Second Circuit Expands Protections for Internal Whistleblowers

September 10, 2015

As we forecast in our August 2015 post, "The SEC's Interpretive Guidance on Internal Whistleblowing Under the Dodd-Frank Act," a federal court of appeals today issued a decision in line with the U.S. Securities and Exchange Commission's (SEC) interpretation that the Dodd-Frank Wall Street Reform and Consumer Protection Act protects an individual who reports a violation of securities laws only internally before suffering an adverse employment action. If the decision stands, the split of authority among the courts of appeals resulting from the decision sets the stage for an appeal to the Supreme Court of the United States.

The Second Circuit Court of Appeals, which has jurisdiction over federal cases in Connecticut, New York, and Vermont, issued a divided decision in Berman v. Neo@Ogilvy LLC, No. 14-4626 (September 10, 2015). The majority held that an employee who reported suspected violations to his employer and was discharged—substantially before he reported his concerns to the SEC—was covered under the whistleblower retaliation provisions of Dodd-Frank, despite language in the law that expressly requires a whistleblower to report to the SEC in order to be covered by the Act. The majority acknowledged that its holding is in conflict with the Fifth Circuit Court of Appeals' decision in Asadi v. G.E. Energy (USA), L.L.C., the first appellate decision on the issue, and the decisions of the district courts that have followed Asadi. The Second Circuit noted, however, that "although our decision creates a circuit split, it does so against a landscape of existing disagreement among a large number of district courts," pointing out that a larger number of district courts have declined to follow Asadi. The court also noted the SEC guidance that was the subject of our recent post.

The effect of the Berman decision is to extend the possibility that, in the Second Circuit, an individual who has failed to satisfy the requirements for pursuing a claim under the Sarbanes-Oxley Act of 2002, and who has not reported to the SEC, may yet have a claim under Dodd-Frank. Dodd-Frank, in contrast to Sarbanes-Oxley, provides a much longer limitations period and direct access to federal as well as enhanced remedies, and does not require exhaustion of administrative remedies.

One judge on the three-judge panel in Berman issued a sharp dissent, detailing the defects—in his view—in the majority's reasoning. The SEC's original contradictory regulations and recent interpretive guidance came under scrutiny in the dissent, specifically the timing of the guidance:

The regulation at issue reflects the SEC's territorial interests. . . . Until only yesterday or so, a separate SEC regulation specified the procedures by which a Dodd-Frank whistleblower "must" report a violation—either by mail or fax "to the SEC Office of the Whistleblower" in Washington, D.C., or online through the SEC's website. . . . After oral
argument, the SEC issued an "interpretive rule" amending its regulations to conform to the error it has (successfully) argued here. (Emphasis added.)

If the Second Circuit does not reverse the Berman decision, which it could yet do— and which Neo@Ogilby I.L.C may seek to have it do, either by the panel or by the full court—experts expect a petition to the Supreme Court to resolve the issue. Even before a definitive decision from the Supreme Court, however, employers should expect to see an increase in Dodd-Frank litigation by internal whistleblowers. Ogletree Deakins will continue to monitor the situation as developments unfold and will keep you updated.