U.S. Supreme Court Rules on Employee Whistleblower Protections

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Kirstin Story is an employment attorney in Lewis Roca Rothgerber Christie's Labor & Employment Group. Kirstin was with the firm from 2007 to 2013 before joining the Office of the Attorney General for the State of Arizona. While with the Arizona Attorney General's office, Kirstin advised agencies and courts on compliance with state and federal employment laws as well as the Arizona and United States Constitutions, employee discipline, merit rules, policies, and procedures.

On Wednesday, February 21, the U.S. Supreme Court issued a decision ruling that whistleblowers protected by the Sarbanes-Oxley Act and the Dodd-Frank Act are limited to employees who provide information concerning violations of those laws to the Securities and Exchange Commission. The ruling reversed a prior decision of the Ninth Circuit, which extended those whistleblower protections to include employees who internally reported violations of the Sarbanes-Oxley Act to their own employers, even if they had not provided information to the Securities and Exchange Commission.

The Sarbanes-Oxley Act of 2002 was enacted in the wake of the Enron and WorldCom scandals to protect investors and reduce fraud by increasing oversight of public companies by the Securities and Exchange Commission. Among other things, the 2010 Dodd-Frank Act implemented several provisions designed to encourage and protect whistleblowers who report violations of the Sarbanes-Oxley Act. It provided financial incentives to whistleblowers who convey original information to the Securities and Exchange Commission that result in fines or sanctions to the company (often referred to as the "bounty" provision). It also increased the protections against retaliation afforded to whistleblowers. Before the Court's latest ruling, lower courts were split over whether an employee could qualify as a whistleblower under the anti-retaliation protections simply by reporting an alleged violation of the Sarbanes-Oxley Act within their company, and without having to make a report to the Securities and Exchange Commission. The Supreme Court resolved that split by holding that is not the case, and to qualify as a whistleblower whose reports are protected from retaliation under the Sarbanes-Oxley Act and the Dodd-Frank Act, the employee must have made a report to the Securities and Exchange Commission.

The decision narrows the scope of employees who qualify as whistleblowers protected from retaliation under the Sarbanes-Oxley Act. Nevertheless, public companies should remain mindful that employees who do provide information to the Securities and Exchange Commission may be protected under the anti-retaliation provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act, and take care to ensure compliance, by:

- Establishing corporate compliance programs that encourage and facilitate required reports and disclosures by employees.
- Acting immediately, upon notice that an employee has made a protected report, and implement measures to prevent actions (including harassment, demotion, or termination) that may be construed as retaliation.

Employers should also keep in mind that this decision by the Supreme Court may not impact employer liability for retaliation claims under laws other than the Sarbanes-Oxley and Dodd-Frank Acts. As a result, employers may be subject to wrongful termination claims based on state law for retaliation for internal reporting, depending upon the state in which the action takes place. Employers should consult with counsel with questions concerning potential wrongful termination claims.

Lewis Roca Rothgerber Christie offers advice and expertise to employers regarding Sarbanes-Oxley compliance and other wrongful termination matters.

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