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

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# THE CONTINUING LEGACY OF ENRON: WHISTLEBLOWING UNDER THE SARBANES- OXLEY ACT AFTER *LAWSON V. FMR LLC*

## I. INTRODUCTION

Just as the Securities Act of 1933 followed the United States Great Depression<sup>1</sup> and the recent Dodd-Frank legislation followed the subprime mortgage crisis,<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> Before its collapse, Enron was fraudulently boasting revenues of U.S. \$138.7 billion.<sup>5</sup> By December of that same year, Enron had declared bankruptcy.<sup>6</sup> The widespread and large-scale fraud Enron had engaged in shocked its investors and the country alike.<sup>7</sup>

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<sup>1</sup> See *A Brief History of Securities Regulation*, ST. OF WIS. DEP’T OF FIN. INSTITUTIONS, <https://www.wdft.org/fi/securities/regexemp/history.htm> (last visited Nov. 8, 2014) (exploring origins of securities regulation).

<sup>2</sup> See Damien Paletta & Aaron Lucchetti, *Law Remakes U.S. Financial Landscape: Senate Passes Overhaul That Will Touch Most Americans; Bankers Gird for Fight Over Fine Print*, WALL ST. J., July 16, 2010, <http://www.wsj.com/articles/SB10001424052748704682604575369030061839958> (examining Dodd-Frank legislation’s purpose in preventing another crisis like subprime mortgage crisis); see also Matt Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral In The New Era of Dodd-Frank Act “Bounty Hunting”*, 45 CONN. L. REV. 483, 486 (2012) (“The Dodd-Frank Act, among other things, amended the Securities Exchange Act of 1934 . . . by adding Section 21F entitled ‘Securities Whistleblower Incentives and Protection’ to significantly expand the SEC’s existing whistleblower bounty program.”).

<sup>3</sup> 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).

<sup>4</sup> MIRANDA H. FERRARA AND MICHELE P. LAMEAU, *CORPORATE DISASTERS: WHAT WENT WRONG AND WHY* 100 (Miranda H. Ferrara & Michele P. LaMeau eds., 7th ed. 2012).

<sup>5</sup> *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/2002/01/15/0115enron.html> (explaining how revenue was generated).

<sup>6</sup> FERRARA & LAMEAU, *supra* note 4.

<sup>7</sup> See Richard Moberly, *Sarbanes-Oxley’s Whistleblower Provisions: Ten Years Later*, 64

Sox was enacted in response to Enron's fraud.<sup>8</sup> Although Sox was enacted to prevent future corporate fraud, the protective measures put in place by Sox have not prevented fraud from continuing.<sup>9</sup> 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.<sup>10</sup> As the recent Supreme Court Case *Lawson v. FMR, LLC*<sup>11</sup> and a handful of subsequent decisions have already exemplified,<sup>12</sup> whistleblowing continues to be an

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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.”).

<sup>8</sup> 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).

<sup>9</sup> See, e.g., Jack Ewing, *Volkswagen Says 11 Million Cars Worldwide Are Affected in Diesel Deception*, N.Y. TIMES, Sept. 22, 2015, [http://www.nytimes.com/2015/09/23/business/international/volkswagen-diesel-car-scandal.html?\\_r=0](http://www.nytimes.com/2015/09/23/business/international/volkswagen-diesel-car-scandal.html?_r=0) (reporting Volkswagen emissions fraud); Liz Rappaport, *Auditors Face Fraud Charge*, WALL ST. J., Dec. 20, 2010, <http://www.wsj.com/articles/SB10001424052748704138604576029991727769366> (describing Ernst & Young's potential involvement in Lehman Brothers's Fraud in 2010); Sarah N. Lynch, *Diamond Foods to pay \$5 million to settle SEC fraud case*, REUTERS, Jan. 9, 2014, <http://www.reuters.com/article/us-diamond-sec-accountingfraud-idUSBREA0813020140109> (describing Diamond Food Inc.'s fraud by misrepresenting cost of walnuts).

<sup>10</sup> 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).

<sup>11</sup> 134 S. Ct. 1158 (2014). *Lawson*, in fact, was the Supreme Court's first decision interpreting the whistleblower protection provision of Sox. See Jason Zuckerman, Jason C. Schwartz, & Gabrielle Levin, *Developments and Trends in Sarbanes-Oxley and Dodd-Frank Whistleblower Litigation*, 8TH ANN. ABA SECTION OF LAB. AND EMP. L. CONF. 1, 1, 10, (Nov. 6, 2014), <https://www.zuckermanlaw.com/wp-content/uploads/2014/01/Developments-and-Trends-in-Sarbanes-Oxley-and-Dodd-Frank-Whistleblower-Litigation.pdf> (describing who can be whistleblowers after *Lawson*).

<sup>12</sup> See, e.g., *Safarian v. Am. DG Energy Inc.*, No. 10-6082, 2014 U.S. Dist. LEXIS 59684, at \*8-16 (3d Cir. Apr. 30, 2014) (interpreting *Lawson* narrowly); *Wiest v. Lynch*, 15 F. Supp. 3d 543, 567-72 (E.D. Pa. 2014) (holding agency-based relationship pled as outlined in *Lawson*); *Gibney v. Evolution Mktg. Research, LLC*, 25 F. Supp. 3d 741, 744-48 (E.D. Pa. 2014) (interpreting *Lawson* narrowly).

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.<sup>13</sup> 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<sup>14</sup> practiced until Enron's collapsed in 2001.<sup>15</sup> Despite its size, influence, and power, a number of short-sighted business practices and bad deals led to substantial losses for Enron.<sup>16</sup> After these losses, Enron needed to borrow money in order to have capital to operate.<sup>17</sup> However, in order to look loan-worthy to its creditors Enron's

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<sup>13</sup> 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.").

<sup>14</sup> See 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](http://archive.fortune.com/magazines/fortune/fortune_archive/2002/02/18/318145/index.htm) (explaining Enron's trading practices).

<sup>15</sup> See Geoffrey Etherington & Brian P. Iaia, *Regulation of Derivatives in a Post-Enron World*, 1 NO. 16 ANDREWS ENRON LITIG. REP. 4 (2002) (detailing Enron's collapsed along with consequences).

<sup>16</sup> See FERRARA & LAMEAU, *supra* note 4, at 101 (describing Enron's business dealings).

<sup>17</sup> *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](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.”<sup>18</sup> Enron’s fraudulent financial reporting was not immediately apparent because its independent auditing firm, Arthur Andersen LLP, failed to identify the problem.<sup>19</sup> Furthermore, employees within Enron were rewarded with lavish compensation for actively assisting Enron’s fraudulent activity,<sup>20</sup> and Enron had strong policies encouraging silence among other employees to keep its fraudulent activities from being discovered.<sup>21</sup> The fraud resulted in one of the largest bankruptcies in U.S. history.<sup>22</sup> Seemingly overnight, thousands of people lost jobs and billions of dollars in assets disappeared.<sup>23</sup>

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.<sup>24</sup> The hearings revealed that many employees were aware of fraudulent activity, but did not report it; it was effectively a “corporate code of silence.”<sup>25</sup> Due to the perceived code of silence, Congress included in the Sarbanes-Oxley

<sup>18</sup> See Kahn, *supra* note 17 (describing involvement of SPEs).

<sup>19</sup> See Lawson, 134 S. Ct. at 1162 (accusing 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).

<sup>20</sup> FERRARA & LAMEAU, *supra* note 4, at 101-02; see also William C. Powers, Raymond S. Troubh, and Herbert S. Winokur, Jr., *Report of Investigation by the Special Investigative Committee of the Board of Directors of Enron Corp.*, FINDLAW (Feb. 1, 2002), <http://news.findlaw.com/wsj/docs/enron/sicreport/> (discovering conflict of interest employees operating the fraudulent shell companies did not disclose). Enron paid 140 executives a combined total of over \$680 million in 2001. See *Enron Fast Facts*, CNN, <http://www.cnn.com/2013/07/02/us/enron-fast-facts/> (last updated Apr. 26, 2015, 9:39 AM) (listing history of Enron collapse). Kenneth Lay alone, one of the top executives spearheading the fraud, received \$67.4 million of that payout. *Id.*

<sup>21</sup> 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).

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

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

<sup>24</sup> See Moberly Ten Years Later, *supra* note 7, at 3 (explaining Congress actions with hearings). Moberly also refers readers to the Library of Congress’s guide to the Enron hearings, noting at least 10 different Congressional committees holding over forty-five different hearings. See *id.* (citing Library of Congress, *Guide to Law Online: Enron Hearings*, LAW LIBRARY OF CONGRESS (July 25, 2012), <http://www.loc.gov/law/help/guide/federal/enronhrsgs.php> (providing access to hearing transcripts)).

<sup>25</sup> See S. REP. NO. 107-146, at 4-5 (2002) (recognizing Enron’s “code of silence” with need for reform).

Act of 2002<sup>26</sup> “wide-ranging corporate governance provisions specific sections related to whistleblowers.”<sup>27</sup>

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,<sup>28</sup> and how the company retaliated against her for bringing that to the attention of the company CEO, Ken Lay.<sup>29</sup> While not the case across the board,<sup>30</sup> 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.”<sup>31</sup> It was this conduct, that “discouraged [employees] at nearly every turn” from blowing the whistle on fraud that motivated the expansive Sox whistleblowing provisions.<sup>32</sup> 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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<sup>26</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2000) (codified in scattered sections of 15 & 18 U.S.C.).

<sup>27</sup> See 18 U.S.C. § 1514A (2006) (detailing Sox Whistleblower provision); see also *Lawson*, 134 S. Ct. at 1169 (exploring congress’s intent when interpreting 18 U.S.C. § 1514A); Richard E. Moberly, *Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers*, 2006 B.Y.U. L. REV. 1107, 1117-25 (2006) [hereinafter Moberly Structural Model] (explaining whistleblower’s roles in Enron scandal); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 74-75 (2007) [hereinafter Moberly Empirical Analysis] (explaining whistleblower provision in Sox).

<sup>28</sup> See *The Financial Collapse of Enron—Part 3: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 107th Cong. 14-66 (2002), <https://www.gpo.gov/fdsys/pkg/CHRG-107hhrg77991/pdf/CHRG-107hhrg77991.pdf> (detailing Sherron Watkin’s congressional testimony).

<sup>29</sup> 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).

<sup>30</sup> See Moberly Structural Model, *supra* note 27, at 1117 (examining WorldCom’s board of directors firing wrongdoer, not whistleblower).

<sup>31</sup> See S. REP. NO. 107-46, at 5 (producing email from Enron’s outside counsel regarding “risks associated with discharging” whistleblower).

<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> Furthermore, only a handful of states prior to Sox had statutes covering private-sector whistleblowers.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

### III. SOX WHISTLEBLOWER PROTECTION

Sox included a whistleblower protection provision<sup>38</sup> to provide protection for whistleblowers, enhance transparency in corporations, and

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<sup>33</sup> See Moberly Ten Years Later, *supra* note 7, at 6 (quoting S. REP. NO. 107-146, at 4-5.).

<sup>34</sup> 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 Prots. 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).

<sup>35</sup> See S. REP. NO. 107-46, at 10 (noting inconsistent treatment of whistleblowers between states).

<sup>36</sup> See *id.* (listing forty states where employees could bring tort for retaliatory discharge).

<sup>37</sup> See 18 U.S.C. § 1514A(b)(1) (creating private cause of action for whistleblowers when there is a retaliatory discharge, under Sox); S. REP. NO. 107-46, at 10 (noting inconsistent treatment of whistleblowers between states).

<sup>38</sup> 18 U.S.C. § 1514A.

ultimately prevent fraud.<sup>39</sup> 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 *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.<sup>40</sup> 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.<sup>41</sup> Once protected, §1514A makes it illegal for the employer to retaliate against an employee.<sup>42</sup>

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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> If the

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<sup>39</sup> See Moberly Structural Model, *supra* note 27, at 1126-31 (explaining goal, impact, and significance of Sox's Whistleblower protection).

<sup>40</sup> 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. *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. See *Lawson*, 134 S. Ct. at 1167 (explaining, under Sox, whistleblower actions "shall be governed" by § 42121(b) of title 49).

<sup>41</sup> 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.'" *Id.* (quoting 18 U.S.C. § 1514A(a)(1)).

<sup>42</sup> *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. See *id.* (noting other avenue for employee protection not limited to allegations of fraud).

<sup>43</sup> See § 1514A(b) (detailing steps to seek relief for violation of subsection (a)); *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).

<sup>44</sup> See 18 U.S.C. § 1514A(b)(2)(D) (outlining timeline for claim); 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. 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).

<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

Sox borrowed the language for § 1514A from the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century,<sup>48</sup> also known as AIR 21, and Sox set its burden of proof for plaintiffs to be the same as AIR 21.<sup>49</sup> This is a more plaintiff-employee friendly burden than most whistleblower statutes.<sup>50</sup> 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.<sup>51</sup>

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

“considerably longer”).

<sup>46</sup> See *id.* at 4-5 (offering more detail on administrative process).

<sup>47</sup> See 18 U.S.C. §§ 1514A(b)(1)(B), 1514A(b)(2)(E) (2015) (proceedings in these situations will be reviewed *de novo*).

<sup>48</sup> See *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1162 (2014) (comparing Sox to whistleblower model, 49 U.S.C. § 42121).

<sup>49</sup> 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 INVESTIG. 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).

<sup>50</sup> 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).

<sup>51</sup> See 29 C.F.R. Part 1980.104(e) (codifying burden shifting of whistleblower protection claims).

significantly improved whistleblower protection in the United States.<sup>52</sup> Sox has been modified since its enactment, such as: subsequent statutes adding a refusal to engage in unlawful conduct as protected activity,<sup>53</sup> increasing statute of limitations period,<sup>54</sup> prohibiting employees from waiving their rights under § 1514A, such as with arbitration agreements,<sup>55</sup> and the Dodd-Frank Act amended Sox to prohibit associational discrimination as retaliation.<sup>56</sup> Political party did not seem to matter when these statutes were enacted, with both Republican and Democratic presidents signing whistleblower laws.<sup>57</sup>

#### 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.<sup>58</sup> Generally speaking,

<sup>52</sup> Compare Moberly Ten Years Later, *supra* note 7, at nn.8-9 (considering Sox Whistleblowing favorably), with Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1-34 (2004) (considering Sox an inadequate “half-measure.”).

<sup>53</sup> See, e.g., FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 402, 124 Stat. 3885, 3968 (2011); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1057(a)(4), 124 Stat. 1376, 2031-32 (2010); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1558, 18C(a)(5), 124 Stat. 119, 261 (2010); Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 6, 116 Stat. 2985, 2989 (2002).

<sup>54</sup> See, e.g., § 402, 124 Stat. at 3968 (stating limitation period is 180 days); § 1057(a)(4), 124 Stat. at 1744 (stating limitation period is two years); § 1057(a)(4), 124 Stat. at 1846 (stating limitation period is six years); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1558, 124 Stat. 119, 261 (2010) (stating limitation period is 180 days); Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, § 6, 116 Stat. 2985, 2990 (2002) (stating limitation period is 180 days). Dodd-Frank changed the limitation period from 90 days to 180 days, and clarified that the period began running only once an employee becomes aware that he or she has been retaliated against. Moberly Ten Years Later, *supra* note 7, at 16 (citing § 1057(a)(4), 124 Stat. at 1848).

<sup>55</sup> See § 748, 124 Stat. at 1746 (providing rights may not be waived through agreements and arbitration agreements are invalid); §1057(d), 124 Stat. at 2035 (providing rights may not be waived through agreements and arbitration agreements are invalid). But see § 402, 124 Stat. at 3971 (prohibiting employee waiver, but silent on pre-dispute arbitration agreements). Furthermore, the employee may be entitled to a *de novo* hearing. See Hartsfield, *supra* note 49, at § 12:34 (detailing employee’s rights).

<sup>56</sup> See § 1057(a)(4), 124 Stat. at 2031 (prohibiting discrimination).

<sup>57</sup> See Moberly Ten Years Later, *supra* note 7, at 16 (recognizing that anti-retaliatory provisions were passed under both President Bush and President Obama). Professor Moberly notes with interest that nearly all of President Obama’s signature legislation—healthcare reform, financial industry reform, and the economic stimulus bill—contained anti-retaliation provisions. *Id.*

<sup>58</sup> *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014).

mutual funds are public companies that do not have any employees.<sup>59</sup> Instead, their management or advising is contracted or subcontracted to other companies, who handle those mutual funds' day-to-day operations.<sup>60</sup> There were two plaintiffs in this case.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> Having worked for FMR for fourteen years, Lawson was serving as a Senior Director of Finance before raising concerns regarding FMR's accounting practices.<sup>64</sup> 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.<sup>65</sup> FMR moved to dismiss the suits, arguing that neither plaintiff had a claim under § 1514A because FMR was a private company.<sup>66</sup> The district court rejected FMR's interpretation of § 1514A, denying the motion to dismiss.<sup>67</sup> FMR filed an interlocutory appeal, where a divided First Circuit reversed the district court's decision and granted FMR's motion to dismiss.<sup>68</sup>

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.<sup>69</sup> However, the First Circuit agreed with FMR's argument that "an employee" in § 1514A(a) refers to only employees of public companies.<sup>70</sup> In other words, § 1514A, under the First Circuit's interpretation, would protect only employees of the public

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<sup>59</sup> *Id.*

<sup>60</sup> *See id.* ("...include[ing] making investment decisions, preparing reports for shareholders, and filing reports with the Securities and Exchange Commission (SEC).").

<sup>61</sup> *Id.* at 1164.

<sup>62</sup> *See id.*

<sup>63</sup> *See Lawson*, 134 S. Ct. at 1164 (explaining treatment of cases).

<sup>64</sup> *See id.* ("[*Lawson*] believ[ed] that [FMR] overstated expenses associated with operating the mutual funds.")

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *See Lawson v. FMR LLC*, 724 F. Supp. 2d 141, 167 (Mass. 2010) (denying FMR's motion to dismiss Sox claim).

<sup>68</sup> *See Lawson v. FMR LLC*, 670 F. 3d 61, 83 (1st Cir. 2012) (explaining court is bound by text of statute).

<sup>69</sup> *See id.* at 68-80 (explaining holding).

<sup>70</sup> *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.<sup>71</sup> 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 from any legal protection."<sup>72</sup>

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*<sup>73</sup>—disagreeing with the First Circuit's interpretation of § 1514A in *Lawson*.<sup>74</sup> 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.<sup>75</sup> The ARB explained that § 1514A affords whistleblower protection to employees of privately held contractors that render services to public companies.<sup>76</sup>

With the differing interpretations of the First Circuit and the ARB opinion and Judge Thompson's dissent, the Supreme Court agreed to hear *Lawson*.<sup>77</sup>

### B. The Supreme Court Weighs In

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

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<sup>71</sup> *Id.* at 83.

<sup>72</sup> *Id.*

<sup>73</sup> 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).

<sup>74</sup> *See id.* (distinguishing *Lawson*); *Lawson*, 134 S. Ct. at 1164-65.

<sup>75</sup> *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).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1164-65.

<sup>78</sup> 134 S. Ct. 1158 (2014).

<sup>79</sup> *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.”<sup>80</sup> This overturned the First Circuit majority, ruling in line with Judge Thompson’s dissent and the ARB’s case in *Spinner*.<sup>81</sup>

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.”<sup>82</sup> 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.’”<sup>83</sup> 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.”<sup>84</sup> 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.”<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> Therefore, reading the plain text of § 1514A, the Sox whistleblower provision included employees of contractors as well as those of public companies.<sup>88</sup>

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

<sup>80</sup> *Lawson*, 1345 S. Ct. at 1160-161.

<sup>81</sup> See *supra* section IV.A (comparing 1st Circuit majority in *Lawson* with ARB *Spinner* decision).

<sup>82</sup> *Lawson*, 134 S. Ct. at 1165 (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990)).

<sup>83</sup> *Id.* (quoting *Lawson*, 670 F.3d at 84 (Thompson, J., dissenting)).

<sup>84</sup> See *id.* (exploring other Sox provisions which place “an employee” in provisions).

<sup>85</sup> 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.”).

<sup>86</sup> *Id.*

<sup>87</sup> See *Lawson*, 134 S. Ct. at 1165 (explaining purpose of provision is prevention of another Enron scandal).

<sup>88</sup> See *id.* at 1166 (“Absent 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.<sup>89</sup> 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."<sup>90</sup> 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.<sup>91</sup>

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).'"<sup>92</sup> 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.<sup>93</sup>

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.<sup>94</sup> 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."<sup>95</sup> 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.<sup>96</sup>

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<sup>89</sup> See *id.* at 1169 (citing S. Rep., at 2-11) (explaining reasons for enacting Sox).

<sup>90</sup> See *id.* (quoting *Spinner*, ALJ No. 2010-SOX-029, at. 12-13) (providing textual analysis for § 1514A).

<sup>91</sup> See *id.* (explaining purpose of § 1514A).

<sup>92</sup> *Lawson*, 134 S. Ct. at 1167.

<sup>93</sup> *Id.*

<sup>94</sup> See *id.* at 1170 (rejecting FMR's argument).

<sup>95</sup> See *id.* at 1171 ("This construction protects the 'insiders [who] are the only firsthand witnesses to the [shareholder] fraud.'").

<sup>96</sup> 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 LLC*<sup>97</sup> 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.<sup>98</sup> In *Gibney*, the plaintiff reported overbilling practices of the private contractor to a public company.<sup>99</sup> 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.<sup>100</sup> The court held that, despite the factual similarities with *Lawson*,<sup>101</sup> § 1514A did not extend to protect the employee in *Gibney*.<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup> Therefore, Congress did not intend for Sox to extend to cover shareholder fraud enacted by private contractors *against* public companies.<sup>105</sup>

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

<sup>97</sup> 25 F. Supp. 3d 741 (E.D. Pa. 2014).

<sup>98</sup> See *id.* at 744-48 (questioning protection of new class of employees under § 1514A).

<sup>99</sup> See *id.* at 746 (explaining reporting at issue).

<sup>100</sup> See *id.* at 746-47 (detailing contractor's argument).

<sup>101</sup> 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).

<sup>102</sup> See *Gibney*, 25 F. Supp. 3d at 747 (distinguishing *Lawson*).

<sup>103</sup> See *id.* at 747-48 (distinguishing *Lawson* from *Gibney*).

<sup>104</sup> 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)).

<sup>105</sup> *Id.*

<sup>106</sup> 2014 U.S. Dist. LEXIS 59684 (D. NJ April 30, 2014).

<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> Because the plaintiff was an engineer, the plaintiff was not a protected class of employee.<sup>110</sup> 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.<sup>111</sup>

Finally, another case that has continued where *Lawson* left off is *Wiest v. Lynch*.<sup>112</sup> 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*.<sup>113</sup> 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.<sup>114</sup> 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.<sup>115</sup>

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.<sup>116</sup> *Lawson*, if interpreted as other academics have, stands as a rare, partisan exception to that trend.<sup>117</sup> Successful appellate litigators focus arguments on case-specific facts.<sup>118</sup>

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necessary permits. *Id.* at \*3.

<sup>108</sup> *Id.* at \*13.

<sup>109</sup> *See id.* at \*12-14 (explaining scope of §1514A).

<sup>110</sup> *Id.*

<sup>111</sup> *See* Moberly Structural Model, *supra* note 27, at 1167 (explaining limitation of § 1514A).

<sup>112</sup> 15 F. Supp. 3d 543 (E.D. Pa 2014).

<sup>113</sup> *See id.* at 558 (explaining holding).

<sup>114</sup> *See id.* at 568-69 (relying on *Lawson*).

<sup>115</sup> *See id.* (applying reasoning in *Lawson*).

<sup>116</sup> *See* Coates, *supra* note 79, at 32 (detailing successful appellate arguments in current judicial climate).

<sup>117</sup> *See id.* (illustrating successful appellate arguments in current judicial climate); *supra* note 54 and accompanying text (listing initial opinions of *Lawson*).

<sup>118</sup> *See* Coates, *supra* note 79, at 32 (detailing successful appellate arguments in current judicial climate).



## 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.<sup>119</sup> The Court made it clear that “[a] contractor may not retaliate against its own employee for engaging in protected whistleblowing activity.”<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> The Third Circuit was one of the first circuits to do so, with the *Gibney*.<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup> *Gibney*, however, took it even further, narrowing *Lawson*’s interpretation of § 1514A to focus

<sup>119</sup> 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*).

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

<sup>121</sup> 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).

<sup>122</sup> See *supra* Section IV (outlining recent decisions questioning, challenging, or interpreting *FMR* decision).

<sup>123</sup> See *Gibney*, 25 F. Supp. 3d at 747 (analyzing claims that fall within Sox).

<sup>124</sup> See *id.* (analyzing claims that fall within Sox).

<sup>125</sup> 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.<sup>126</sup>

Courts like *Gibney* are not without support, such as academic Lisa Krug.<sup>127</sup> Krug, like those circuits narrowing *Lawson* to apply only to peculiar companies like mutual funds, advocates that public companies are radically different from investment companies like mutual funds, and that these require two different spheres of securities regulations.<sup>128</sup> 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 *Lawson*.<sup>129</sup> 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.<sup>130</sup>

When bringing a claim in court, a whistleblower's attorney will want to emphasize the differences between the fraudsters in Enron and those in *Lawson*.<sup>131</sup> While it is true that the factual situation in *Lawson* was unique, at its basic level the fraud was committed against a public company, the mutual fund, another employer, and FMR.<sup>132</sup> 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.<sup>133</sup> Sox was enacted specifically with the widespread fraud of Enron in mind.<sup>134</sup> If these district courts' opinions were correct,<sup>135</sup> they would fail

<sup>126</sup> See *id.* at 746-48 (limiting Sox application where one company is publicly held).

<sup>127</sup> See Krug, *supra* note 8, at 1642-44 (arguing Court did not adequately consider implications of *Lawson*).

<sup>128</sup> See *supra* note 8 and accompanying text (explaining origin of Sox); *supra* section IV.C (explaining scope of § 1514A post *Lawson*).

<sup>129</sup> See *supra* section II (emphasizing how Enron used outside accountants to "cook the books"); see also *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1169 (2014) (holding common knowledge §1514A was a direct response to Enron's accounting fraud).

<sup>130</sup> See *Lawson*, 134 S. Ct. at 1169-70 (explaining how contractors and subcontractors assisted Enron's Fraud).

<sup>131</sup> See *supra* Section II (detailing Enron's collapse and its inspiring the enactment of Sox); *supra* Section IV.B (examining Supreme Court's *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, *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).

<sup>132</sup> See *supra* Section IV.A (examining *inter alia* factual background of *Lawson*).

<sup>133</sup> See *supra* Section II (exploring commission of fraud in Enron's collapse, including by external accountants, Arthur Anderson).

<sup>134</sup> See *supra* Section II (exploring history of Sox, including Enron context). The *Lawson*

to protect employees of external companies who reported potential fraud against the public company, such as accountants at Arthur Anderson LLP.<sup>136</sup> The purpose of Sox is to prevent corporate fraud, like that committed by Enron.<sup>137</sup> This was only underscored by the Supreme Court through its extensive examination of § 1514A.<sup>138</sup> *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.<sup>139</sup>

Finally, to hold the language as anything but inclusive would have implications beyond mutual funds.<sup>140</sup> It would leave § 1514 with “a huge hole . . . were the dissent’s view of § 1514A’s reach to prevail.”<sup>141</sup> The Court explicitly recognized in the following section that the reach they interpreted from § 1514A was as inclusive as possible.<sup>142</sup> 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.<sup>143</sup>

The Court noted that Congress included “publically traded

decision specifically acknowledged the importance of Enron in the context and history of Sox’s enactment. See *Lawson*, 134 S. Ct. at 1169 (explaining intention of Sox was prevention of another Enron debacle).

<sup>135</sup> See *supra* Section IV.C (reviewing district courts questioning scope of *Lawson*).

<sup>136</sup> See *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. See *id.* (expanding definition of § 1514A).

<sup>137</sup> See *id.* at 1169 (explaining intention of Sox was prevention of another Enron debacle); *supra* Section II (discussing Enron’s fraudulent activity and motivation for Sox).

<sup>138</sup> See generally *supra* Section IV.B (analyzing Court’s holding).

<sup>139</sup> See *supra* Sections II and IV.C; see also *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 324-25 (1992) (using common law agency test).

<sup>140</sup> 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. See *id.* (finding § 1514A’s vital function only works when protecting those who could report).

<sup>141</sup> *Id.*

<sup>142</sup> *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. *Id.*

<sup>143</sup> See *id.* (rejecting FMR’s limitation on § 1514A; Watnick, *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, *supra* note 1311, at 832.

companies” as a discrete category of companies required to file reports under “section 15(d).”<sup>144</sup> In this context—including 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.<sup>145</sup> The intention of Congress was to regulate public companies, explicitly, including but not limited to mutual funds.<sup>146</sup> 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.<sup>147</sup>

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.<sup>148</sup> 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.<sup>149</sup> Furthermore, the ‘40 Act contains no whistleblower protection clause.<sup>150</sup> 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.<sup>151</sup>

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.<sup>152</sup> 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.<sup>153</sup>

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<sup>144</sup> 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.

<sup>145</sup> *Id.*

<sup>146</sup> 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).

<sup>147</sup> See *id.* at 1176 (applying § 1514A to employees of contractor without limiting to mutual funds).

<sup>148</sup> See *supra* note 12 and accompanying text (recognizing Mutual funds regulated by both Investment Advisers Act and Sox).

<sup>149</sup> See *Lawson*, 134 S. Ct. at 1168 (addressing §1514A’s application to mutual funds).

<sup>150</sup> See generally Investment Advisers Act of 1940, 15 U.S.C. § 80b-1-21 (1940) (lacking Whistleblower Protection clause).

<sup>151</sup> See *Lawson*, 134 S. Ct. at 1160 (holding textual differences were not overwhelming).

<sup>152</sup> See *id.* at 1162 (explaining scope of § 1514A).

<sup>153</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (preventing retaliation against whistleblowers).

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."<sup>154</sup> 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.<sup>155</sup>

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*.<sup>156</sup> This seems to offer some merit to employers seeking to defend employee terminations in these jurisdictions.<sup>157</sup> Wrongful termination or constructive discharge can be difficult claims to prove in court.<sup>158</sup> It is unnecessary to limit those provisions to prevent over-protection.<sup>159</sup> The courts and legislature determined these classes need all the protection they can get.<sup>160</sup> Ultimately, they need this protection so that information flows freely, preventing the next Enron.<sup>161</sup>

### *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.<sup>162</sup> Without a grant of certiorari, an employee could lose a case brought in a circuit currently limiting interpretation of §1514A.<sup>163</sup> 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.<sup>164</sup> Alternatively, if the Department of Labor does not

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<sup>154</sup> See Zuckerman, *supra* note 11, at 2-4 (explaining addition of language and significance during litigation).

<sup>155</sup> See 18 U.S.C. § 1514A (2006) (protecting whistleblowers); *Lawson*, 134 S. Ct. at 1162 (noting Congress's efforts on ending corporate fraud).

<sup>156</sup> See *supra* Section IV.C (demonstrating district courts' narrow interpretations of *Lawson*).

<sup>157</sup> *Lawson*, 134 S. Ct. at 1187 (noting lower courts).

<sup>158</sup> *Id.* (Sotomayor, J., dissenting).

<sup>159</sup> See Zuckerman, *supra* note 11, at 2-4 (explaining broad intention of protections).

<sup>160</sup> See *supra* Section II (describing motivation behind §1514A was encouraging employees and whistleblowers without fearing retaliation).

<sup>161</sup> See *supra* Section II (describing motivation behind §1514A was encouraging employees and whistleblowers without fearing retaliation).

<sup>162</sup> See *supra* Section IV (detailing some circuits limiting scope of §1514A).

<sup>163</sup> See *supra* Section IV (identifying circuits rejecting contractor-employee claims).

<sup>164</sup> 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.<sup>165</sup>

## 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.<sup>166</sup> Proactive steps will enable private employers to sidestep the expense of even litigating, let alone being subject to § 1514A.<sup>167</sup> 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.<sup>168</sup> The policy can be simple, or complex, depending on the regulatory pressures faced by the private company and other germane whistleblowing laws.<sup>169</sup> However, it should at the very least establish an unofficial “hotline”—that is, a point of contact who is independent from employees immediate supervisors.<sup>170</sup> 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.<sup>171</sup>

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.<sup>172</sup> Although there are a

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<sup>165</sup> See *supra* Section II (describing motivation behind §1514A was encouraging employees and whistleblowers without fearing retaliation).

<sup>166</sup> See *supra* Section V (examining *Lawson*’s impact on private employers who conduct business with public companies).

<sup>167</sup> 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”).

<sup>168</sup> See, Public Counsel Law Center, *WHISTLEBLOWER POLICY FOR A CALIFORNIA PUBLIC BENEFIT NONPROFIT CORPORATION* [http://www.publiccounsel.org/tools/publications/files/wb\\_policy.pdf](http://www.publiccounsel.org/tools/publications/files/wb_policy.pdf) (last visited August 15, 2015).

<sup>169</sup> *Id.*

<sup>170</sup> 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.”).

<sup>171</sup> See Libit, *supra* note 1677 (explaining need for internal reporting capabilities).

<sup>172</sup> 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.<sup>173</sup> 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

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<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 5 000 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).

<sup>173</sup> 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](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.<sup>174</sup>

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.<sup>175</sup> Establishing a whistleblower policy can potentially be the basis for a breach of contract claim.<sup>176</sup> 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.<sup>177</sup> Generally speaking, damages for contract claims are more limited than torts, and notably are not subject to the possibility of punitive damages.<sup>178</sup> 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).<sup>179</sup> 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.<sup>180</sup> 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

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<sup>174</sup> See *supra* note 1733 (demonstrating how attorneys should recommend whistleblowing programs).

<sup>175</sup> See Hartsfield, *supra* note 49.

<sup>176</sup> See *supra* note 49 and accompanying text.

<sup>177</sup> See Hartsfield, *supra* note 49 (citing *Romanek v. Deutsche Asset Mgmt.*, No. C05-2473, 2005 U.S. Dist. LEXIS 33712 (N.D. Cal. Sep. 6, 2005)).

<sup>178</sup> See generally Theodore Eisenberg, John Goerd, 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).

<sup>179</sup> *Id.*

<sup>180</sup> 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).



internal communication.

### VIII. HOW PUBLIC COMPANIES SHOULD PROCEED

Public companies should recognize that *Lawson* represents an expansion of Sox.<sup>181</sup> 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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<sup>181</sup> 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.

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