

CLIENT ALERT

2nd Circuit Affirms Dodd-Frank Anti-Retaliation Provisions Don't Extend Beyond U.S., Sidesteps Debate Over Internal Whistleblower Protection

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In a case closely watched by counsel for both whistleblower plaintiffs and defendants, the Second Circuit last week followed other courts in finding that the anti-retaliation provisions of the Dodd-Frank Act do not apply to non-U.S. citizens working outside the United States. However, the Second Circuit surprised many by avoiding the growing debate about whether a putative whistleblower is protected by Dodd-Frank if he or she only complains internally and does not report his or her concerns to the Securities and Exchange Commission (SEC).

In *Liu v. Siemens AG*, the Second Circuit affirmed the district court's dismissal of Liu Meng-Lin's complaint against Siemens AG, the parent corporation of his former employer Siemens China Ltd. The court held that he was not protected by the anti-retaliation provisions of Dodd-Frank because the alleged unlawful activity, Liu's alleged whistleblowing about it, and the alleged retaliatory termination of his employment all occurred in China and/or Germany. Liu worked as a compliance officer for Siemens China Ltd. in Taiwan. The Second Circuit noted there was no indication that Congress intended Dodd-Frank to apply to conduct that occurs outside the United States, and therefore the court followed the "longstanding principle of American law" that federal statutes are "meant to apply only within the territorial jurisdiction of the United States" absent evidence of a contrary intent by Congress.

While the Second Circuit's decision regarding extraterritorial application of Dodd-Frank is not surprising, many thought the court would use *Liu* as a vehicle to create a Circuit split with the Fifth Circuit's decision last year in *Asadi v. GE Energy*. In *Asadi*, the Fifth Circuit found that Dodd-Frank's anti-retaliation provisions do not protect putative whistleblowers who only complain internally. Several district courts around the country have refused to apply the *Asadi* decision, but no other Circuit has waded into the debate on an issue many think is destined for the Supreme Court. Like the district court in *Liu*, which noted the debate but ultimately decided the case on other grounds, the Second Circuit punted on the question of protection for internal whistleblowers. Looking ahead, the Eighth Circuit appears to be the next appeals court likely to address this issue, as that court is considering a pending motion for interlocutory appeal brought by the defendant in *Bussing v. COR Clearing LLC*. In *Bussing*, the district court had found that plaintiff's internal complaints were protected by Dodd-Frank.

We will continue to monitor developments related to this important question. In the meantime, employers should note that a number of other whistleblower statutes protect whistleblowers who make only internal complaints. Accordingly, a best practice is to maintain robust internal complaint and investigation mechanisms in the hope that any putative whistleblower will be encouraged to raise his or her concerns internally first, thereby enabling the company to address any issues without the involvement of state or federal officials and without expensive and time consuming litigation.

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