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EMPLOYMENT LAW ALERT

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First Case Decided Under Dodd-Frank Interprets its Whistleblower Anti-Retaliation Provisions Expansively

On May 4, 2011, a district court in the Southern District of New York issued the first decision interpreting the scope of Dodd-Frank's whistleblower anti-retaliation provisions. In *Egan v. TradingScreen, Inc.*, 2011 WL 1672066 (S.D.N.Y. May 4, 2011), Judge Sand interpreted the anti-retaliation provisions of section 922 of Dodd-Frank broadly to cover not only whistleblowers who "provide information" to the SEC, but also individuals whose disclosures are "required or protected" under the Sarbanes-Oxley Act ("SOX"), the Securities Exchange Act ("SEC"), 18 U.S.C.
§ 1513(e), or any other law, rule, or regulation subject to the SEC's jurisdiction. Should other courts follow this broad application of Dodd-Frank, a significant increase in whistleblower litigation is likely to occur.

Background

Egan was TradingScreen's former Head of U.S. Sales. According to his complaint, in early 2010, he informed TradingScreen's President that its CEO was diverting the company's corporate assets to another company that the CEO solely owned, and which offered products and services similar to those of TradingScreen. TradingScreen's President informed the independent members of TradingScreen's Board of Directors of the allegations (i.e., those who were not controlled by the CEO), and those Directors hired the law firm of Latham & Watkins to investigate. Latham's investigation allegedly confirmed the allegations, but before the independent Directors could force the CEO to resign, the CEO gained control of the Board and fired Egan. Egan brought suit, asserting several claims, including a claim for retaliation under section 922 of the Dodd-Frank Act, 15 U.S.C. § 78u-6.

Defendants' Motion To Dismiss

The defendants moved to dismiss Egan's retaliation claim on the ground that he was not a "whistleblower" covered by Dodd-Frank. Section 922 of Dodd-Frank defines a "whistleblower" as "any individual who provides, or two or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, by the Commission." 15 U.S.C. § 78u-6 (emphasis added). As Egan made his reports to TradingScreen, not to the SEC, the defendants argued he was not a "whistleblower" afforded protection under the Act.

The Court's Analysis And Decision

The court agreed with the defendants that, by its plain terms, Dodd-Frank's anti-retaliation provision prohibits retaliation against whistleblowers who provide information to the SEC, and that if Congress wanted to extend whistleblower protections to individuals beyond those who report to the SEC, it would have explicitly done so.

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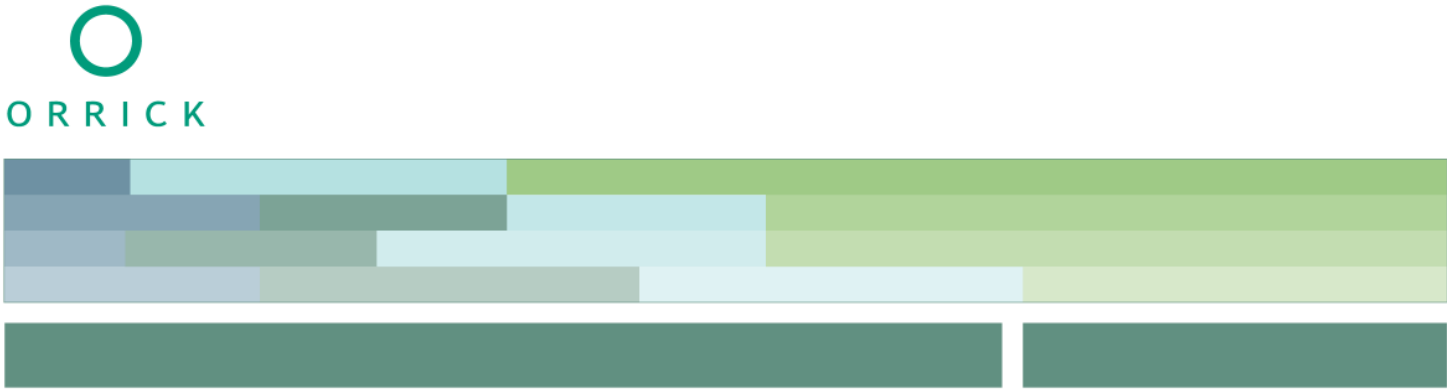


But the court then looked at § 78u-6(h)(1)(A) and noted that, in addition to protecting lawful acts done by the whistleblower to provide information or testimony to the SEC, sub-section 78u-6(h)(1)(A)(iii) protects whistleblower disclosures that are required or protected under: (1) the Sarbanes-Oxley Act; (2) the Securities Exchange Act; (3) 18 U.S.C. § 1513(e); and (4) any other law, rule, or regulation subject to the jurisdiction of the Commission.

The court determined that this created a contradiction in the statute, as "a literal reading of the definition of the term 'whistleblower'…requiring reporting to the SEC, would effectively invalidate…the protection of whistleblower disclosures that do not require reporting to the SEC."

The court then determined that "the contradictory provisions of the Dodd-Frank Act are best harmonized by reading 15 U.S.C. § 78u-6(h)(1)(A)(iii)'s protection of certain whistleblower disclosures not requiring reporting to the SEC as a narrow exception to 15 U.S.C. § 78u-6(a)(6)'s definition of a whistleblower as one who reports to the SEC."

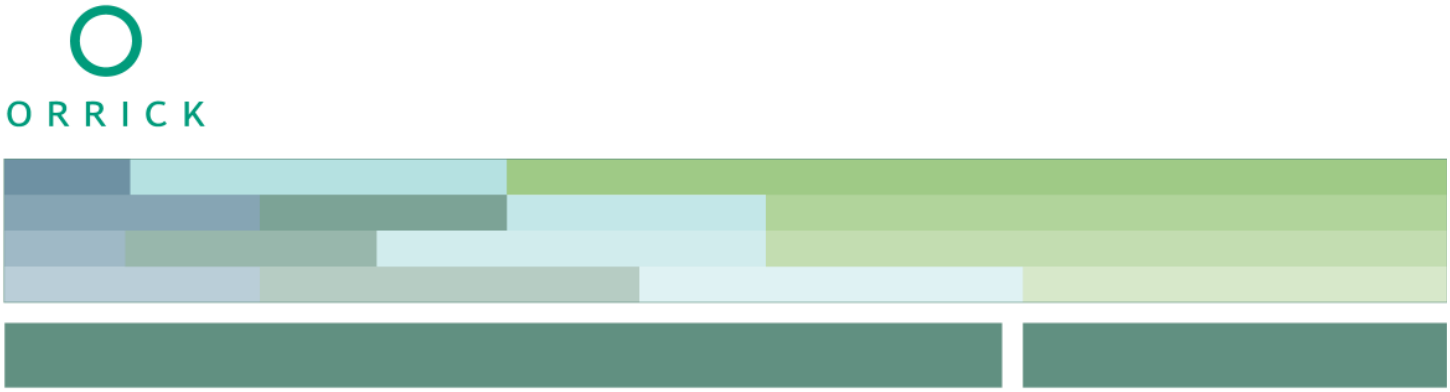
Thus, under the court's reading of the statute, a plaintiff asserting a Dodd-Frank retaliation claim must *either*:

> allege that his information was reported to the SEC, *or* that his disclosures fell under the four categories of disclosures delineated by 15 U.S.C. § 78u-6(h)(1)(A)(iii) that do not require such reporting: those under the Sarbanes-Oxley Act, the Securities Exchange Act, 18 U.S.C. § 1513(e), or other laws and regulations subject to the jurisdiction of the SEC.

Egan attempted to rely on two of the four categories of disclosures under 15 U.S.C. § 78u-6(h)(1)(A)(iii) in support of his retaliation claim. First, he claimed that his reporting to TradingScreen was protected by SOX. The court rejected this argument because TradingScreen is a privately held company, and SOX's protections only apply to employees of publicly traded companies or those required to file reports under section 15(d) of the Securities Exchange Act. Thus, Egan's reporting was not "required or protected" under SOX. Second, Egan claimed that his reporting was protected by 18 U.S.C. § 1513(e), which is a criminal statute prohibiting retaliation for reporting federal offenses to federal law enforcement officers. The court rejected this argument because Egan's complaint did not allege that he made a report to federal law enforcement officers other than the SEC, as described below.

Finally, Egan claimed that he "provided information" to the SEC by initiating the inquiry into the CEO's malfeasance and disclosing information to Latham & Watkins in interviews, which, upon information and belief, Latham & Watkins then reported to the SEC. Egan argued that these actions amounted to "jointly" providing information to the SEC with Latham & Watkins. The defendants countered that, to be protected under Dodd-Frank, a whistleblower must personally provide information directly to the Commission.

The court rejected the defendants' argument and chose to broadly interpret Dodd-Frank's anti-retaliation provision to conclude that Egan "adequately alleged that he acted jointly with the Latham & Watkins attorneys, in an effort to provide information to the SEC regarding [the CEO's] alleged misconduct." Egan had not, however, adequately alleged that Latham & Watkins *actually* reported the CEO's alleged misconduct to the SEC, so the court dismissed the claim without prejudice, giving Egan the opportunity to amend his complaint to include such factual allegations.



In reaching its conclusion that Egan adequately alleged that he acted jointly with the Latham & Watkins attorneys in an effort to provide information to the SEC, the court drew a distinction between section 922's anti-retaliation provisions and its bounty provisions, stating with respect to the latter, "[o]bviously, a whistleblower must directly report to the SEC to receive a bounty award from the SEC."

Implications for Employers

The implications of *Egan* are significant for two reasons. First, because the court held that any SOX-protected complaints fall within the scope of Dodd-Frank's whistleblower provisions whether or not the employee reports to the SEC, employees in any SOX matter will now arguably be able to bring their whistleblower retaliation claims under Dodd-Frank instead of SOX. Dodd-Frank has an expansive six to ten-year statute of limitations (as opposed to SOX's 180-day statute of limitations), a direct right of action in federal district court, as opposed to having to exhaust remedies before OSHA, and double back-pay damages. Thus, particularly if the *Egan* court's reasoning is adopted by other courts going forward, the plaintiffs' bar can be expected to vigorously pursue SOX claims under the more employee-favorable provisions of Dodd-Frank, including claims that might otherwise be time-barred under SOX, instead of under OSHA's administrative scheme. Such a shift in strategy could greatly diminish OSHA's role in investigating and adjudicating SOX cases going forward, and could lead to the newly-amended 180-day SOX statute of limitations becoming obsolete. The court's opinion in *Egan* did not appear to consider these implications with respect to the existing SOX statutory scheme, probably because TradingScreen was clearly not a SOX-covered entity.

Second, the court provided a very broad interpretation of what constitutes "providing information" to the SEC under section 922's anti-retaliation provisions, holding that Egan's reporting of misconduct to his employer and participation in a law firm investigation may be sufficient to "jointly" "provide information" to the SEC if the law firm subsequently reported the issue to the SEC. Although the court did not extend this broad definition to the bounty provisions of the Act, it still creates concerns for employers who may unwittingly increase their exposure to a retaliation suit under Dodd-Frank by investigating and reporting issues to the SEC that stem from a whistleblower's report. One way to avoid such exposure may be for investigators of whistleblower reports to inform the whistleblowers that they are not acting "jointly" with the whistleblowers with respect to any SEC reporting that may occur.

Egan is the first federal district court case to weigh in on the scope of Dodd-Frank's anti-retaliation provisions, and it remains to be seen how influential this decision will be in cases that are working their way through the judicial system in New York and in other jurisdictions. For now, however, employers should be aware of the very broad potential scope of Dodd-Frank's anti-retaliation provisions and take precautionary measures wherever possible to avoid potential liability under the Act.