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The Supreme Court Significantly Limits the Scope of Whistleblowers Protected under the Dodd- Frank Act

Whistleblowing and retaliation claims continue to be extraordinarily prevalent and challenging for employers to avoid and defend against. At the same time, courts continue to address the scope of whistleblowing and anti-retaliation provisions in a wide variety of laws that govern workplace conduct.

One example is the United States Supreme Court's decision on February 21, 2018, which held that the Dodd-Frank Act's (the Act) whistleblower protections extend only to those employees who report a securities-law violation to the Securities and Exchange Commission (SEC) and do not protect employees who bring their complaints internally only. This decision settled a circuit split between the Ninth and Fifth Circuits, reversing the Ninth Circuit's ruling.

In *Sommers v. Digital Realty Trust, Inc.*, the Ninth Circuit previously held that Sommers, a former Digital Realty executive, was entitled to protection under the Act after being fired because he complained to upper management that his supervisor violated provisions of the Sarbanes-Oxley Act (he alleged that a senior vice president had eliminated some internal corporate controls), even though those concerns were never reported to the SEC. The Ninth Circuit found that applying the statutory definition of "whistleblower" to the anti-retaliation provisions would narrow the scope of protections "to the point of absurdity." In so holding, the Ninth Circuit rejected plain language interpretations of the Act's retaliation provision to apply only to a "whistleblower" who provides "information relating to a violation of the securities laws to the Commission."

Justice Ginsburg, on behalf of the Supreme Court, explained that its decision to limit the scope of protected whistleblowers is consistent with the purpose of the Act's provisions, which is to encourage reporting to the SEC. The Court is confident

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employees wishing to report potential violations will still be appropriately protected when doing so. The Court noted that all employees needed to do was report concerns internally and “also provide relevant information to the Commission.”

By reversing the Ninth Circuit’s ruling, the Supreme Court, in a unanimous decision, makes clear that the anti-retaliation provisions protect only those employees who report violations to the SEC.

What this means for employers is that employees who bring internal complaints only continue to be protected by the anti-retaliation provisions of the Sarbanes-Oxley Act, but are not entitled to the Act’s increased protections, including immediate access to federal court, a six-year statute of limitation and the potential to recover double back pay with interest. Additionally, this ruling may encourage employees to report potential issues directly to the SEC more frequently.

While this decision significantly limits the pool of potential employee whistleblowers, employers should be mindful of the SEC’s continued focus on protecting and encouraging whistleblowers. Overall, employers also should continue to adopt and implement effective policies and practices to prevent, manage, and defend against whistleblower and retaliation complaints in order to minimize the risk of exposure to substantial liability.

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