

What Does it Mean To “Blow the Whistle” Under The Dodd-Frank Act? Courts Provide Different Answers

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As discussed in our previous [blog post](#), the U.S. Securities and Exchange Commission (SEC) continues to incentive employees to “blow the whistle” on their employers for alleged securities violations. What happens when the complaint of alleged securities impropriety is made only to the employer, rather than the SEC? Is the employee’s complaint protected? If you do not know the answer, you are not alone. Dozens of district courts and several appellate courts across the country have come to opposite conclusions when faced with the question of whether employees may seek the protections of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) when making purely internal complaints to their employer.

The Dodd-Frank Act, which was enacted in 2010, contains anti-retaliation provisions for employee whistleblowers. The anti-retaliation provision of the Dodd–Frank Act provides that an employer may not adversely affect the terms and conditions of a whistleblower’s employment “because of any lawful act done by the whistleblower . . . in providing information **to the Commission** in accordance with this section . . .” 15 U.S.C. § 78u–6(h)(1)(A) (emphasis added). The term “whistleblower” is defined as “any individual who provides . . . information relating to a violation of the securities laws **to the Commission**, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u–6(a)(6) (emphasis added).

Nevertheless, the SEC has taken the position that the Dodd-Frank Act protects even internal complaints, not just those made to the SEC. Federal courts are split on this issue, however. The Fifth Circuit, in *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013), disagreed with the SEC’s position and found that employees must make a complaint to the SEC. The Second Circuit, in *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145 (2d Cir. 2015), held in a 2-1 decision that the Dodd-Frank Act protects a whistleblower who internally reports violations of the securities laws without reporting the violations directly to the SEC. The Second Circuit found sufficient ambiguity in the statute to warrant deference to the SEC, as the agency in charge of regulating securities. To add further confusion, some federal district courts have issued opinions splitting on this issue.

It does not appear that this conflict among federal courts will be resolved soon, as the defendants in the *Berman* case elected not to pursue Supreme Court review. For now, employers would be wise to assume that an internal complaint of alleged securities impropriety is protected. Moreover, because it may be difficult to discern between normal business concerns and protected activity, employers

should address the anti-retaliation provisions of the Dodd-Frank Act (and other anti-retaliation statutes) proactively. Employers should review the seven elements of an effective whistleblower protection and anti-retaliation system provided in our [blog post](#), as they are critical to a company's efforts to comply with the Dodd-Frank Act, regardless of whether internal complaints are protected.

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