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Ninth Circuit Expands Reach of Dodd-Frank Anti-Retaliation Protections

Adding to an existing split among the federal appeals courts, the US Court of Appeals for the Ninth Circuit ruled on March 8, 2017 that employees who make internal reports about suspected violations of the federal securities laws and other anti-fraud statutes are covered by the "whistleblower" protections of the Dodd-Frank Act (Dodd-Frank), even if they never report the suspected violations to the Securities and Exchange Commission (SEC or Commission). *Somers v. Digital Realty Trust*, 2017 U.S. App. LEXIS 4079 (9th Cir. 2017). The Ninth Circuit decision reinforces the importance of proceeding carefully before taking any adverse action against an employee who has made an internal complaint that might trigger Dodd-Frank's protections.

The Decision

Section 21F of Securities Exchange Act, which was created by Dodd-Frank, prohibits an employer from taking any adverse action, threatening, harassing or otherwise discriminating against any "whistleblower" who, among other things, makes "disclosures that are required or protected by" the Sarbanes-Oxley Act[1] or any other "law, rule, or regulation subject to the jurisdiction of the Commission." 15 U.S.C. § 78u-6(h)(1)(A)(iii). An employee who suffers retaliation in violation of this provision (Subsection (iii)) may sue their employer in federal court and obtain reinstatement to their former position, two times their back pay (plus interest), and reimbursement for legal fees and costs. 15 U.S.C. § 78u-6(h)(1)(C).

At issue in *Somers* was the meaning of the term "whistleblower." While the term is not defined in Subsection (iii), it is defined elsewhere in Section 21F to mean any person who reports suspected violations of the federal securities laws "*to the Commission*" (emphasis added). 15 U.S.C. § 78u-6(a)(6). Because the plaintiff in *Somers* had only reported his concerns to his former bosses – and not to the SEC – at the time he was fired, his employer argued that he was not a "whistleblower" for purposes of Section 21F and that his retaliation claim must therefore be dismissed.

The Ninth Circuit disagreed. Siding with the plaintiff (and the SEC, which had weighed in on the case), the court ruled that, for purposes of Dodd-Frank's anti-retaliation prohibition, a "whistleblower" is any employee who makes a covered disclosure of potential violations, whether to the Commission or internally. To read the term as covering just those employees who report to the SEC, the court reasoned, would undercut Congress' intent to protect employees against retaliation and would narrow the application of those protections "to the point of absurdity." 2017 U.S. App. LEXIS 4079 at *11.

1 The Sarbanes-Oxley Act protects the disclosure of conduct that violates not only the federal securities laws but also wire fraud, bank fraud, mail fraud and other statutes. 18 U.S.C. § 1514A(a)(1).

The Current State of the Law

Public company employees who internally report on suspected violations of the securities laws and other statutes, have, of course, long been protected against retaliation by the whistleblower provisions of Sarbanes-Oxley. Unlike Dodd-Frank, however, that statute does not confer upon employees an unfettered right to sue in federal court. Under Sarbanes-Oxley, an employee who believes they have suffered retaliation as a result of a protected internal disclosure must proceed initially through an administrative process with the Department of Labor and may only go to federal court if the agency fails to act on their complaint within 180 days. 18 U.S.C. § 1514A(b). As a result of the ruling in *Somers*, such employees in the Ninth Circuit[2] will be able to go straight to federal court under Dodd-Frank's anti-retaliation provisions and recover double the back pay available under Sarbanes-Oxley. In addition, such claims under Dodd-Frank are subject to a far more generous statute of limitations than is available under Sarbanes-Oxley.[3]

The Ninth Circuit's decision adds to an existing split among the federal appeals courts concerning the reach of Dodd-Frank's anti-retaliation provisions. While the Second Circuit, like the Ninth, has ruled that an employee need not report to the SEC to be a protected "whistleblower" for purposes of those provisions, the Fifth Circuit has held otherwise, ruling that they only protect employees who report to the Commission. *See Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2nd Cir. 2015) and *Asadi v. G.E. Energy United States, LLC*, 720 F.3d 620 (5th Cir. 2013).[4] This growing divergence among the circuits increases the likelihood that the US Supreme Court will ultimately weigh in to resolve the conflict. In the meantime, employers should be mindful of the risk of employee lawsuits under Dodd-Frank, even in situations where employees have not reported any suspected violations outside the company.

Please contact your principal lawyer or any of the lawyers listed for additional information or for help on related matters.

2 The Ninth Circuit covers California, Oregon, Washington, Arizona, Nevada, Idaho, Montana, Hawaii and Alaska.

3 The statute of limitations for retaliation claims under Sarbanes-Oxley is 180 days. 18 U.S.C. § 1514A(b)(2)(D). Under Dodd-Frank, it is three years. 15 U.S.C. § 78u-6(h)(1)(B)(ii).

4 The Second Circuit covers New York, Connecticut and Vermont, while the Fifth Circuit covers Texas, Louisiana and Mississippi.

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