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## WHISTLEBLOWER STATUS UP FOR DEBATE BEFORE SCOTUS: *DIGITAL REALTY TRUST INC. v. SOMERS*

By Laurel Brandstetter and Danielle Morrison

The nation's top court will soon decide a key aspect of how employers should handle employee complaints about possible fraud or financial wrongdoing in the company that may violate federal laws. These situations provide significant challenges for businesses, especially when the complaining employee is also potentially subject to termination or other adverse employment actions.

On November 28, 2017, the Supreme Court of the United States heard oral argument in *Digital Realty Trust Inc. v. Somers*. This important case may resolve a split among the Circuit Courts of Appeal about whether the Dodd-Frank Act protects internal whistleblowers from adverse employment actions. Some view the grant of oral argument and vocal support during the arguments as a signal the Court will narrow the anti-retaliation provisions of the Dodd-Frank Act.

Digital Realty Trust ("Digital") employed Paul Somers in a senior management position for about four years until it terminated his employment for cause. Somers filed a complaint in a California federal court against Digital and a senior vice president, claiming his termination was in violation of the Dodd-Frank Act's anti-retaliation provision. He asserted that Digital actually terminated him after he complained internally about alleged violations of federal securities laws by his former supervisor. Digital maintained that Somers does not qualify as a whistleblower under Dodd-Frank

because he reported the alleged wrongdoing internally and not to the U.S. Securities and Exchange Commission ("SEC"). Dodd-Frank defines "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." Somers contends this definition does not apply to the anti-retaliation part of the law. The district court and U.S. Court of Appeals for the Ninth Circuit agreed with Somers, based in part on the "overall operation of the statute."

The fundamental issue before the Court is whether an internal whistleblower falls within the protections of Dodd-Frank. Historically, Dodd-Frank has protected employees who assist the SEC and the Sarbanes-Oxley Act has protected all other "ordinary" whistleblower claims. However, in recent years, a split among the Circuit Courts of Appeal has arisen because plaintiffs are increasingly attempting to bring their claims under Dodd-Frank, which provides larger awards and allows more time to file a claim. The SEC has sometimes interpreted Dodd-Frank as protecting whistleblowers even if they do not file a complaint with the Commission.

This case highlights the tenuous line businesses must increasingly walk with their employees with respect to federal regulations and statutes. The False Claims Act, Foreign Corrupt Practices Act,

Dodd-Frank, Sarbanes-Oxley and other laws impose significant regulatory and compliance obligations on businesses with respect to employee complaints and how they should be addressed. Employers and employees are often at cross-purposes under these Acts and alleged violations must be investigated and responded to with care.

Indeed, since the passage of Dodd-Frank, companies have seen both an increase in the number of internal investigations and significant penalties for investigations that were not handled in a timely, competent, or thorough fashion. In this climate, businesses would do well to ensure that their compliance programs are in order and that they have an internal investigations plan in place, in the event of a whistleblower complaint. Employers must also take the added step of educating their employees and managers: about how to file a complaint; about resources available to employees in the event of misconduct; and about the company's anti-retaliation policies and procedures. These best practices are likely to grow in importance even if the Supreme Court limits the application of Dodd-Frank for internal whistleblowers.

Schnader will continue to monitor this case and will report on developments, including the Supreme Court's decision, which is expected by June 2018. ♦

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