Expansive Employee "Whistleblower" Protections In The Dodd-Frank Wall Street Reform and Consumer Protection Act

July 22, 2010

In the wake of the American economic crisis, on July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”), which is the most significant expansion of government power over banking and markets since the Great Depression. While a number of the Dodd-Frank Act’s provisions have garnered a lot of attention, lesser-known parts of the legislation provide expansive protection to whistleblowers in the financial services industry. The Act also expands the whistleblower protection provision of the Corporate and Criminal Fraud Accountability Act of 2002 (“Sarbanes-Oxley”), and creates new private rights of action for whistleblowers under the Securities Exchange Act of 1934 (“SEA”) and the Commodity Exchange Act of 1936 (“CEA”).

New Whistleblower Provision For Financial Services Employees

The Dodd-Frank Act creates a private right of action for employees in the financial services industry who suffer retaliation for disclosing information about fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service. This provision applies to a broad array of companies in the financial services industry including those that (i) extend credit or service or broker loans or leases; (ii) provide real estate settlement services or perform property appraisals; (iii) engage in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer; (iv) sell, provide or issue stored value or payment instruments; (v) provide check cashing, check collection, or check guaranty services; (vi) provide payments or other financial data processing products or services to a consumer by any technological means; (vii) provide financial advisory services to consumers relating to proprietary financial products; (viii) collect, analyze, maintain or provide consumer report information or other account information in connection with any decision regarding the offering or provision of a consumer financial product or service; or (ix) collect debt related to any consumer financial product or service. The Dodd-Frank Act prohibits retaliation by any of these employers against an employee who has (i) provided (or is about to provide) information to the Bureau of Consumer Financial Protection (the “Bureau”) or any other government authority or law enforcement agency regarding any violation of the Dodd-Frank Act’s consumer protection provisions as well as any rule, order or standard prescribed or enforced by the Bureau; (ii) testified (or will testify) in a proceeding resulting in the administration or enforcement of the Dodd-Frank Act’s consumer protection provisions; (iii) filed or instituted any proceeding under federal consumer financial law; or (iv) objected to, or refused to participate in any activity, practice or assigned task that the employee reasonably believes to be a violation of law, rule, standard or prohibition subject to the jurisdiction of, or enforceable by, the Bureau.

The Dodd-Frank Act whistleblower provision sets forth an employee-friendly burden of proof. To prevail in a whistleblower claim under the Dodd-Frank Act an employee need only demonstrate by a preponderance of the evidence that the protected conduct was a "contributing factor" to the reprisal. (By contrast, under other federal anti-retaliatory statutes such as the provision included within Title VII, a plaintiff-employee must establish that the impermissible consideration was a "determining" or "significant" factor in the employer's decision, which arguably represents a higher burden of proof). Once the employee meets this burden, an employer can avoid liability by demonstrating by "clear and convincing evidence" that it would have taken the same action in the absence of the employee engaging in protected conduct. This high burden, although like the standard for whistleblower claims under Sarbanes-Oxley, is in sharp contrast to Title VII's *McDonnell Douglas* framework whereby an employer need only articulate a legitimate, non-discriminatory reason in order to shift the burden of proving retaliation back to the employee.

The statute of limitations to file a Dodd-Frank Act claim is 180 days after the violation occurred, and the employee must initially file a complaint with the Secretary of Labor, who will investigate the complaint. If the Secretary concludes that there is reasonable cause to believe that a violation has occurred, the Secretary is required to issue a preliminary order that may include reinstatement with full back pay, compensatory damages and costs. If the Secretary concludes that the complaint is frivolous or filed in bad faith, she may award the employer reasonable attorneys fees, not exceeding $1,000, to be paid by the complainant.

Within 60 days after the Secretary issues her findings, any aggrieved party may appeal to the United States Court of Appeals for the circuit in which the violation allegedly occurred or in the circuit where the complainant resided on the day of the violation. If the Secretary has not issued a final order within 210 days of the filing of the complaint, the employee can file a lawsuit in federal district court. The Dodd-Frank Act expressly exempts whistleblower claims under this provision from mandatory arbitration agreements, except those contained in collective bargaining agreements.

The Dodd-Frank Act Expands the Coverage of Sarbanes-Oxley's Whistleblower Protection Provision

The Dodd-Frank Act clarifies that the whistleblower provision in Sarbanes-Oxley applies to employees of any subsidiaries or affiliates of publicly traded companies whose financial information is included in the publicly traded company's consolidated financial statements. This is a subject that had previously divided courts and will result in the expansion of the reach of Sarbanes-Oxley's whistleblower protection provision. Indeed, only a few months ago, the Department of Labor's Administrative Review Board issued an order inviting all interested persons to comment on whether employees of subsidiaries are protected by Sarbanes-Oxley.

The Dodd-Frank Act Provides a New Private Right of Action Under the Securities Exchange Act of 1934 and the Commodity Exchange Act of 1936

The Dodd-Frank Act also amends the SEA and CEA to provide broad, new private rights of action for employees who have suffered retaliation as a result of providing information to the Securities and Exchange Commission or the Commodity Futures Trading Commission. These rights of action are separate and apart from an employee's rights under Sarbanes-Oxley and the Dodd-Frank Act's whistleblower provisions for financial services employees and includes provisions that are substantially more favorable to employees.

The amendments to the SEA and CEA are essentially identical, save for the different statute of limitations triggers and filing periods. Under the SEA, covered whistleblowers may file lawsuits up to six years after the alleged retaliation occurred or, under the so-called discovery rule, three years after the employee knew or reasonably should have known of facts material to a violation, so long as the complaint is filed within 10 years of the violation. By contrast, the statute of limitations under the CEA is two years from the date of the violation, and there is no discovery rule. The express codification of the discovery rule in the SEA is quite atypical for a whistleblower statute. In fact, Sarbanes-Oxley has a 90-day statute of limitations period that commences solely upon the adverse action, and the statute of limitations in the other 17 whistle-blowing statutes administered by the Occupational Safety and Health Administration exclusively runs from the occurrence of the alleged violation.

The similarities of the amendments to the SEA and CEA are evident in a number of instances. Of note, complainants are not required to adhere to any administrative prerequisites before commencing a lawsuit against the whistleblower's employer. By comparison, Sarbanes-Oxley and the whistleblower provision in the Dodd-Frank Act require a complaint be filed with the Department of Labor before an employee is able to file suit. In addition, the amended SEA and CEA increase employees' incentive to report fraud by allowing a successful employee to recover punitive remedies such as double backpay with interest, litigation costs, expert witness fees and reasonable attorneys' fees. The Securities Exchange Commission or the Commodity Futures Trading Commission may also pay a reward to individuals who provide original information that results in monetary sanctions to a company exceeding $1 million. Neither of these provisions is available under Sarbanes-Oxley.

* * *

If you have any questions or concerns regarding this new law or related issues, please contact the lawyers at Proskauer Rose.

Authors: ***Lloyd B. Chinn*** *and* ***Harris Mufson.***

Related Professionals

- **Joseph Baumgarten**
- **Lloyd B. Chinn**
  Partner
- **Anthony J. Oncidi**
  Partner
- **Nigel F. Telman**
  Partner
- **Mark W. Batten**
  Partner