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Blowing the Whistle on the New Whistleblower Protections Created by the Dodd-Frank Act

By: Michael James Lombardino

The "Dodd-Frank Wall Street Reform and Consumer Protection Act" (Dodd-Frank)[1] is a game-changing piece of legislation that impacts your business.

What does this mean? This unprecedented legislation requires employers, managers, and Human Resources representatives to take calculated steps to minimize the risk of whistleblower claims. Dodd-Frank will not only cause an increase in the number of whistleblower claims companies may face, but also an increase in the costs and risks associated with defending these claims. Any claim of retaliation that could have been brought by a whistleblower under Sarbanes-Oxley Act of 2002 (SOX)[2] can still be brought – under either SOX or Dodd-Frank. In addition, an employee who is required to report potential fraud under the banking and securities laws as part of the employee's job description will still receive whistleblower protection under Dodd-Frank if that individual provides "original information" to the SEC.

It is important to remember that "whistleblowers" who are still employees of a company could potentially act as the government's "eyes and ears" inside the company -- and will be compensated for doing so (if the information they provide is "original information" as defined in Dodd-Frank).

Amendments to the Sarbanes Oxley Act of 2002

Dodd-Frank, signed by President Obama on July 21, 2010, significantly expands whistleblower protection under SOX. It also creates additional anti-retaliation requirements for employers.

Now includes subsidiaries and affiliates

Dodd-Frank expands the coverage of SOX's whistleblower provisions to expressly cover both publicly-traded companies and "any subsidiary or affiliate whose financial information is included in the consolidated financials of the company." SOX also now covers any nationally-recognized statistical rating organization.

What does this mean? The parent company of a foreign subsidiary should be aware that employees of the foreign subsidiary may be potential whistleblowers under SOX.

ACTION: Employers should keep all reports by employees confidential, and all reports should be fully investigated.

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[1] As mandated by the Dodd-Frank Act, the SEC will issue final regulations within 270 days of its passage, or April 2011. These final regulations will have a significant impact on the effects of Dodd-Frank.

[2] SOX, which was enacted in response to Enron-type corporate abuses, protects "whistleblowers" against retaliation because they openly oppose certain violations of law by their employers. Examples of retaliation could be termination of employment, reduction in pay, a demotion, or similar negative employment action.

Statute of limitations for SOX claims lengthened to 180 days

The most common basis for dismissal of SOX claims has been employee's failure to file a complaint with the U.S. Department of Labor (DOL) within 90 days of the employer's retaliatory conduct. Dodd-Frank increases this 90-day period to 180 days.

What does this mean? Employees now have almost 6 months to file a complaint with OSHA and initiate a Sarbanes-Oxley Whistleblower complaint.

Invalidation of arbitration agreements

Reversing judicial precedent, Section 922 of Dodd-Frank prohibits pre-dispute arbitration agreements and any other "agreement, policy, form, or condition of employment" that requires a waiver of rights under SOX.

What does this mean? SOX claims are not subject to mandatory arbitration agreements or policies. Moreover, there is a question as to whether a separation and release agreement can still include a waiver of SOX claims; and, whether language in separation agreements created prior to Dodd-Frank is still enforceable.

The Dodd-Frank Act Creates Its Own Cause of Action

Dodd-Frank also creates its own causes of action – many of which mirror SOX, but others that go far beyond the limitations of SOX. Dodd-Frank's causes of action covers retaliation due to any disclosures "required or protected" under: (1) SOX; (2) the Securities Exchange Act of 1934 (Exchange Act); (3) 18 U.S.C. § 1513(e), which prohibits retaliation, including in connection with employment, against individuals for providing information to a law enforcement officer about possible commission of a federal offense; and (4) any other law, rule, or regulation subject to the SEC's jurisdiction.[3]

Abandons the "Reasonable Belief" standard

Prior to Dodd-Frank, not only did an employee have to report a potential violation of the law, but that employee had to have reasonably believed that the activity constitutes securities, bank or wire fraud or a violation of an SEC rule or other federal law relating to fraud against shareholders. Dodd-Frank expands protection to any individual who complains to the SEC, *regardless of the validity or reasonableness of the complaint.*

What does this mean? Any employee, from the cleaning staff to the CFO, receives protection as a "whistleblower" for reporting potential fraud to the SEC, regardless of the merits of the report.

[3] Dodd-Frank also contains provisions protecting whistleblowers from retaliation for, among other things, providing information to the Commodities Futures Trading Commission or the Bureau of Consumer Financial Protection. *See* Dodd-Frank Act §§ 748 and 1057.

Whistleblower Bounty Program

Dodd-Frank creates an entirely new category of whistleblowers: those who provide the SEC with "original information" (as defined in Dodd-Frank) and qualify for a newly-enacted whistleblower bounty program. Section 922 allows the SEC, in any action involving sanctions in excess of $1 million, to compensate the whistleblower with up to 30% but not less than 10% of the amount of the sanctions. The whistleblower bounty program has already proved lucrative for whistleblowers. On July 27, 2010, the SEC reported that it awarded $1 million to Glen Kaiser and Karen Kaiser who blew the whistle on insider trading committed by Pequot Capital Management, Inc. The Kaisers provided the SEC with emails between a Microsoft employee and a Pequot employee.

What does this mean? There is now an incentive for employees to "fish" for and disclose confidential and/or internal documents or information with the hope of becoming a millionaire.

Statute of Limitations: Up to 10 Years

Employees filing under Dodd-Frank have 6 years to file after the retaliatory conduct or 3 years after facts material to the right of action are known or reasonably should have been known by the employee. However, no action may be brought more than 10 years after the date of the violation.

What does this mean? Employees filing under Dodd-Frank (as opposed to SOX) will have up to 6 or more years to file their complaint.

Dodd-Frank covers all companies (Including Private Entities)

Dodd-Frank applies to all companies. This means, for example, that an employee of a small, non-public company who reports to the SEC that individuals at the company are engaging in wire fraud and suffers an adverse employment action after such report can bring a claim of whistleblower retaliation.

What does this mean? Private entities should be aware that their employees may be potential whistleblowers who receive protection under SOX.

ACTION: Employers should keep all reports by employees confidential, and all reports should be fully investigated.

Direct access to federal court under Dodd-Frank

Dodd-Frank provides whistleblowers a private right of action, which an employee may pursue directly in federal court. There is no preliminary OSHA adjudication of these complaints.

What does this mean? Employees filing under Dodd-Frank (as opposed to SOX) will have immediate access to federal district courts.

Double damages

Under SOX, prevailing plaintiffs are awarded reinstatement with equivalent seniority and back-pay with interest. Dodd-Frank, on the other hand, provides prevailing plaintiffs reinstatement with equivalent seniority and two-times back pay with interest.

What does this mean? Employees have an incentive to file Dodd-Frank claims, because they may receive twice as much as they otherwise would under SOX.

THE BOTTOM LINE

- Given the breadth and scope of Dodd-Frank, employers are encouraged to consult with counsel before taking any adverse personnel actions against employees who may have engaged in activities protected by Dodd-Frank.

- Employers should assess which subsidiaries or affiliates are now covered by SOX.

- Employers should consider revising and strengthening their internal reporting procedures (of both the parent company and any subsidiaries or affiliates) to encourage employees to first raise any concerns directly with their employer prior to resorting to litigation.

- Employers that do not already do so, should encourage employees to report compliance concerns within the parent, subsidiary, or affiliate (such as a confidential 1-800 number or a confidential reporting procedure) to help ensure the opportunity to investigate concerns, take any necessary action, and hopefully reduce any potential liability.

- Employers should consider revising any applicable document-retention policies to retain any personnel files or other records pertinent in defending against retaliation claims for a 10 year period (the maximum statute of limitations period under Dodd-Frank).

For additional information and/or assistance, please contact your Bracewell & Giuliani attorney, or one of the following:

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