

Dodd-Frank Whistleblowers Must Report to the SEC

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Employees must report suspected securities fraud violations to the U.S. Securities and Exchange Commission (SEC) to benefit from the anti-retaliation provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). In a unanimous decision in Digital Realty Trust v. Somers, the United States Supreme Court has resolved a long-running dispute over whether securities fraud whistleblowers could bring a claim for retaliation under Dodd-Frank if they reported their complaint internally to their employer but not to the SEC. For example, in 2017, the Ninth Circuit held that the anti-retaliation protections of the Dodd-Frank applied to employees who have complained internally about potential securities law violations but who have not reported that conduct to the SEC. The Fifth Circuit previously held that Dodd-Frank mandates that an employee report a securities law violation to the SEC in order for the conduct to be protected by the statute's anti-retaliation provision.

The Supreme Court resolved the circuit split in favor of what the Court termed the "unambiguous whistleblower definition" in the statute. The Court further said that the definition precludes the SEC from interpreting the term "whistleblower" more expansively to allow whistleblowers to bring a claim under Dodd-Frank if they reported suspected fraud internally but not to the SEC.

The Court's holding might appear to limit employee protections, but employers should be aware that prospective whistleblowers have other opportunities to claim protection from retaliation. For example, the Sarbanes-Oxley Act of 2002 ("SOX") allows workers to file a complaint with the U.S. Department of Labor within 180 days of being terminated. In addition, some states have whistleblower laws which protect employees in the private sector. Florida's private-sector whistleblower law protects employees from retaliation for, among other activities, disclosing or threatening to disclose to a governmental agency, such as the SEC, an activity of the employer that is in violation of a law, rule, or regulation or objecting to, or refusing to participate in, any activity of the employer which in violation of a law, rule or regulation. Section 448.102, Fla. Stat. The statute of limitations for bringing a private-sector retaliation claim under Florida law is four (4) years.

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Employers should be aware that the Supreme Court's ruling might encourage employees to report to the SEC, not only to bolster protection from retaliation, but because the statute of limitations to bring a Dodd-Frank retaliation claim is much longer (10 years) and because Dodd-Frank's bounty provisions allow the whistleblower to be awarded a share of any monetary sanctions the SEC ultimately imposes on the target company.