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Retaliation

Dodd-Frank Anti-Retaliation Provision May Lead to More Lawsuits That Raise Compliance Issues

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Much attention has been focused on the increasing role of whistleblowers in the government's pursuit of financial fraud. Several federal statutes create bounty programs, allowing whistleblowers who bring fraud to the government's attention to recover significant sums. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank'') is only the latest example. Dodd-Frank amended the Securities and Exchange Act of 1934 (''Exchange Act'') to create awards for whistleblowers who provide information relating to a violation of the securities laws to the SEC.[1]

The size of the awards under this section can be significant, with bounties ranging between 10 and 30 percent of (1) the SEC's recovery in a judicial or administrative action brought by the SEC that results in monetary sanctions exceeding $1 million; and (2) recoveries of certain other government agencies in actions related to that SEC action.[2]

The Dodd-Frank whistleblower provisions also contain anti-retaliation provisions allowing whistleblowers to sue in federal court alleging that their employers unlawfully retaliated against them after they disclosed alleged violations of the securities laws. While these anti-retaliation provisions have not received as much attention as the bounty program, more whistleblowers are filing retaliation lawsuits, and a number of recent federal court decisions expanding the scope of protections given to whistleblowers under Dodd-Frank are likely to accelerate this trend.

In today's charged regulatory environment, these lawsuits can raise significant concerns for companies.

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The D-F Anti-Retaliation Provisions

The anti-retaliation provisions of Dodd-Frank prohibit an employer from discharging or otherwise discriminating against a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower in (1) providing information to the SEC; (2) initiating, testifying in, or assisting in any SEC investigation or judicial or administrative action based upon such information; or (3) making disclosures that are required or protected under any law, rule, or regulation within the SEC's jurisdiction, including the Sarbanes-Oxley Act and the Exchange Act.[3] In addition, these anti-retaliation provisions allow an employee to file a retaliation lawsuit directly in federal court, and provide remedies including reinstatement, recovery of twice the amount of back pay, and costs and attorneys' fees.[4] Dodd-Frank also provides for a six- to 10-year statute of limitations for retaliation claims.[5]

These anti-retaliation provisions provide more generous remedies and faster access to federal court than the Sarbanes-Oxley Act. Sarbanes-Oxley prohibits covered entities or individuals from discharging or otherwise discriminating against a whistleblower because of any lawful act done by the whistleblower in providing information or assistance concerning violations of certain criminal fraud statutes, SEC rules or regulations, or any provision of federal law relating to fraud against shareholders to a federal regulatory or law enforcement agency, Congress, or a person with supervisory authority over the whistleblower.[6]

However, unlike a Dodd-Frank whistleblower, a Sarbanes-Oxley whistleblower claiming retaliation cannot file an action directly in federal district court; instead, the whistleblower must file an administrative complaint with the Department of Labor, which has 180 days to issue a final decision.[7] If the agency issues a final decision in that time

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[1] 15 U.S.C. § 78u-6.
[2] *Id.* § 78u-6(a), (b); 17 C.F.R. §§ 240.21F-3, 240.21F-4.
[3] 15 U.S.C. § 78u-6(h)(1)(A).
[4] *Id.* § 78u-6(h)(1)(B), (C).
[5] *Id.* § 78u-6(h)(1)(B).
[6] 18 U.S.C. § 1514A(a).
[7] *Id.* § 1514A(b).

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frame, the whistleblower can appeal that decision to the appropriate federal circuit court of appeals; if the agency does not timely issue a decision, a whistleblower may then commence an action in federal court. In addition, the Sarbanes-Oxley Act has a 180-day statute of limitations and restricts the employee's recovery to reinstatement and back pay, plus costs and attorneys' fees.[8]

Recent Court Decisions Expand Protection of D-F Whistleblowers

A number of recent federal court decisions have interpreted Dodd-Frank's anti-retaliation provisions broadly, expanding the scope of protections available to Dodd-Frank whistleblowers. These cases have considered the apparent conflict in Dodd-Frank between the definition of ''whistleblower'' and the conduct covered by the anti-retaliation provisions. In relevant part, Dodd-Frank defines a ''whistleblower'' as someone who provides information relating to a violation of the securities laws to the SEC in a manner established by that agency.[9] While the anti-retaliation provisions explicitly prohibit retaliation against whistleblowers who provide information, testimony, or assistance to the SEC, these provisions also protect whistleblowers who make disclosures that are required or protected under the laws within the SEC's jurisdiction. Significantly, this latter provision does not require that disclosures be made *directly* to the SEC in a manner established by that agency, and it therefore appears to conflict with the statute's whistleblower definition.

Recently, a Connecticut federal district court addressed this conflict and held that Dodd-Frank protects a whistleblower who complains either to the SEC *or* internally to the whistleblower's employer.[10] In reaching this conclusion, the court adopted an SEC rule that interpreted the statute similarly, and agreed with the conclusion reached by the other federal courts that have considered the issue.[11] Under these authorities, a Dodd-Frank whistleblower who complains internally therefore can claim protection against retaliation, provided the whistleblower has a reasonable belief that there has been a violation of the securities laws. Furthermore, under these cases a whistleblower who does report externally to the SEC need not do so in the manner established by the SEC.

Implications for Companies Facing Retaliation Lawsuits

These cases and their broad interpretation of Dodd-Frank's anti-retaliation provisions have significant implications for entities subject to that statute. As an initial matter, employers likely will be confronted with additional retaliation claims, even where the employee has raised complaints only internally. Indeed, a number of cases have been filed in recent months by employees claiming that their employers violated Dodd-Frank by discharging or otherwise retaliating against them after they raised internal complaints.[12] In these cases, the employees complained internally that their employers were violating applicable securities laws or regulations, and alleged that such disclosures were required or protected by one or more laws subject to the SEC's jurisdiction, including the Sarbanes-Oxley Act, the Exchange Act, or the Foreign Corrupt Practices Act. Moreover, the additional cases that likely will result from the expansion of Dodd-Frank whistleblower protection, while nominally constituting mere employment disputes, have the potential to expose compliance issues to judicial scrutiny, as well as possible review by federal regulators or the Justice Department.

Indeed, whistleblowers who invoke Dodd-Frank's anti-retaliation provisions must demonstrate that they have disclosed information concerning a possible violation of one or more laws subject to the SEC's jurisdiction. As part of proving such a claim, the discovery process will most likely focus at least in part on alleged compliance failures by the whistleblower's employer, failures which may not have previously been brought to the government's attention when the employee reported the failure internally. The government may very well take notice of such allegations and determine that further inquiry is warranted.

Given this heightened risk of government scrutiny, employers are well-advised to ensure that they have robust internal reporting policies to encourage whistleblowers to come forward internally. Such policies should include strong anti-retaliation protections and measures—such as anti-retaliation training, procedures that provide whistleblowers with potential transfers or alternative work arrangements, and periodic updates on the status of internal investigations—with the goal of encouraging whistleblowers to report internally and minimizing the likelihood that those who do so will subsequently file a federal retaliation lawsuit, exposing the alleged compliance failings to public scrutiny. Employers would be well-advised to have counsel familiar with retaliation issues review such policies. Supervisors and senior management also should receive guidance as to how to handle effectively, and if need be escalate, internal complaints. Moreover, employers should recognize that imposing discipline on whistleblowers for poor performance or other legitimate reasons unrelated to the whistleblowing may result in retaliation lawsuits. It is not uncommon for whistleblowers to have performance issues. In fact, performance issues may be the the reason the whistleblower came forward in the first place, and employers must weigh the need to reassign or discharge the employee against the risk of a potential retaliation lawsuit and public disclosure of alleged compliance failings. Where an employer chooses to discharge the whistleblower because of performance issues, the employer should attempt to ensure that the issues are well-documented, to aid in defense of any subsequent retaliation lawsuit.

In short, given Dodd-Frank's anti-retaliation provisions and recent case law broadly interpreting them, employers confronted by a whistleblower who discloses internally must appreciate the risks of a potential retaliation lawsuit and the corresponding and potentially damaging disclosures of alleged compliance failures that may result.

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[8] *Id.* § 1514A(b), (c).

[9] 15 U.S.C. § 78u-6(a)(6).

[10] Kramer v. Trans-Lux Corp., No. 3:11cv1424 (SRU), 2012 BL 249583 (D. Conn. Sept. 25, 2012).

[11] *See* 17 C.F.R. § 240.21F-2; Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986 (M.D. Tenn. 2012); Egan v. Trading Screen, Inc., 10 Civ. 8202 (LBS), 2011 BL 339160 (S.D.N.Y. May 4, 2011).

[12] *See, e.g.*, Liu v. Siemens A.G., 13 Civ. 0317 (WHP) (S.D.N.Y.) (filed Jan. 5, 2013); Orlandi v. Citibank, N.A., No. 1:12CV6057 (E.D.N.Y.) (filed Dec. 10, 2012); Murray v. UBS Securities, LLC and UBS AG, 12 Civ. 5914 (JMF) (S.D.N.Y.) (filed Aug. 12, 2012); Jagodzinski v. Morgan Stanley Smith Barney LLC, 12 Civ. 5891 (DLC) (S.D.N.Y.) (filed Aug. 1, 2012).