

Dodd-Frank Whistleblower Issues for Employers

By Allegra J. Lawrence-Hardy and Lee A. Peifer

In the two and a half years since the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank or the Act),¹ companies and courts alike have struggled to navigate the new legal landscape for potential whistleblowers and their employers. Taking a proactive approach to potential complaints should be an important priority for employers—and can mean the difference between a quick, internal resolution and a lengthy, external investigation.



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New Terrain

Before Dodd-Frank, the primary source of an employer's whistleblower liability under the securities laws was the anti-retaliation provision of the Sarbanes-Oxley Act of 2002, or SOX.² Despite its breadth, however, this provision had important limits. As a general rule, for instance, the anti-retaliation provision applied only to publicly traded companies. Moreover, it allowed courts to enforce mandatory arbitration agreements in whistleblower retaliation suits. And, for cases that actually proceeded in court, SOX did not require jury trials.

Dodd-Frank made sweeping changes to this relatively settled area of the law. Among other things, the Act extended SOX's anti-retaliation provision to cover publicly traded companies' affiliates, rendered pre-dispute arbitration agreements unenforceable against whistleblower plaintiffs, and guaranteed a right to jury trials for plaintiffs who exhaust their remedies before the Department of Labor. Dodd-Frank also exposed companies providing consumer financial services to SOX-like retaliation liability for the first time.³

The Act further created a new species of retaliation liability for companies that are subject to the federal securities and commodities laws (regardless of whether they are publicly traded).⁴ Under these new laws, whistleblower plaintiffs can wait years—up to ten years for Securities and Exchange Commission (SEC) whistleblowers⁵—to pursue retaliation claims. They can also sue directly in federal court for reinstatement, attorney's fees and back pay.

Finally, Dodd-Frank created new bounty systems to encourage reporting of potential violations of the securities or commodities laws to federal officials. These systems entitle individual whistleblowers who voluntarily provide original information leading to a successful enforcement action to recover between 10 and 30 percent of the total sanctions collected from the offender.⁶ Both the SEC and the U.S. Commodity Futures Trading Commission (CFTC) have issued detailed rules describing the eligibility requirements and procedures for collecting an award,⁷ and early indications are that the programs are succeeding. The SEC reported receiving more than 3,000 tips from potential whistleblowers during its 2012 fiscal year and paid \$50,000 toward its first bounty last August.⁸

Unanswered Questions

Given the extent of Dodd-Frank's changes in the whistleblower context, it comes as no surprise that many questions remain unanswered. Federal trial courts have split on whether Dodd-Frank's prohibition of mandatory arbitration for SOX retaliation claims is retroactive.⁹ Similarly, courts continue to address questions about the scope of the new anti-retaliation protections for SEC whistleblowers. In *Egan v. TradingScreen, Inc.*,¹⁰ for example, a New York federal court held that employees who provide information to their employer's counsel might qualify for whistleblower protection if the lawyer later discloses that information to the SEC. And several courts have held that the Act's new anti-retaliation provisions may apply to SEC whistleblowers even when they do not qualify for a bounty award.¹¹

Proactive Responses

The full implications of Dodd-Frank's new whistleblower provisions remain uncertain. This much, however, is clear: employers can prepare to respond to a growing number of whistleblowers and their claims of alleged retaliation. Indeed, the lengthy statutes of limitation for claims under the Act's SEC and CFTC anti-retaliation provisions suggest that employers may wish to consider retaining documentation to support every human resources decision within the applicable limitations period.

Employers can reduce their overall exposure to whistleblower claims by encouraging a culture of compliance in the workplace. Consider establishing policies and training materials that reflect a commitment to obeying the letter and spirit of the law. Emphasize that retaliating against potential whistleblowers will not be tolerated. Dedicated compliance personnel and anonymous hotlines can also encourage employees to share their concerns with the company instead of turning to a governmental agency. And thoroughly investigating potential violations can go a long way toward building credibility with dissatisfied employees who might otherwise become external whistleblowers.

These suggestions are only a few of the possible ways to minimize a company's exposure to whistleblower claims. Despite Dodd-Frank's additional burdens, effective preventives and defenses to whistleblower claims still exist. With the assistance of capable counsel, companies can adequately prepare for whistleblowers and the unique challenges that they pose from an employment perspective. **S**

1. Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank].
2. See generally 18 U.S.C. § 1514A, amended by Dodd-Frank § 922(c).
3. Dodd-Frank § 1057 (codified at 12 U.S.C. § 5567).
4. Dodd-Frank § 922(a) (codified in relevant part at 15 U.S.C. § 78u-6(h)); *id.* § 748 (codified in relevant part at 7 U.S.C. § 26(h)).
5. 15 U.S.C. § 78u-6(h)(1)(B)(iii).
6. 7 U.S.C. § 26(b)(1); 15 U.S.C. § 78u-6(b)(1). Under both these provisions, whistleblowers are entitled to an award only if the total sanctions imposed in the enforcement action exceed \$1 million. See 7 U.S.C. § 26(a)(1); 15 U.S.C. § 78u-6(a)(1).
7. 17 C.F.R. §§ 165.1–19 (CFTC rules); *id.* § 240.21F-1–17 (SEC rules).
8. See U.S. Sec. & Exch. Comm'n, Annual Report on the Dodd-Frank Whistleblower Program 4 (Nov. 2012), <http://www.sec.gov/about/offices/owb/annual-report-2012.pdf>; Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues First Whistleblower Program Award (Aug. 21, 2012), <http://www.sec.gov/news/press/2012/2012-162.htm>.
9. See *Wong v. CKX, Inc.*, No. 11 Civ. 6291 (JGK), 2012 WL 3893609, at *10 & n.2, 2012 U.S. Dist. LEXIS 129406, at *26 & n.2 (S.D.N.Y. Sept. 10, 2012) (noting disagreement among courts).
10. No. 10-CIV-8202 (LBS), 2011 WL 1672066, at *7–9, 2011 U.S. Dist. LEXIS 47713, at *19–26 (S.D.N.Y. May 4, 2011).
11. See, e.g. *id.*, 2011 WL 1672066, at *5, 2011 U.S. Dist. LEXIS 47713, at *13; *accord Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5, 2012 U.S. Dist. LEXIS 136939, at *12–13 (D. Conn. Sept. 25, 2012) (citing 17 C.F.R. § 240.21F-2(b)(1)).