

## Dodd-Frank Act Whistleblower Protections Require More Than Internal Reporting, Federal Appeals Court Rules

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In a departure from a steady stream of federal district court decisions broadly construing the anti-retaliation provisions of the Dodd-Frank Act of 2010 (“DFA”), the Fifth Circuit Court of Appeals, in New Orleans, has limited the scope of the term “whistleblower” under those provisions to apply only to employees who actually report information relating to a violation of securities laws *to the U.S. Securities and Exchange Commission* (“SEC”), thus reducing employers’ exposure to such claims. *Asadi v. G.E. Energy*, No. 12-20522 (5th Cir. July 17, 2013).

Khaled Asadi, a former G.E. Energy executive, alleged that he was fired after reporting a possible securities law violation to his supervisor and the company’s regional ombudsman. Asadi claimed he was protected by the anti-retaliation provisions of the DFA, even though, indisputably, he did not provide any information to the SEC, and therefore, did not meet the express statutory definition of the term “whistleblower.” Instead, he argued that his *internal reports* were protected based on purportedly conflicting language in the statute’s anti-retaliation provision. He argued that the DFA’s anti-retaliation provision protects those who make disclosures that are protected under the Sarbanes-Oxley Act, even if they do not report a violation to the SEC.

Rejecting Asadi’s argument, the Fifth Circuit concluded that the plain language and structure of the statute compelled the conclusion that internal communications alone were not protected. It so doing, the Court disagreed with numerous district court decisions that have held to the contrary. *See, e.g., Murray v. UBS Secs., LLC*, 2013 U.S. Dist. LEXIS 71945 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 2013 U.S. Dist. LEXIS 41302 (D. Colo. Mar. 25, 2013); *Kramer v. Trans-Lux Corp.*, 2012 U.S. Dist. LEXIS 136939 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994 n.9 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, 2011 U.S. Dist. LEXIS 103416 (S.D.N.Y. May 4, 2011). It also rejected the SEC’s similar administrative interpretation of the statute.

Based on district court decisions, many employers, not surprisingly, had begun to question whether internal reporting mechanisms they had adopted were simply a trap waiting to ensnare them in DFA whistleblower litigation, rather than the constructive vehicle they had envisioned for achieving compliance through transparency and self-regulation. The Fifth Circuit’s decision may provide a welcome tonic for employers’ concerns.

In light of *Asadi*, employers should re-evaluate and update their corporate internal reporting mechanisms or so-called whistleblower hotlines. Supported by employee awareness programs, these avenues of communication should encourage internal reporting. Adopting clear language and process, articulating strong assurances from senior management of protection from retaliation, and managing expectations of those who employ the procedure to make reports also are essential.

Employers must manage internal resources effectively. They must respond promptly, conduct diligent internal review, take appropriate corrective action, and self-report as warranted. Employees of organizations that deliver on their promises are less likely to resort to the SEC. While reporting to the SEC ultimately may be warranted in some situations, the employer will have the opportunity to be involved and in some measure to affect the course of events.

The Jackson Lewis LLP [Corporate Governance and Internal Investigations](#) Practice represents employers faced with internal employee whistleblower claims and claims filed under federal statutes enforced by OSHA and the SEC, including SOX and the DFA, as well as claims brought under state whistleblower laws. We also assist employers to develop and implement compliance programs that meet the requirements of the U.S. Sentencing Guidelines, as well as those for federal contractors. Additionally, we provide guidance

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### Practices

Corporate Governance and  
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to employers on the appropriate approach to address whistleblower complaints.

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