March 29, 2018

Supreme Court Recently Limited the Scope of Whistleblower Protection Under Dodd-Frank, But State Laws Continue to Provide Broader Protections

On February 21, 2018, in *Digital Realty Trust, Inc. v. Somers*, the U.S. Supreme Court held that, to sue under the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), an individual must report a violation of securities laws to the Securities and Exchange Commission (SEC).

Dodd-Frank was enacted in 2010, in the wake of the 2008 financial crisis, to promote the country's financial stability by improving accountability and transparency in the financial system. Dodd-Frank responded to various perceived shortcomings in financial regulation, including the SEC's need for assistance in regulating securities markets. To assist the SEC in identifying violations of securities laws, Dodd-Frank established a whistleblower program designed to motivate people who know of securities law violations to alert the SEC and to protect whistleblowers from retaliation by their employers.

Dodd-Frank defines a "whistleblower" as a person who provides information to the SEC relating to a violation of securities laws. The statute's anti-retaliation provision prohibits an employer from discharging, harassing or otherwise discriminating against a whistleblower because the whistleblower has (1) provided information to the SEC; (2) initiated, testified in or assisted in an investigation by the SEC; or (3) made disclosures that are required or protected under the Sarbanes-Oxley Act, the Securities Exchange Act of 1934, the federal criminal anti-retaliation statute, or any other law subject to the jurisdiction of the SEC. Dodd-Frank also entitles whistleblowers to a cash award of between 10 and 30 percent of the monetary sanctions collected in an SEC enforcement action based on information provided by the whistleblower.

In *Digital Realty Trust*, the Supreme Court held that an individual who complained only internally to his employer, and not to the SEC, falls outside Dodd-Frank's definition of whistleblower and is ineligible to seek redress under that statute. Looking beyond the statute's definition of whistleblower, the Court noted that the purpose of Dodd-Frank is to motivate people who know of securities law violations to tell the SEC, which corroborates the conclusion that the statute's anti-retaliation provision applies only to those who have reported to the SEC. The Court acknowledged that its interpretation of Dodd-Frank's anti-retaliation provision limits the number of people shielded from retaliation. Nevertheless, it found that conclusion understandable in light of the statute's purpose of encouraging reporting to the SEC and aiding the SEC's enforcement efforts.

Dodd-Frank, however, is not the only statute that provides workplace protection to whistleblowers, and the *Digital Realty Trust* decision does not limit the scope of other statutes that define "whistleblower" differently. Indeed, many states have enacted their own statutes that prohibit employers from retaliating against whistleblowers in various contexts, as the following examples illustrate.

In ***New Jersey***, the Conscientious Employee Protection Act (CEPA) prohibits employers from retaliating against an employee who discloses or threatens to disclose to a supervisor or a public body an activity of the employer that the employee reasonably believes violates the law or is fraudulent or criminal. Unlike Dodd-Frank, CEPA prohibits retaliation against employees who report violations internally. An employer who violates CEPA may be required to reinstate the employee and compensate him/her for lost wages and benefits and attorneys' fees, and may also be required to pay punitive damages, as well as a civil fine of not more than $10,000 for the first violation and not more than $20,000 for each subsequent violation.

A ***Connecticut*** statute prohibits employers from retaliating against an employee who has reported a violation or suspected violation of a federal, state or municipal law or regulation to a "public body" (i.e., a federal, state or local government agency).

The Connecticut statute does not protect those who report only to their employer. An employer that violates the Connecticut whistleblower statute may be required to reinstate the employee and compensate him/her for lost wages and benefits and attorneys' fees.

A ***New York*** statute prohibits employers from retaliating against an employee who has disclosed or threatened to disclose to a supervisor or a public body an activity, policy or practice of the employer that violates the law, but the violation must either present a substantial and specific danger to the public health or safety or constitute healthcare fraud. Like the Connecticut statute, an employer who violates the New York whistleblower statute may be required to reinstate the employee and compensate the employee for lost wages and benefits and attorneys' fees.

Massachusetts has no whistleblower protection statute applicable to private employers. Rather, that state's statute applies only to employees of state or local government.

Though the specific prohibitions and penalties vary from state to state, employers in any jurisdiction should be mindful of penalizing employees who have identified potential violations of laws or rules.

Would you like to receive our *Employment and Labor Quarterly Update?* Sign up here.

Authors

Daniel L. Schwartz
Partner

Stamford, CT | (203) 977-7536

New York, NY | (212) 297-5800

dlschwartz@daypitney.com

David P. Doyle
Partner

Parsippany, NJ | (973) 966-8136

ddoyle@daypitney.com

Francine Esposito
Partner

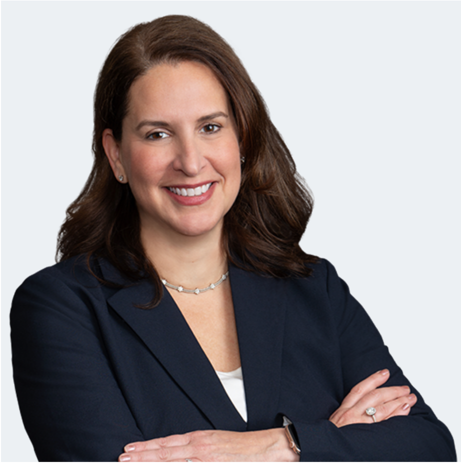
Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com

Glenn W. Dowd
Partner

Hartford, CT **|** (860) 275-0570

gwdowd@daypitney.com



Heather Weine Brochin
Partner

Parsippany, NJ **|** (973) 966-8199

New York, NY **|** (212)-297-5800

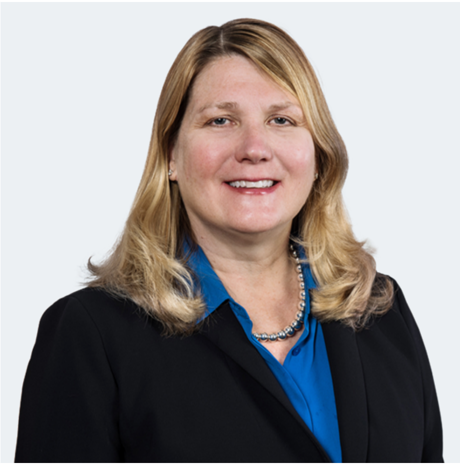
hbrochin@daypitney.com

Rachel A. Gonzalez
Partner

Parsippany, NJ **|** (973) 966-8201

New York, NY **|** (212) 297-5800

rgonzalez@daypitney.com



Theresa A. Kelly
Partner

Parsippany, NJ **|** (973) 966-8168

tkelly@daypitney.com