Dodd-Frank Solicits Whistleblowers

Virtually every new federal law which impacts the employment relationship prohibits retaliation, designed to protect those who report, complain about or otherwise express concerns regarding activities which they believe to be illegal, as well as those who cooperate in investigations and other enforcement procedures. The usual form of such protections is the model found in employment discrimination law, language dealing with "participation in" claims and "opposing" violations of the law, with victims of retaliation having the same rights and remedies as those available to those who experience discrimination. A variant of that approach is found in the Sarbanes-Oxley Act of 2002, in which the "whistleblower" protections are expressed in a criminal statute which also carries civil remedies.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111-203, H.R. 4173), signed on July 21, 2010, adopts a quite different approach. Although the statute contains the typical non-retaliation language and affords confidentiality to those who report what they think to be illegal activities, Dodd-Frank offers a strong incentive for blowing the whistle: one who furnishes "original information" to either the Securities and Exchange Commission or the Commodities Futures Trading Commission which results in the successful prosecution of securities law violations can receive between 10 and 30 percent of any monetary recovery in excess of one million dollars – incentives similar to those in the False Claims Act. Additionally, victims of discharge or "other discrimination" arising out of making such reports can obtain court-ordered reinstatement, double back pay plus interest, and their attorneys' fees. The result of this provision is that many employees may elect to bypass internal company whistleblower programs in order to be eligible to receive this new "bounty" award – a result which threatens to undercut many employer whistleblower programs.

Law firms which represent plaintiffs in such cases report a strong upsurge in clients. Stuart Meissner, a claimants' attorney in New York, has announced his filing of a new lawsuit against a major investment bank by one of its former securities brokers who had been wooed to join the major firm based on the promise of a book of business belonging to another broker who had been fired, and has also written to the SEC to urge vigorous enforcement activities[1] and carefully-drafted regulations to flesh out the Dodd-Frank requirements. Attorneys on both sides of these issues report a definite upturn in activity although the requirements of the law are largely undefined and no regulations are in place.

The SEC's tentative schedule for Dodd-Frank rulemaking (including whistleblower provisions) can be found at: http://www.sec.gov/spotlight/dodd-frank/dfactivity-upcoming.shtml#0910.

What Does the Law Require?

Dodd-Frank represents a major expansion of federal securities laws, as reflected in a series of Client Alerts which we have published since July of this year:

[1] http://www.smeissner.com/sec-comment-dodd-frank-whistleblower-statute/.

Dodd-Frank Act's Corporate Governance and Executive Compensation Provisions Will Impact Public Companies' Disclosures and Practices; Dodd-Frank Act Modifies "Accredited Investor" Definition and Creates Additional Bad Boy Disqualification for Regulation D Offerings; Dodd-Frank Act Permanently Exempts Non-Accelerated Filers From SOX Auditor Attestation Requirement; Dodd-Frank Act Governance and Compensation Requirements: A "Punch List" of Action Items.

The provisions of Dodd-Frank are wide-ranging, as noted by the impact of the law on employee complaints discussed in this alert.

Who Does It Protect?

While the Sarbanes-Oxley Act, in its 2002-2010 form, covered only employees of publicly-traded companies, Dodd-Frank makes an enormous expansion of that coverage: almost every employee in the financial services industry – whether the employer is publicly or privately held – is accorded whistleblower protection of one sort or another. Those who extend credit, service loans, give financial or credit counseling, engage in check-cashing or check deposit services, handle financial services data processing, do consumer reporting, or are associated with real estate settlement or appraisal activities are given protected status along with those whose jobs comprise what might be viewed as "core" banking, insurance, securities and commodities services.

The law amends the Securities Exchange Act of 1934, Sarbanes-Oxley, the Commodity Exchange Act, the Foreign Corrupt Practices Act and the False Claims Act, which will require the regulatory explanations to be immense.

How Are Claims Made?

The Sarbanes-Oxley complaint process contemplated a system in which complaints to regulators, followed by an administrative hearing procedure, were the norm and resort to the full litigation avenue was a narrow exception. Dodd-Frank changes this dramatically, allowing direct access to the courts – what some industry representatives refer to as an "end run," but what is termed a "private right of action" in the statute – under Section 922 of Dodd-Frank.

Dodd-Frank whistleblower complaints normally go to the Secretary of Labor, just as has been the case with those under Sarbanes-Oxley, and must be filed within 180 days of the action challenged in the complaint. From this point forward, however, the process changes: a Labor Department investigation results in preliminary findings which may include reinstatement "with full back pay," compensatory damages and costs. However, if the complaint is deemed to be frivolous or filed in bad faith, the employee can recover his "reasonable attorneys' fees" of up to $1000.

"Bounty" claims follow a third path: If the SEC or the CFTC forward "original information" from a whistleblower to prosecution in court, the complainant need not appear as a party in the case, and can even remain anonymous as an informant. However, to maintain identity secrecy, the complaining individual must have attorney representation "until compensation is to be paid."

What Steps Should Be Taken?

The first step in any action plan should be an assessment of current practices compared to the new legal and practical requirements an employer faces. Depending upon the staffing and sophistication of your organization, you should identify the individuals who should have input into the process and determine whether advice of counsel should be a part of your plan.

Although the scope of suggested actions will depend in part on the regulations ultimately adopted by the SEC and the particular circumstances of an organization, we recommend companies consider the following actions:

- Review your documents. Policies, handbooks, contracts, alternative dispute resolution procedures, and release/separation documents should all be analyzed to see whether there are problems in need of correction. In some instances, documents which should be maintained either no longer exist or, even worse, never existed. Determining the status of this situation and taking pains to adjust it is highly important.

- Internal and external reporting. Reporting should not just be allowed; it should be encouraged. Concerns about possible frivolous complaints should yield to the necessity of establishing or maintaining a compliance mindset which goes beyond written policies to actual practices and perceptions. The procedure should protect confidentiality as far as possible and should allow anonymity if feasible. A toll-free hotline or other confidential reporting system can be very beneficial.

- Demonstrate commitment and prevent retaliation. The message from the top of the organization should be that there is a commitment to the spirit of the law and that retaliation will not be tolerated. Even meritless complaints are worthy of consideration, and it should not be up to any one person – including the one aggrieved – to dismiss a concern as unimportant or ill-advised.

- Train your personnel. Those who will receive complaints, those who will investigate them, your management team, and the rest of the workforce will all need training, but the content will vary significantly depending on the roles of each.

- Take effective corrective action. Nothing will impair a compliance program more than a failure to take prompt, decisive action which is objectively viewed as fair and responsive.

- How far should you go? Dodd-Frank eliminates some of the chain-of-command defenses which existed under prior laws; for example, Sarbanes-Oxley had been interpreted as conferring whistleblower rights on employees of publicly traded companies, which meant that if a parent company – often a holding company or other thinly-staffed entity – had few employees, those who worked for the subsidiary had no Sarbanes-Oxley protection. Dodd-Frank purports to eliminate this distinction, which will no doubt be a subject for litigation.

- Beyond the Basics. In addition, should you allow third parties – independent contractors, other contingent workers, service personnel, and those in business relationships with the employer – to access the complaint system and, if so, should there be a separate reporting channel? This involves legal considerations regarding liability issues, and the decision needs to be an informed one.

What Remains to be Decided?

The typical recent trend is to create a broad statutory charter and leave it to the regulators to write the rules and to the courts to interpret them. Dodd-Frank is no departure from this model. Issues regarding

coverage, retroactivity, and a myriad of other details will not be resolved for years. As this story unfolds, it is imperative to adjust practices to reflect these developments. Although much of what employers will be doing must, in reality, be based on educated guesses, education is an ongoing process which cannot be ignored.

If you have any questions, please contact Charlie Edwards or any member of the firm's Labor and Employment Group.

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