history.htm (last visited Nov. 8, 2014) (exploring origins of securities regulation).


3. See Vega, supra note 2, at 494-95 (illustrating scandalous backdrop motivating enactment of Sox). Ironically, the case against one of the lead Enron fraudsters, Jeffrey Skilling, did not conclude until 2013, after the passage of the Dodd-Frank legislation in response to a second financial catastrophe. See Aaron Smith, Ex-Enron CEO Skilling Has 10 Years Lopped off Sentence, CNN, June 21, 2013, http://money.cnn.com/2013/06/21/news/companies/skilling-enron-resentencing/ (reporting final settlement of one of Enron-related criminal convictions).


5. Id. Much of this so-called revenue was generated by buying and selling the same gas or electricity over and over again. See Dan Ackman, Enron the Incredible, FORBES, Jan. 15, 2002, http://www.forbes.com/2002/01/15/0111enron.html (explaining how revenue was generated).

6. FERRARA & LAMEAU, supra note 4.

7. See Richard Moberly, Sarbanes-Oxley’s Whistleblower Provisions: Ten Years Later, 64
Sox was enacted in response to Enron’s fraud. Although Sox was enacted to prevent future corporate fraud, the protective measures put in place by Sox have not prevented fraud from continuing. Most recently, Alayne Fleischmann, a securities lawyer working for JPMorgan Chase—also known as the “$9 Billion Witness”—came forward in response to the fraudulent lending practices of her former employer. As the recent Supreme Court Case Lawson v. FMR, LLC and a handful of subsequent decisions have already exemplified, whistleblowing continues to be an

S.C. L. REV. 1, 2 [hereinafter Moberly Ten Years Later] (“In 2001 and 2002, corporate scandals exploded in the United States as the public learned about massive fraud at large companies such as Enron and WorldCom.”).

8 See Lawson v. FMR, LLC, 134 S. Ct. 1158, 1162 (2014) (“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.”); but see Anita K. Krug, Downstream Securities Regulation, 94 B.U. L. REV. 1589, 1594 (2014) (differentiating Lawson arguing two types of securities regulation: public companies, and investment companies and advisers). The “Corporate Code of Silence” involved discouraging employees, including attorneys, accountants, and auditors, from reporting concerns about wrongdoing or inconsistencies. See Lawson, 134 S. Ct. at 1162-63 (detailing Corporate Code of Silence aspect of Sox’s enactment).


10 See Matt Taibbi, The $9 Billion Witness: Meet JPMorgan Chase’s Worst Nightmare, ROLLING STONE, Nov. 6, 2014, http://www.rollingstone.com/politics/news/the-9-billion-witness-20141106 (exploring JPMorgan Chase’s mortgage fraud and Fleischmann’s whistleblowing under Dodd-Frank). Similar to Arthur Andersen and Enron, JPMorgan Chase had internal policies against emailing concerns or problems related to the mortgages. Id. As Fleischmann recalled, “if you sent him an email, he would actually come out and yell at you.” Id. (exemplifying informal cultures of silence that discourage reporting).


evolving area of law, with the goal of protecting investors from the type of fraud that had been perpetrated by trusted advisers, professionals, and even attorneys at companies like Enron. This note examines in detail the enactment of Sox, provides an overview of Sox whistleblowing claims, explores the scope of the Sox whistleblower protection clause, and identifies some unresolved issues relating to Sox's whistleblower protection provision. Finally, this recommends that both public and private employers implement an internal reporting system to encourage internal communication around potential problems in order to facilitate prompt and internal correction of these issues.

II. SOX ORIGIN

Enron was considered an innovative company, and it spearheaded the kind of derivatives trading practiced until Enron's collapsed in 2001. Despite its size, influence, and power, a number of short-sighted business practices and bad deals led to substantial losses for Enron. After these losses, Enron needed to borrow money in order to have capital to operate. However, in order to look loan-worthy to its creditors Enron's

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13 See supra notes 10-12 (giving examples of recent Sox whistleblower controversy); see also Zuckerman, supra note 11, at 1 (“2014 has been an extremely important year for litigants dealing with whistleblower claims brought under the Sarbanes-Oxley Act of 2002... and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010...”). This area of law is likely to see acceleration in development as federal courts and administrative tribunals alike handle a numerous, unresolved issues regarding Sox whistleblower claims. See Zuckerman, supra note 11, at 1 (“The development of the law in this area is likely to continue to accelerate, as administrative tribunals and federal courts grapple with a number of key, unresolved issues regarding the scope of SOX and Dodd-Frank whistleblower claims.”).


16 See FERRARA & LAMEAU, supra note 4, at 101 (describing Enron’s business dealings).

17 Id. Enron did this through a number of accounting methods, including placing debt in Special Purpose Entities—colloquially known as shell companies—and market-to-market accounting cost valuations. See id. at 101-02 (explaining role of SPEs). Enron created shell companies specifically to isolate financial risk so it could be removed from Enron’s financial disclosures, while reporting the transaction as a revenue-generating “sale.” Jeremy Kahn, Off Balance Sheet—and Out of Control, FORTUNE, Feb. 18, 2002, http://archive.fortune.com/magazines/fortune/fortune_archive/2002/02/18/318145/index.htm (explaining role of SPEs). See generally Steven Schwarcz, Enron and the Use and Abuse of Special Purpose Entities in Corporate Structures, 70 U. CIN. L. REV. 1309, 1323 (2002) (explaining how Enron reporting those transactions was false revenue).
financial statements needed drastic “cosmetic surgery.”

Enron’s fraudulent financial reporting was not immediately apparent because its independent auditing firm, Arthur Andersen LLP, failed to identify the problem. Furthermore, employees within Enron were rewarded with lavish compensation for actively assisting Enron’s fraudulent activity, and Enron had strong policies encouraging silence among other employees to keep its fraudulent activities from being discovered. The fraud resulted in one of the largest bankruptcies in U.S. history. Seemingly overnight, thousands of people lost jobs and billions of dollars in assets disappeared.

Congress held investigative hearings following Enron’s epic collapse in order to determine how the country’s corporate governance system, law enforcement agencies, and anti-fraud measures failed to detect the widespread deceptions of Enron, as well as other companies that had engaged in similar fraudulent activity during this time frame. The hearings revealed that many employees were aware of fraudulent activity, but did not report it; it was effectively a “corporate code of silence.” Due to the perceived code of silence, Congress included in the Sarbanes-Oxley

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18 See Kahn, supra note 17 (describing evolvement of SPEs).

19 See Lawson, 134 S. Ct. at 1162 (acussing accountants, along with Arthur Anderson LLP with fraudulent activity within Enron); Etherington & Iaia, supra note 15 (noting Arthur Anderson LLP failed with fraud prevention and corrective measures).


21 See Lawson, 134 S. Ct. at 1162 (explaining employees who did speak up faced retaliation). In fact, there was “abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a ‘corporate code of silence’ … discourag[ing] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally.” Id.; see Vega, supra note 2, 502-05 (arguing for increased emphasis on internal reporting procedures for whistleblowing provisions).

22 See Moberly Ten Years Later, supra note 7, at 2 (explaining fraud in bankruptcy context).

23 See id. at 2 n.3 (citing sources reviewing Enron’s rapid change from ‘most admired’ to ‘most despised’ status following fraud).


Act of 2002 twenty-six “wide-ranging corporate governance provisions specific sections related to whistleblowers.”

During the congressional hearings, Sherron Watkins, who was an internal accountant at Enron during its fraudulent activities, gave testimony on both how the company manipulated its finances, and how the company retaliated against her for bringing that to the attention of the company CEO, Ken Lay. While not the case across the board, the Senate hearing emphasized how Enron “did not consider firing [Arthur] Andersen [Enron’s outside accounting auditing firm]; rather, the company sought advice on the legality of discharging the whistleblower.” It was this conduct, that “discouraged employees at nearly every turn” from blowing the whistle on fraud that motivated the expansive Sox whistleblowing provisions. The Senate had concluded that to encourage employees to come forward with evidence of wrongdoing, the law needed (more) robust protection from retaliation:

[C]orporate whistleblowers are left unprotected under current law. This is a significant deficiency because often, in complex fraud prosecutions, these insiders are the only

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29 See Moberly Ten Years Later, supra note 7, at 5 (describing Sherron Watkin’s testimony). In fact, Enron’s human resources department asked its outside counsel for advice on whether Watkins could be fired after reporting accounting fraud, and outside counsel informed them that no law prevented it. See Email from Carl Jordan, Attorney, Vinson & Elkins L.L.P., to Sharon Butcher, Assistant Gen. Counsel, Enron (Aug 24, 2001, 7:02 PM), http://www.justice.gov/archive/enron/exhibit/03-15/BBC-0001/Images/9810.001.PDF (discussing legality of discharging whistleblower).
30 See Moberly Structural Model, supra note 27, at 1117 (examining WorldCom’s board of directors firing wrongdoer, not whistleblower).
32 See id. at 5, 10 (explaining consequences faced by whistleblower when reporting on fraud).
firsthand witnesses to the fraud. They are the only people who can testify as to “who knew what, and when,” crucial questions not only in the Enron matter, but also in all complex securities fraud investigations. Although current law protects many government employees who act in the public interest by reporting wrongdoing, there is no similar protection for employees of publically traded companies who blow the whistle on fraud and protect investors. With one in every two Americans investing in public companies, this distraction fails to serve the public good.33

The Senate, in drafting and enacting Sox, sought to provide that protection, ultimately aiming to prevent corporate fraud.

The Sox whistleblowing provision amounted to a significant broadening of federal whistleblower protection, especially compared to the industry-specific and/or state-specific protections prior to Sox.34 Furthermore, only a handful of states prior to Sox had statutes covering private-sector whistleblowers.35 The breadth of coverage for private employees varied significantly between states, so that employees had difficulty predicting the scope of protection and differing treatment of employees in large, national businesses.36 In the wake of Enron, Congress decided to address this statutory “patchwork and vagaries” of state law, and provide a more consistent, nationally-reaching protection for whistleblowers.37

III. SOX WHISTLEBLOWER PROTECTION

Sox included a whistleblower protection provision38 to provide protection for whistleblowers, enhance transparency in corporations, and

33 See Moberly Ten Years Later, supra note 7, at 6 (quoting S. Rep. No. 107-146, at 4-5.).
34 See Moberly Ten Years Later, supra note 7, at 6-7 (referring to prior whistleblowing protection statutes as “‘silos’ of protection”); see also Private Sector Whistleblowers: Are There Sufficient Legal Protections?: Hearing Before the Subcomm. on Workforce Protections, H. Comm. on Educ. & Labor, 110th Cong. 2-3 (2007), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=lawfacpub (statement of Richard E. Moberly, Assistant Professor of Law, Univ. of Neb. College of Law).
36 See id. (listing forty states where employees could bring tort for retaliatory discharge).
38 18 U.S.C. § 1514A.
ultimately prevent fraud.\textsuperscript{39} Sox makes it illegal for a covered-company to fire or otherwise discriminate against an employee for providing information or assisting with an investigation regarding what the employee \textit{reasonably believes} to be a violation of a rule of the Securities and Exchange Commission, the federal criminal laws regarding mail, wire, and bank fraud, or any other federal law relating to fraud against shareholders.\textsuperscript{40} The protection of §1514A attaches when the employee provides information of conduct he or she reasonably believes to be in violation of an applicable rule or law.\textsuperscript{41} Once protected, §1514A makes it illegal for the employer to retaliate against an employee.\textsuperscript{42}

In order to receive the §1514A protections, an employee must file a complaint with the Department of Labor—specifically, with the Occupational Safety and Health Administration.\textsuperscript{43} A claim must be filed within 180 days of the reported activity or 180 days from when the employee should have known of the violation.\textsuperscript{44} OSHA then has 60 days to investigate the complaint and issue a letter indicating whether or not it has found reasonable cause to believe a violation has occurred.\textsuperscript{45}

\textsuperscript{39} See Moberly Structural Model, supra note 27, at 1126-31 (explaining goal, impact, and significance of Sox’s Whistleblower protection).

\textsuperscript{40} See Zuckerman, supra note 11, at 1-2 (citing 18 U.S.C. § 1514A(a)(1)), Sox Whistleblower Protection statute). Dodd-Frank inserted the “reasonably believes” clause into 18 U.S.C. § 1514A, in order to further protect employees. \textit{Id.} It is important to recognize, however, that Sox borrowed the language for §1514A from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (“AIR21”), and Sox set its burden of proof for plaintiffs accordingly. \textit{See Lawson,} 134 S. Ct. at 1167 (explaining, under Sox, whistleblower actions “shall be governed” by § 42121(b) of title 49).

\textsuperscript{41} See Zuckerman, supra note 11, at 2 (explaining how §1514A protections work). Protected reporting includes when the employee provides information or assistance to a federal regulatory agency, law enforcement agency, Congress, or even internally reporting to someone in the company “with supervisory authority over the employee” or with authority to “investigate, discover, or terminate misconduct.” \textit{Id.} (quoting 18 U.S.C. § 1514A(a)(1)).

\textsuperscript{42} \textit{Id.} Sox also amended the obstruction of justice statute, 18 U.S.C. § 1513(e), making it illegal for employers to interfere with the livelihood of any person in retaliation for their providing truthful reports to law enforcement officer. \textit{See id.} (noting other avenue for employee protection not limited to allegations of fraud).

\textsuperscript{43} See § 1514A(b) (detailing steps to seek relief for violation of subsection (a)); \textit{Filing Whistleblower Complaints under the Sarbanes-Oxley Act, OCCUPATIONAL SAFETY AND HEALTH ADMIN.} (Dec. 2011), https://www.osha.gov/Publications/osha-factsheet-sox-act.pdf [hereinafter OSHA Fact Sheet ] (outlining requirements, rights, procedure of §1514A protections and claims).

\textsuperscript{44} See 18 U.S.C. § 1514A(b)(2)(D) (outlining timeline for claim); \textit{see also} OSHA Fact Sheet, supra note 43 (outlining requirements, rights, procedure of §1514A protections and claims). This 180 day statute of limitations is significantly larger than some other whistleblower protection provisions. \textit{See, e.g.,} Clean Air Act of 1970, 42 U.S.C. § 7622 (requiring reports within 30 days); Safe Drinking Water Act 1974, 42 U.S.C. § 300j-9(i) (requiring reports within 30 days); Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 (requiring reports within 90 days).

\textsuperscript{45} See Zuckerman, supra note 11, at 4 (recognizing in practice OSHA typically takes
Department of Labor makes a determination within 180 days, the complaint is tried administratively, but is appealable to the federal courts. If the Department of Labor has not issued a final decision within 180 days of filing the complaint, the employee is “entitled to a trial by jury” and may file his case directly to the federal district court. Sox borrowed the language for § 1514A from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, also known as AIR 21, and Sox set its burden of proof for plaintiffs to be the same as AIR 21. This is a more plaintiff-employee friendly burden than most whistleblower statutes. Under the contributing factor standard, once an employee satisfies his or her burden the burden shifts to the employer who now must prove—by clear and convincing evidence—that it would have taken the same actions regardless of the employee’s whistleblowing.

Many, though not all, considered Sox’s broad applicability, employee-plaintiff friendly burdens of proof, and other protections, to have

“considerably longer”).

46 See id. at 4-5 (offering more detail on administrative process).
49 See 18 U.S.C. § 1514A(b)(2)(C) (stating burden of proof is governed by 49 U.S.C. § 42121(b)); see also Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, PUB. L. No. 106-181, § 519(a), 114 Stat. 61 (reproducing 49 U.S.C. § 42121); William Hartsfield, 2 INVEST. EMPLOYEE CONDUCT § 12:34 ("Proceedings under Sarbanes-Oxley are governed by the rules and procedures and burdens of proof of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century."). Sox provides that, with few exceptions, whistleblower actions “shall be governed by the legal burdens of proof set forth in § 42121(B) of title 49.” 18 U.S.C. § 1514A(b)(2)(c). In other words, the “heightened pleading standards established in federal courts may not be applied” to Sox claims. See Hartsfield, supra (explaining differences between Sox whistleblower claims and other whistleblower claims).
50 See Moberly Ten Years Later, supra note 7, at 8. Under § 1514A, employees must merely prove that the whistleblowing was a motivating factor for the retaliatory conduct. See 18 U.S.C. § 1514A(a)(1) (describing elements); 29 C.F.R. § 1980.104(b) (2011) (describing elements). Both the Department of Labor, which handles many whistleblowing claims, and many legal scholars consider the “motivating factor” standard much easier for plaintiffs to prove than the typical discrimination standard of employer “mixed-motive.” See, e.g., Timothy P. Glynn et al., Employment Law: Private Ordering and Its Limitations 224-25 (2007) (“Congress’s use of ‘contributing factor’ in Sarbanes-Oxley suggests the same or perhaps even a lower level of causation [than] motivating factor causation.”); Moberly Empirical Analysis, supra note 27, at 80 (comparing contributing factor causation to mixed-motive causation). Furthermore, the statute of limitations period only begins running once the employee-complainant knows or reasonably should have known that the employer’s conduct to the employee was actionable. See Hartsfield, supra note 49, at § 12:34 (explaining Sox statute).
significantly improved whistleblower protection in the United States.\textsuperscript{52} Sox has been modified since its enactment, such as: subsequent statutes adding a refusal to engage in unlawful conduct as protected activity,\textsuperscript{53} increasing statute of limitations period,\textsuperscript{54} prohibiting employees from waiving their rights under § 1514A, such as with arbitration agreements,\textsuperscript{55} and the Dodd-Frank Act amended Sox to prohibit associational discrimination as retaliation.\textsuperscript{56} Political party did not seem to matter when these statutes were enacted, with both Republican and Democratic presidents signing whistleblower laws.\textsuperscript{57}

IV. COURTS CONSIDER THE SCOPE OF §1514A.

A. Split Interpretations

The Plaintiffs in Lawson were employees of companies that contracted to advise or manage mutual funds.\textsuperscript{58} Generally speaking,
mutual funds are public companies that do not have any employees. Instead, their management or advising is contracted or subcontracted to other companies, who handle those mutual funds’ day-to-day operations. There were two plaintiffs in this case. The first plaintiff is Lawson, who was employed by Fidelity Brokerage Services, LLC, a subsidiary of FMR Corp., which was succeeded by FMR LLC (“FMR”), the named defendant. The second plaintiff, Zang, was employed by a different FMR subsidiary, but due to the subsidiary’s shared parent company, and for convenience, the two cases were treated collectively as FMR. Having worked for FMR for fourteen years, Lawson was serving as a Senior Director of Finance before raising concerns regarding FMR’s accounting practices. Zang, who worked for FMR for eight years, was employed as a portfolio manager for several funds when he reported concerns about inaccuracies in a draft SEC registration statement concerning certain funds. FMR moved to dismiss the suits, arguing that neither plaintiff had a claim under § 1514A because FMR was a private company. The district court rejected FMR’s interpretation of § 1514A, denying the motion to dismiss. FMR filed an interlocutory appeal, where a divided First Circuit reversed the district court’s decision and granted FMR’s motion to dismiss.

The majority in the FMR interlocutory appeal (FMR Appeal) accepted that FMR was a contractor within the meaning of § 1514A(a), and therefore among the actors prohibited from retaliating against employees engaging in protected activity. However, the First Circuit agreed with FMR’s argument that “an employee” in § 1514A(a) refers to only employees of public companies. In other words, § 1514A, under the First Circuit’s interpretation, would protect only employees of the public

59 Id.
60 See id. (“...include[ing] making investment decisions, preparing reports for shareholders, and filing reports with the Securities and Exchange Commission (SEC.”).
61 Id. at 1164.
62 See id.
63 See Lawson, 134 S. Ct. at 1164 (explaining treatment of cases).
64 See id. (“[Lawson] believ[ed] that [FMR] overstated expenses associated with operating the mutual funds.”)
65 Id.
66 Id.
68 See Lawson v. FMR LLC, 670 F. 3d 61, 83 (1st Cir. 2012) (explaining court is bound by text of statute).
69 See id. at 68-80 (explaining holding).
70 Id.
company the fraud is reported against, but would not protect employees of companies contracted by public companies even if it is the contractor’s employees who recognize and report potential fraud. Judge Thompson alone dissented from the First Circuit’s ruling. 71 In her view, the majority’s view “impose[d] an unwarranted restriction on the intentionally broad language of the Sarbanes-Oxley Act . . . bar[ring] a significant class of potential securities fraud whistleblowers form any legal protection.” 72

A few months later, the Department of Labor’s Administration Review Board (“ARB”) issued a decision in an unrelated case— Spinner v. David Landau & Assoc., LLC 73—disagreeing with the First Circuit’s interpretation of § 1514A in Lawson. 74 The whistleblower in Spinner was an employee of an accounting firm that provided auditing, consulting, and, ironically, Sarbanes-Oxley compliance services to a public company. 75 The ARB explained that § 1514A affords whistleblower protection to employees of privately held contractors that render services to public companies. 76

With the differing interpretations of the First Circuit and the ARB opinion and Judge Thompson’s dissent, the Supreme Court agreed to hear Lawson. 77

B. The Supreme Court Weighs In

On March 4, 2014, the Supreme Court in Lawson v. FMR LLC 78 took up the issue of the definition of the protected class under Sox’s whistleblower protection provision, § 1514A. 79 The Court, interpreting §

71 Id. at 83.
72 Id.
73 Administrator’s Final Decision and Order of Remand, Spinner v. David Landau & Assoc., LLC, Docket No. 2010-SOX-029 (Dep’t of Labor May 31, 2012).
74 See id. (distinguishing Lawson); Lawson, 134 S. Ct. at 1164-65.
75 See Administrator’s Final Decision and Order of Remand, Spinner v. David Landau & Assoc., LLC, Docket No. 2010-SOX-029 (Dep’t of Labor May 31, 2012) (describing Spinner’s role).
76 Id.
77 Id. at 1164-65.
78 134 S. Ct. 1158 (2014).
79 See Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014) (“This case concerns the definition of the protected class: Does § 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 enterprises—who perform work for the public company?”). The Court’s decision is especially significant when placed in the context of its stance on securities cases during the “Roberts Era”. See John C. Coates IV, Securities Litigation in the Roberts Court: An Early Assessment, 57 Ariz. L. Rev. 1, 22 (discussing Lawson in context of Justices’ voting affiliations). Voting on Lawson was
1514A, held that “based on the text of § 1514A, the mischief to which Congress was responding, and earlier legislation Congress drew upon, that the provision shelters employees of private contractors and subcontractors, just as it shelters employees of the public company served by the contractors and subcontractors.” This overturned the First Circuit majority, ruling in line with Judge Thompson’s dissent and the ARB’s case in Spinner.

The Supreme Court came to its interpretation using a few different interpretive methods. First, it looked to the language of the statute, “giving the words used their ordinary meaning.” Using this approach, and agreeing explicitly with Judge Thompson’s dissent, the Court found that “boiling [§ 1514A] down to its relevant syntactic elements, it provides that ‘no... contractor... may discharge... an employee.’” The Court held that, in order to follow FMR’s argument and the First Circuit’s reasoning, the words “of a public company” must be inserted after “an employee.” The Court made it clear that, “[a]bsent any textual qualification, we presume the operative language to mean what it appears to mean: [a] contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.” Furthermore, the prohibited retaliatory measures—demotion, harassment, or other changes to condition of employment—are those measures that an employer would take against its own employees. To hold that Sox would not apply to employees of contractors working for public companies, would make the inclusion of “contractors” and “subcontractors” in § 1514A insignificant. Therefore, reading the plain text of § 1514A, the Sox whistleblower provision included employees of contractors as well as those of public companies.

“relatively unusual,” and the majority “included three left- and three right-leaning Justices.” Id. at 22.

80 Lawson, 134 S. Ct. at 1160-161.
81 See supra section IV.A (comparing 1st Circuit majority in Lawson with ARB Spinner decision).
82 Lawson, 134 S. Ct. at 1165 (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)).
83 Id. (quoting Lawson, 670 F.3d at 84 (Thompson, J., dissenting)).
84 See id. (exploring other Sox provisions which place “an employee” in provisions).
85 See id. at 1166 (“Contractors are not ordinarily positioned to take adverse actions against employees of the public company with whom they contract. FMR’s interpretation of § 1514A, therefore, would shrink to insignificance the provision’s ban on retaliation by contractors.”).
86 Id.
87 See Lawson, 134 S. Ct. at 1165 (explaining purpose of provision is prevention of another Enron scandal).
88 See id. at 1166 (“Absence any textual qualification, we presume the operative language means what it appears to mean: A contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.”).
The Court further identified that it is common knowledge §1514A was enacted as part of the Sox statutory scheme to prevent another Enron debacle.\textsuperscript{89} The Supreme Court accepted ARB’s observation that Congress had recognized “that outside professionals—accountants, law firms, contractors, agents, and the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up [Enron] officers ... perpetrated.”\textsuperscript{90} The Court goes so far as to say that Congress was focused on the role of Enron’s outside contractors facilitating Enron’s own internal fraud, when enacting Sox.\textsuperscript{91}

The Supreme Court also found further reason to interpret § 1514A as extending to employees of contractors: “employees gain protection for furnishing information to . . . ‘a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).’”\textsuperscript{92} The reference to employer knowledge is an additional indicator of Congress’ expectation that the retaliator § 1514A protects against will typically be the employee’s employer, which in Lawson was the independent contractor to FMR.\textsuperscript{93}

Another consideration in Lawson was that to read § 1514A as not applying to employees of contractors, at least in regards to the mutual fund industry, would insulate virtually the entire mutual fund industry where mutual funds typically have no employees of their own.\textsuperscript{94} The Court specified that “[t]hese investment advisers, under our reading of § 1514A, are contractors prohibited from retaliating against their own employees for engaging in whistleblowing activity.”\textsuperscript{95} While the First Circuit relied on protection against fraud in other provisions of Sox and other statutes, the Supreme Court held that separate protection does not remove the problem of protection for employees, which is specifically provided for only in § 1514A.\textsuperscript{96}

\textsuperscript{89} \textit{See id.} at 1169 (citing S. Rep., at 2-11) (explaining reasons for enacting Sox).
\textsuperscript{90} \textit{See id.} (quoting \textit{Spinner}, ALJ No. 2010-SOX-029, at. 12-13) (providing textual analysis for § 1514A).
\textsuperscript{91} \textit{See id.} (explaining purpose of § 1514A).
\textsuperscript{92} \textit{Lawson}, 134 S. Ct. at 1167.
\textsuperscript{93} \textit{Id.}
\textsuperscript{94} \textit{See id.} at 1170 (rejecting FMR’s argument).
\textsuperscript{95} \textit{See id.} at 1171 (“This construction protects the ‘insiders [who] are the only firsthand witnesses to the [shareholder] fraud.’”).
\textsuperscript{96} \textit{See id.} at 1172 (“Indeed, affording whistleblower protection to mutual fund investment advisers is crucial to Sarbanes-Oxley’s endeavor to protect investors . . .”) (internal citations omitted).
C. In the Wake of Lawson, Continued Questioning on the Reach of § 1514A

While the ruling in Lawson is unquestioned in regards to the extent of § 1514A’s coverage to investment companies, and unquestioned in regards to the kinds of contractors who assisted in Enron’s fraud, the eastern district court of Pennsylvania in Gibney v. Evolution Mktg. Research LLC97 has raised—mere months after the ruling in Lawson—a new question regarding § 1514A’s protection for employees of private companies who contract under Public Companies.98 In Gibney, the plaintiff reported overbilling practices of the private contractor to a public company.99 The contractor argued that because it was not assisting the public company with its fraud, the reported activity did not fall within the scope of § 1514A.100 The court held that, despite the factual similarities with Lawson,101 § 1514A did not extend to protect the employee in Gibney.102 The court reasoned that the ruling in Lawson was specifically tailored and focused on the mutual fund industry, and in Gibney a narrower interpretation of § 1514A did not ‘insulate the entire industry’ from the statute.103 The court in Gibney further reasoned that in enacting Sox, Congress was specifically focused on preventing fraud by public companies on their shareholders, or through their contractors.104 Therefore, Congress did not intend for Sox to extend to cover shareholder fraud enacted by private contractors against public companies.105

Another case limiting § 1514A in the wake of Lawson is Safarian v. Am. DG Energy, Inc.106 Safarian dealt with an engineer who reported possible fraud on the part of his company.107 The Safarian court declined

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98 See id. at 744-48 (questioning protection of new class of employees under § 1514A).
99 See id. at 746 (explaining reporting at issue).
100 See id. at 746-47 (detailing contractor’s argument).
101 Compare Lawson, 134 S. Ct. at 1172-73 (“By inflating its expenses, and thus understating its profits, [and thus FMR] could potentially increase the fees it would earn from the mutual funds, fees ultimately paid by the shareholders of those funds.” (quoting Brief for Petitioner 3)) with Gibney, 25 F. Supp. 3d at 741, 746 (detailing the over-billing practices resulting in fraud).
102 See Gibney, 25 F. Supp. 3d at 747 (distinguishing Lawson).
103 See id. at 747-48 (distinguishing Lawson from Gibney).
104 See id. (“Sox ‘was not intended to capture every complaint an employee might have as a potential violation of the Act. Rather, the goal of the legislation was to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws.’” (quoting Harvey v. Safeway, 2004 SOX 21, 2005 WL 4889073, at *3 (Dept. of Labor Feb. 11 2005)) (internal citations omitted)).
105 Id.
107 See id. at *11-13 (detailing fraud at issue). Here, the plaintiff specifically reported overbilling customers, improper construction, fraudulent tax filings, and failure to obtain
to extend protection to the employee. The court interpreted § 1514A as 
contemplating only employees actively involved in the accounting, legal, or 
reporting roles in the company, who would have first-hand knowledge and 
expertise to recognize alleged wrongdoing. Because the plaintiff was an 
engineer, the plaintiff was not a protected class of employee. Therefore, 
though Lawson made clear that § 1514A applies broadly to public 
companies and contractors alike, Safarian limited that interpretation to 
apply to only certain classes of investors.

Finally, another case that has continued where Lawson left off is 
Wiest v. Lynch. The court in Wiest held that the plaintiff had 
satisfactorily plead an agency-based relationship to bring another 
defendant, Tyco and Tyco, under the scope of Lawson. The court in 
Wiest relied on the majority in Lawson, who reversed the First Circuit to 
make explicit that § 1514A included employees of contractors and personal 
employees of public company officers and employees. The court in 
Wiest also went on to say that it saw no reason that the protection spelled 
out in Lawson, which extended from Public Companies to employees of 
Contracted Companies to even personal employees of those officers or 
employees, should not extend further down an unbroken line of 
employment.

The Roberts court in the securities context has shown an 
entrenchment on procedure that has the effect of constraining federal court 
litigation in favor of business. Lawson, if interpreted as other academics 
have, stands as a rare, partisan exception to that trend. Successful 
appellate litigators focus arguments on case-specific facts.
VI. BRINGING WHISTLEBLOWER CLAIMS ON BEHALF OF PRIVATE CONTRACTOR EMPLOYEES, POST-LAWSON

A. Arguing Against Defense Motion to Dismiss in Federal Court

The Supreme Court in Lawson seemed to uphold the broad-interpretation of § 1514A, as described by Judge Thompson of the First Circuit. The Court made it clear that “[a] contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.” Despite this seemingly clear upholding of a broad interpretation of § 1514A interpretation, subsequent litigators have argued that courts have limited the reach of § 1514A siding with FMR’s arguments in Lawson which it would virtually insulate the mutual fund industry from § 1514A whistleblower protection.

Before the ink had dried on the FMR ruling, district courts across the country were questioning the true scope of § 1514A’s reach from the FMR ruling. The Third Circuit was one of the first circuits to do so, with the Gibney. The court in Gibney grappled with the distinction between a contractor assisting a public company with its own fraud, or a private contractor conducting fraud unilaterally against the public entity. The Third Circuit in Gibney has decided that this distinction is a critical difference from the ruling in FMR, and that the § 1514A whistleblowing provision will not apply to employees of contractors in instances of unilateral, contractor fraud upon public companies. Gibney, however, took it even further, narrowing Lawson’s interpretation of § 1514A to focus

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[119] See Lawson, 134 S. Ct. at 1165 (agreeing with Judge Thompson’s dissent in Lawson). According to Judge Thompson’s dissent in the First Circuit Court of Appeal’s decision in Lawson, 670 F.3d 61, to follow the narrower interpretation of § 1514A would be an unwarranted “restriction on the intentionally broad language of the Sarbanes-Oxley Act” and it would bar significant classes of potential securities litigants from any legal protection. See 670 F.3d at 83 (Thompson, J., dissenting) (emphasis added) (rejecting application of Lawson).

[120] See 134 S. Ct. at 1166 (enlarging “view from the term ‘an employee’ to the provision as a whole”).

[121] See supra Section IV.C (reviewing courts’ differentiations from Lawson); see also Lawson, 134 S. Ct. at 1170 (noting practical implications of FMR’s argument for interpreting limited scope for § 1514A).

[122] See supra Section IV (outlining recent decisions questioning, challenging, or interpreting FMR decision).

[123] See Gibney, 25 F. Supp. 3d at 747 (analyzing claims that fall within Sox).

[124] See id. (analyzing claims that fall within Sox).

[125] See id. (recognizing factual similarities in fraudulent activity, but distinguishing actors). They further noted that Sox was concerned with preventing fraud enacted by public companies on shareholders through private contractors, but fraud by private entities on public corporations was not the envisioned scope of protection. Id.
only on the mutual fund industry.\textsuperscript{126}

Courts like \textit{Gibney} are not without support, such as academic Lisa Krug.\textsuperscript{127} Krug, like those circuits narrowing \textit{Lawson} to apply only to peculiar companies like mutual funds, advocates that public companies are radically different form investment companies like mutual funds, and that these require two different spheres of securities regulations.\textsuperscript{128} What Krug and those circuits have chosen to ignore, however, is that Enron’s fraud was conducted through private contractors and other business entities—similar in manner to the investment adviser’s fraud in \textit{Lawson}.\textsuperscript{129} The assumption that the use of contractors and subcontractors is particular to mutual funds and investment companies in an extreme manner does not bely the fact that public companies, like Enron, were able to utilize contractors in much the same way.\textsuperscript{130}

When bringing a claim in court, a whistleblower’s attorney will want to emphasize the differences between the fraudsters in Enron and those in \textit{Lawson}.\textsuperscript{131} While it is true that the factual situation in \textit{Lawson} was unique, at its basic level the fraud was committed against a public company, the mutual fund, another employer, and FMR.\textsuperscript{132} This is not unlike Enron, where the fraud was not only committed by employees of the public company, but also by its external accountants, Arthur Anderson LLP.\textsuperscript{133} Sox was enacted specifically with the widespread fraud of Enron in mind.\textsuperscript{134} If these district courts’ opinions were correct,\textsuperscript{135} they would fail

\textsuperscript{126} See id. at 746-48 (limiting Sox application where one company is publicly held).
\textsuperscript{127} See Krug, supra note 8, at 1642-44 (arguing Court did not adequately consider implications of \textit{Lawson}).
\textsuperscript{128} See supra note 8 and accompanying text (explaining origin of Sox); supra section IV.C (explaining scope of § 1514A post \textit{Lawson}).
\textsuperscript{129} See supra section II (emphasizing how Enron used outside accountants to “cook the books”); see also \textit{Lawson v. FMR LLC}, 134 S. Ct. 1158, 1169 (2014) (holding common knowledge §1514A was a direct response to Enron’s accounting fraud).
\textsuperscript{130} See \textit{Lawson}, 134 S. Ct. at 1169-70 (explaining how contractors and subcontractors assisted Enron’s Fraud).
\textsuperscript{131} See supra Section II (detailing Enron’s collapse and its inspiring the enactment of Sox); supra Section IV.B (examining Supreme Court’s \textit{Lawson} decision). Should issues around a case touch upon political sensitivities, it is also interesting to note that Sox was a bipartisan bill signed into law by President George W. Bush, and viewed favorably as far-reaching. See Valerie Watnick, \textit{Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and a Critique}, 12 FORDHAM J. CORP. & FIN. L. 831, 831-32 (2007) (“Bush signed the bill into law and touted the Act as a ‘far-reaching’ reform of American business practices.”). Sox was at least considered a positive step from both political parties as a means to prevent future corporate fraud. See id. (illustrating support for Sox).
\textsuperscript{132} See supra Section IV.A (examining \textit{inter alia} factual background of \textit{Lawson}).
\textsuperscript{133} See supra Section II (exploring commission of fraud in Enron’s collapse, including by external accountants, Arthur Anderson).
\textsuperscript{134} See supra Section II (exploring history of Sox, including Enron context). The \textit{Lawson}
to protect employees of external companies who reported potential fraud against the public company, such as accountants at Arthur Anderson LLP.\textsuperscript{136} The purpose of Sox is to prevent corporate fraud, like that committed by Enron.\textsuperscript{137} This was only underscored by the Supreme Court through its extensive examination of § 1514A.\textsuperscript{138} \textit{Lawson}, therefore, stands only to reemphasize the intended scope of Sox, and to broadly interpret §1514A to extend to any employee who properly reports potential fraud against a public company.\textsuperscript{139}

Finally, to hold the language as anything but inclusive would have implications beyond mutual funds.\textsuperscript{140} It would leave § 1514 with “a huge hole . . . were the dissent’s view of § 1514A’s reach to prevail.”\textsuperscript{141} The Court explicitly recognized in the following section that the reach they interpreted from § 1514A was as inclusive as possible.\textsuperscript{142} The Court’s recognition that the reach of § 1514A is extensive enough to extend to even housekeepers of corporate executives, makes it clear that the Court intended §1514A to have as much reach as possible if it involves corporate fraud.\textsuperscript{143}

The Court noted that Congress included “publically traded mutual funds.”\textsuperscript{135} See supra Section IV.C (reviewing district courts questioning scope of Lawson).\textsuperscript{136} See \textit{Lawson}, 134 S. Ct. at 1169-71 (illustrating drawbacks of district court opinions). While it is important to note that § 1514A contains language specifically including accountants, the Court unambiguously held that this was not limited to those enumerated but included all outside contractors. \textit{See id.} (expanding definition of § 1514A).

\textsuperscript{137} Id. at 1169 (explaining intention of Sox was prevention of another Enron debacle); \textit{supra} Section II (discussing Enron’s fraudulent activity and motivation for Sox).

\textsuperscript{138} \textit{See generally supra} Section IV.B (analyzing Court’s holding).

\textsuperscript{139} \textit{See supra} Sections II and IV.C; \textit{see also} Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 324-25 (1992) (using common law agency test).

\textsuperscript{140} \textit{See Lawson}, 134 S. Ct. at 1168 (noting broad interpretation is necessary). The Court held broad interpretation to be necessary not only to prevent mutual funds from escaping liability, but also because finding otherwise would deny the protections intended by § 1514A to legions of other professionals, including accountants and lawyers. \textit{See id.} (finding § 1514A’s vital function only works when protecting those who could report).

\textsuperscript{141} Id.

\textsuperscript{142} Id. at 1167-68. Although they wrote it off as more theoretical than real, the Court recognized that their interpretation of the statute would include “housekeepers” and “gardeners,” although they acknowledged few such employees would ever likely come upon and comprehend evidence of their employer’s complicity in corporate fraud. \textit{Id.}

\textsuperscript{143} \textit{See id.} (rejecting FMR’s limitation on § 1514A; Watnick, \textit{supra} note 1311, at 832 (reciting purpose of the act is reaching corporate actors). The Court, in other words, upheld Congress’s attempt to “press[ ] corporate officers, directors, and other employees into service, enlisting them as ‘foot soldiers’ in the fight against corporate fraud.” Watnick, \textit{supra} note 1311, at 832.
companies” as a discrete category of companies required to file reports under “section 15(d).” In this context—included in congress’s definition of §1514A by including “publicly traded companies”—it is necessary to understand that the only “corporate insiders” would be those contractors who manage the mutual funds’ operations. The intention of Congress was to regulate public companies, explicitly, including but not limited to mutual funds. The Court included this section because in order for Sox to be effective with companies, including mutual funds, it must extend to the contractors, which in the mutual fund industry include investment managers, accountants, and more.

The second reason the Court explicitly addressed §1514A’s application to mutual funds was to address concerns raised about mutual funds being separately regulated by the Investment Advisers Act. The Court first pointed out that while the Act did cover Mutual Fund advisers, separate regulation does not remove the problems Sox intended to solve. Furthermore, the ‘40 Act contains no whistleblower protection clause. The Court therefore examined Mutual Funds in the context of the Lawson case specifically to overrule the fallacious reasoning of the Court of Appeals, not to limit its own interpretation of §1514A to mutual funds.

Between the text, the history, and the intent of Sox, the Court had made it clear that §1514A was not meant to be limited, and instead that §1514A should be interpreted to its fullest as a means of protecting whistleblowers for the purpose of promoting, preventing, or correcting corporate fraud. This sentiment was echoed a decade later with Congress’s passing of the Dodd-Frank Whistleblower Protecting Provision, aimed explicitly at financial institutions but also at businesses at large.

144 See supra note 1433 and accompanying text. They also delve into the complex structure of financial vehicles like mutual funds: corporations with virtually no employees that contract out corporate functions. Watnik, supra note 131, at 842.
145 See Lawson, 134 S. Ct. at 1168 (extending § 1514A to petitioners, without limiting to mutual funds). But see id. at 1183 (discussing in depth importance of holding to regulating mutual fund industry).
146 See id. at 1176 (applying § 1514A to employees of contractor without limiting to mutual funds).
147 See supra note 12 and accompanying text (recognizing Mutual funds regulated by both Investment Advisers Act and Sox).
148 See Lawson, 134 S. Ct. at 1168 (addressing §1514A’s application to mutual funds).
150 See supra note 12 and accompanying text (recognizing Mutual funds regulated by both Investment Advisers Act and Sox).
151 See Lawson, 134 S. Ct. at 1160 (holding textual differences were not overwhelming).
152 See id. at 1162 (explaining scope of § 1514A).
Additionally, Congress reaffirmed the Act’s significance as a whistleblowing protection by lessening the burden on employee whistleblowers by adding to §1514A the language “reasonably believes.” Between the two statutes and the Court’s ruling, it is clear that both the legislative and judicial branches of government intended to promote the protection of employees as a means to the more important end of corporate fraud.

However, as illustrated in Section IV.C, some district courts have continued to interpret these statutes narrowly, at least in the initial wake of Lawson. This seems to offer some merit to employers seeking to defend employee terminations in these jurisdictions. Wrongful termination or constructive discharge can be difficult claims to prove in court. It is unnecessary to limit those provisions to prevent over-protection. The courts and legislature determined these classes need all the protection they can get. Ultimately, they need this protection so that information flows freely, preventing the next Enron.

**B. Choosing Venue**

Although contractor-employees should be covered under §1514A, especially after the Lawson decision, it is important as a practitioner bringing such claims to recognize that this area of law is not yet settled. Without a grant of certiorari, an employee could lose a case brought in a circuit currently limiting interpretation of §1514A. Therefore, if the employee-claim is brought in a district that has entertained adopting a limiting interpretation, it will be prudent to wait for and proceed with the Department of Labor and the administrative courts, rather than removing to federal district court.

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154 See Zuckerman, supra note 11, at 2-4 (explaining addition of language and significance during litigation).
156 See supra Section IV.C (demonstrating district courts’ narrow interpretations of Lawson).
157 Lawson, 134 S. Ct. at 1187 (noting lower courts).
158 Id. (Sotomayor, J., dissenting).
159 See Zuckerman, supra note 11, at 2-4 (explaining broad intention of protections).
160 See supra Section II (describing motivation behind §1514A was encouraging employees and whistleblowers without fearing retaliation).
161 See supra Section II (describing motivation behind §1514A was encouraging employees and whistleblowers without fearing retaliation).
162 See supra Section IV (detailing some circuits limiting scope of §1514A).
163 See supra Section IV (identifying circuits rejecting contractor-employee claims).
164 See supra Section III (elaborating on procedure under Sox).
choose to pursue the claim for some reason, careful examination of the
circuits a plaintiff could potentially file in should take place. 165

VII. BOTH PUBLIC AND PRIVATE EMPLOYERS SHOULD
DEVELOP INTERNAL REPORTING PROGRAMS

As detailed above, private companies should not take it for granted
that they are immune from the protective measures of § 1514A. 166
Proactive steps will enable private employers to sidestep the expense of
even litigating, let alone being subject to § 1514A. 167 Private companies
should follow public companies, if they have not already, in creating
policies to encourage internal reporting of potential issues or violations of
law. 168 The policy can be simple, or complex, depending on the regulatory
pressures faced by the private company and other germane whistleblowing
laws. 169 However, it should at the very least establish an unofficial
“hotline”—that is, a point of contact who is independent from employees
immediate supervisors. 170 By encouraging internal reporting to an
independent ombudsman-type position, private employers can address
problems quickly and privately, and ensure that the employees’ rights are
not violated for coming forward. 171

Not only is internal reporting valuable for private companies to
proactively prevent violations of Sox (or other statutes), it also serves a
crucial business purpose: internal communication. 172 Although there are a

165 See supra Section II (describing motivation behind § 1514A was encouraging employees
and whistleblowers without fearing retaliation).
166 See supra Section V (examining Lawson’s impact on private employers who conduct
business with public companies).
167 See Bill Libit, Elements of an Effective Whistleblower Hotline, HLS F. ON CORP.
GOVERNANCE & FIN. REG., (Oct. 15, 2015) http://corpgov.law.harvard.edu/2014/10/25/elements-
of-an-effective-whistleblower-hotline (“It is more crucial than ever that companies have effective
whistleblower hotlines as part of their corporate compliance programs so that employees (and
other company stakeholders, such as vendors) are motivated to report suspected unethical or
unlawful conduct internally and not incentivized to first turn to regulators”).
168 See, Public Counsel Law Center, WHISTLEBLOWER POLICY FOR A CALIFORNIA PUBLIC
BENEFIT NONPROFIT CORPORATION
http://www.publiccounsel.org/tools/publications/files/wb_policy.pdf (last visited August 15,
2015).
169 Id.
170 See id. at Appendix B, Article II (recognizing potential complications with reporting if
employee’s supervisor is wrongdoer). But see Libit, supra note 1677 (“[A]n internal
whistleblower hotline is a critical component of a company’s anti-fraud program, as tips are
consistently the most common method of detecting fraud.”).
171 See Libit, supra note 1677 (explaining need for internal reporting capabilities).
172 See, e.g., David Brown, Internal Communications Should be of Vital Importance to any
Business, ALBANY BUS. REV., Aug. 19, 2002,
number of different types of internal communication that are important to a business’s success, each serving a different purpose, creating a system so that employees of all levels of the company can submit data they believe important to the business as a whole will help any enterprise accomplish this goal. Although it is not necessarily the role of lawyers to tell businesses how to gather information or promote internal communication, creating even a rudimentary whistleblower reporting system can be utilized for much more, and can be used not only as a proactive method to avoid

http://www.bizjournals.com/albany/stories/2002/08/19/focus7.html (noting benefits of internal communication including positive corporate cultural, employee moral, productivity, and operational success); Kevin Bassett, How Important is Internal Communication in my Business?, ENTREPRENEUR MAG., May 22, 2014, http://www.entrepreneurmag.co.za/ask-entrepreneur/hiring-and-managing-staff-ask-entrepreneur/how-important-is-internal-communication-in-my-business/ (“FEIEA’s (the Federation of Business Communicator Associations in Europe) recently announced headline results of its latest survey among nearly 5000 practicing workplace communicators highlights the above findings of internal communications being a key success factor for 79% of organisations ”). Furthermore, it is estimated that almost two thirds of all U.S. companies lose approximately 1.2% of their annual revenue to fraud. See Libit, supra note 167 (“Indirect costs associated with fraud, such as reputational damage and costs associated with investigation and remediation of the fraudulent acts, may also be substantial.”). Moreover, an internal reporting program can be structured to function as more than just an internal hotline—it can, for instance, also operate as a help line for employees. See id. (“Companies should expand the reasons an employee may contemplate calling the hotline, such as having the hotline also serve as a helpline, as this may alter the perception or negativity associated with hotlines and facilitate reducing the fear of calling and the associated stigma.”). The reporting channel can also be used to let employees report efficiency suggestions, quality concerns, and much more. See id. (explaining uses for hotlines).

See Communications Strategies to Engage a Variety of Stakeholders: An Enterprise Rent-A-Car Case Study http://businesscasestudies.co.uk/enterprise-rent-a-car/communication-strategies-to-engage-a-variety-of-stakeholders/internal-communications.html (last visited Oct. 5, 2015) (noting Enterprise’s utilizing intranet to promote internal communication, including suggestions for best practices). This communication need not even be a hotline, but can be accomplished in other ways. Id. Three ways that a company can promote internal communication through implementing a whistleblowing reporting system, be it a hotline, a designated employee, or an intranet similar to the one Enterprise utilized, include encouraging employees to share information, creating an open dialogue by regularly updating employees on key information, and making the company culture one of openness to suggestion and ideas for improvement. See id.; Jennifer Miller, 7 Ways to Improve Internal Communication at Your Business, THE PEOPLE EQUATION (Apr. 29, 2013), http://people-equation.com/7-ways-to-improve-internal-communication-at-your-business/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+ThePeopleEquation+%28The+People+Equation%29 (discussing improvements to internal communications). Furthermore, these forms of intra-company communication can serve as a check and guide to company management, as it can highlight potential issues that may not even yet register to management as potential problems or unethical conduct. See Dan Mayfield., Former Enron CFO: “I wasn’t thinking this was fraud,” HOUSTON BUSINESS JOURNAL, Nov. 26, 2014 (“But, Fastow was also there to explain that the same things he thought were completely above board, the same sketchy accounting methods that other Fortune 10 companies use, got him and his company in deep water. Still, he says, ‘I cannot ever remember an instance where I set out to commit fraud. I didn’t.’”).
potential employment-related litigation, but also as a means to gather data and open channels of communication to all levels of the enterprise.\footnote{174 See supra note 1733 (demonstrating how attorneys should recommend whistleblowing programs).}

A policy or program to comply with § 1514A has a downside, but this downside is the far lesser evil compared to the alternative, and as mentioned above can be utilized for business purposes beyond complying with Sox.\footnote{175 See Hartsfield, supra note 49.} Establishing a whistleblower policy can potentially be the basis for a breach of contract claim.\footnote{176 See supra note 49 and accompanying text.} However, violations of Sox may regardless be the basis for a common law tort claim, and such a claim may not be subject to the procedural limits of Sox.\footnote{177 See Hartsfield, supra note 49 (citing Romaneck v. Deutsche Asset Mgmt., No. C05-2473, 2005 U.S. Dist. LEXIS 33712 (N.D. Cal. Sep. 6, 2005)).} Generally speaking, damages for contract claims are more limited than torts, and notably are not subject to the possibility of punitive damages.\footnote{178 See generally Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells, The Predictability of Punitive Damages, 26 (S2) THE J. OF LEGAL STUD., 623, 654 (June 1997) (examining punitive damages in tort context).} Furthermore, in crafting the whistleblower policy, the company is able to better control the nature of any potential litigation (although the program itself should limit the potential of such an action to begin with).\footnote{179 Id.} It is better therefore to create such a policy and program, because it enables the company to limit possible damages in the totality, reduce the likelihood of litigation in general, and control any such matter before trouble even arises.\footnote{180 See supra notes 150-51 and accompanying text (detailing importance of internal communications and ability to use whistleblowing channels to such ends). In fact, nearly 80% of all whistleblowers blew the whistle in-house first, before reporting to the SEC under the Dodd-Frank Whistleblowing Regime. See Mary Jo White, SEC Chairwoman, Speech at Ray Garrett Jr. Corporate and Securities Law Institute at Northwestern University Law School, INV. NEWS 5 (Apr. 30, 2015) http://www.investmentnews.com/article/20150517/REG/305179990/secs-whistleblower-program-is-a-game-changer). Companies should take advantage of this and utilize internal communication to nip problems in the bud. See Rohit Mahajan, Lead by Example: Making Whistleblowing Programs Successful in Corporate India, DELOITTE 5 (June 2014) http://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-whistleblowing-survey-2014-noexp.pdf. “Organisations must understand that whistleblowing is, perhaps, the only tool that comes close to pointing out a fraud in its nascent stages. It is, therefore, important to build, monitor and nurture this channel continuously.” Id. However, guidelines frequently suggest engaging independent third parties when implementing Whistleblower Protection programs. See generally Libit, supra note 1677 (advocating outsourcing whistleblower programs to third parties).} With these benefits, and the ability of a company to control and limit future litigation, it is in the interest of private companies, if they have not already, to consider establishing whistleblowing procedures and to foster such
internal communication.

VIII. HOW PUBLIC COMPANIES SHOULD PROCEED

Public companies should recognize that Lawson represents an expansion of Sox. Although most if not all public companies already have whistleblower protection programs as part of the anti-fraud requirements of Sox, these companies should reevaluate the scope of their whistleblower reporting channels. Public companies should extend channels to report potential fraud not only to employees, but also to contractors, contractors’ employees, and to third party vendors. Although likely a large pool of potential reports, it can be easier to sort through these reports by utilizing sorting technology and third party reporting programs. Expanding reporting programs in this manner will ensure continued compliance with § 1514A post-Lawson.

IX. CONCLUSION

While the Supreme Court seemed to establish that § 1514A was to be interpreted broadly with its decision in Lawson, instead that decision sparked an immediate skepticism among districts confronted by § 1514A claims immediately following the Lawson decision. The district courts differentiated their holdings from Lawson in different ways, but generally there was an emphasis on the specific factual nature of Lawson where it dealt with fraud on mutual funds, companies with very unique criteria compared to most corporations. However, these courts incorrectly rejected what the Court intended in Lawson. The Court in Lawson asserted a broad scope of protection under § 1514A to encourage reporting by employees of public and private employers when reporting potential fraud against public companies. This decision was consistent with the intent and language of § 1514A, and promoted the goals of corporate transparency and anti-fraud provisions.

Attorneys confronted by § 1514A related litigation should be careful when initiating or responding to these cases. Although the Court’s decision in Lawson seems to clearly stand for protecting employees of private employers (at least when the fraud affects a public company), some early decisions in the wake of Lawson have shown that this may be questioned in certain districts. Plaintiff’s attorneys should consider choice of venue carefully to ensure a friendly district, and defense counsel should

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181 See generally supra section III (examining Lawson decision).
focus on differentiating their case from Lawson by focusing on the unique attributes of fraud on mutual funds. Although this paper argues that those arguments should be incorrect, they have gained at least preliminary traction in certain districts lending at least some merit to such arguments.

Finally, counsel for private employers should consider recommending an internal reporting system for their companies. Reporting systems are not without their costs. However, the costs of not having such a system may be much greater. Without an internal reporting mechanism, for example, an employee may report perceived violations or potential fraud to regulators or law enforcement. The costs of responding to the government, or the costs of negative press, may be far greater than the costs of operating an internal reporting protocol. Furthermore, § 1514A and other whistleblower statutes grant employees the ability to pursue additional damages for retaliation, adding further legal costs to violations of whistleblower protection statutes. Internal reporting protocol may allow companies to appropriately respond to such claims and avoid violation of these statutes.

Internal reporting mechanisms may also serve a positive purpose. If well designed and given the resources required, they can serve as a communication conduit from lower level employees to higher level. This conduit of information can help arm executives with a greater spread of information, rather than what each chain of management report upwards—undoubtedly with a spin most positive to the reporter. Armed with greater knowledge, it can help executives make decisions and grow their companies. Lawson should therefore not only sound as a warning, but also as an opportunity. An opportunity to foster a greater culture of openness, an opportunity to gather more information in an age where information is the cutting edge of business, and an opportunity to boost employee morale by providing a means to feel heard. Such programs may not fit the needs of every private employer, but with the potential for value from preventing whistleblowing-related costs and from developing greater internal communication, they should not be lightly dismissed either.

Although the full scope of § 1514A may not be definitely established yet, Lawson stands for a big win for employees and investors alike, and the only true losers are those relying on codes of silence to operate inappropriately.

Allen K. Barrett