HALL & EVANS LLC
ATTORNEYS AT LAW

NEWS ALERT

UNDER THE DODD-FRANK ACT, THE SEC MUST HEAR YOUR WHISTLE

Congress has enacted two distinct Acts, the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), endeavoring to root out corporate fraud and encourage reporting of securities law violations. Under Dodd-Frank, employers may bar employee retaliation claims if the Securities and Exchange Commission ("SEC") fails to hear the whistle. On February 21, 2018, the United States Supreme Court did just that when it confirmed whistleblower protection under the Dodd-Frank Act only extends to those who report securities law violations **directly** to the SEC.

The Dodd-Frank Act established a new robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC. Among other things, Dodd-Frank affords whistleblowers both incentives and protection. Recognizing that whistleblowers often face the difficult decision between telling the truth and committing career suicide, Congress sought to protect whistleblowers from employment discrimination, including discharge and harassment. A qualifying whistleblower is also entitled to a cash award of 10 to 30 percent of the monetary sanctions collected in any enforcement action as well as double backpay with interest[1]. Importantly, unlike Sarbanes-Oxley, Dodd-Frank entitles whistleblowers to bring actions directly to Federal Court and allows generous six and ten-year limitation periods to assert claims.

In *Digital Realty Trust, Inc. v. Somers*, No. 16-1276, _ _ _ S. Ct. _ _ _, 2018 U.S. LEXIS 1377, at *17 (Feb. 21, 2018), Paul Somers ("Somers") brought a claim of whistleblower retaliation under Dodd-Frank. Somers, a former VP for Digital Realty Trust, claimed he was wrongfully terminated after he reported to senior management suspected securities law violations by the company. Notably, Somers did not assert any claims under Sarbanes-Oxley within the prescribed time. Fatal to his claim under Dodd-Frank, Somers did not alert the SEC of the potential violations prior to his termination.

Relying on pure statutory construction, the Court found that Dodd-Frank defined "whistleblower" to include only those individuals who provide information concerning a securities law violation **directly** to the SEC. This is in contrast to the whistleblower protections afforded under Sarbanes-Oxley, which covers individuals who make reports of securities law violations internally. The Court observed that Sarbanes-Oxley is intended to break the "corporate code of silence" that discouraged internal reporting of fraudulent behavior, while the core objective of Dodd-Frank – enacted eight years after Sarbanes-Oxley – is to promptly report violations directly to the SEC.

This decision provides employers facing whistleblower retaliation claims for reported securities law violations across the nation with clarification as to who may sue under Dodd-Frank. Now, employers may bar employee or former employee claims filed under Dodd-Frank if the employee did not report the alleged securities law violations to the SEC prior to their termination.

If you have any questions about this update, please contact Adam Wiens, wiensa@hallevans.com.

1 By comparison, Sarbanes-Oxley: (1) permits a 180-day limitation period to file a complaint; (2) claimants must exhaust administrative remedies with the Secretary of Labor; damages are generally limited to reinstatement, actual damages, backpay and interest.