



# Workplace Whistleblower

*Perspectives on whistleblower situations that employers frequently face*

## Are Whistleblower Internal Complaints Protected under Dodd-Frank?

*By James R. Beyer*

There is a split in the federal courts over the scope of Dodd-Frank's whistleblower protections that may eventually reach the Supreme Court. The question is if there are only internal reports of potential securities law violations is that activity protected whistleblowing under the Dodd-Frank Act's anti-retaliation provision or must the potential violations be reported to the SEC?

In July 2013, the *Fifth Circuit* became the first federal appeals court to find that the law requires individuals to report to the SEC in order to qualify for anti-retaliation protection. However, on March 11, 2014, a *federal district court* disagreed with the Fifth Circuit and found that internal reporting of potential securities law violations is protected whistleblowing under the Dodd-Frank Act's anti-retaliation provision (*Khazin v. Ameritrade Holding*).

Khazin was an investment oversight officer for Ameritrade. He reported to his supervisor that an offering "was not in compliance with relevant securities regulations." He claimed after he reported this information, the supervisor's response was "unequivocal." Khazin claimed his supervisor sent him an e-mail stating that no corrective changes were to be undertaken. He also claimed that she verbally told him to cease sending her any e-mails on this subject matter. A short time later Khazin's supervisor accused him of being untruthful and evasive regarding a third-party invoice, with which he had very limited involvement. Four days later, Khazin was fired because "he could no longer be trusted by upper management," an explanation he claims is false and a pretext to fire him for raising ethical concerns.

The Khazin decision notes that most district courts addressing this issue have concluded that the Dodd-Frank Act's whistleblower provision is ambiguous on its face and they have relied on the SEC's final rule for guidance. The Khazin court stated, "This Court agrees with the majority of district courts' view that the Dodd-Frank Act is ambiguous with respect to who qualifies as a whistleblower for purposes of the anti-retaliation provision of the statute." The SEC's final rule essentially expands the definition of "whistleblower" and explains that the anti-retaliation whistleblower protection provisions of Dodd-Frank require a plaintiff to show that he either provided information to the SEC or that his disclosures fell under the four categories listed in the statute. Accordingly, although the court concluded that the plaintiff qualified as a whistleblower under Dodd-Frank, it nevertheless dismissed the case and sent it to an arbitrator because of a pre-dispute arbitration agreement Khazin had signed with TD Ameritrade. That agreement predated Dodd-Frank's enactment and the court held that the law did not apply retroactively to bar its enforcement.

The same issue may be addressed by the Second Circuit Court of Appeals in the case of *Liu Meng-Lin v. Siemens*. The district court there held that Dodd-Frank doesn't protect foreign employees from retaliation. The decision was appealed and in February 2014, the SEC filed an *amicus brief* with the Second Circuit in support of whistleblowers who report suspected wrongdoing both internally to their employer, or the SEC. Sean McKessy, Chief of the Office of the Whistleblower, said in a *statement* that the filing of the amicus brief "makes clear that under SEC rules, whistleblowers are entitled to protection, regardless of whether they report wrongdoing to their employer or the Commission."

If the Second Circuit addresses this issue on appeal and disagrees with the Fifth Circuit, there will be a Circuit split which may warrant Supreme Court review.

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