California Judge Sides With Congress and Fifth Circuit In Whistleblower Split

posted on: Tuesday, September 22, 2015

Sean McKessy, Chief, Securities and Exchange Commission’s Office of the Whistleblower, Division of Enforcement discussed a recent split between the circuits this webcast broadcast last Thursday by TheCorporateCounsel.net. The split concerns whether the Dodd-Frank Act prohibits employer retaliation only against “whistleblowers”, who are defined as:

... any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the Commission.

15 U.S.C. §78u-6(a)(6) (emphasis added). The SEC, however, decided to ignore the statute and adopt a different definition of “whistleblower” with respect to its anti-retaliation rules. According to the SEC, a whistleblower need not provide information to only it. Rather, it need only provide information in a manner described in the Dodd-Frank Act.

The Fifth Circuit Court of Appeals, in an opinion authored by Judge Jennifer Walker Elrod, held that because the statute is unambiguous and therefore “we must reject the SEC’s expansive interpretation of the term ‘whistleblower’ for purposes of the whistleblower-protection provision”. Asadi v. G.E. Energy United States, L.L.C., 720 F.3d 620, 630 (5th Cir. 2013). A split in the Circuits arose earlier this month when the Second Circuit Court of Appeals decided to defer to the SEC’s Interpretation. Berman v. Neo@Ogilvy LLC, 2015 U.S. App. LEXIS 16071 (2d Cir. Sept. 10, 2015).


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