

News from our Employment & Labor Group

Expansion of Whistleblower Protection: The Dodd-Frank Act

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”) which was designed to reform the U.S. financial regulatory system in response to the recent financial crisis. To accomplish this goal, the Act creates and expands protection and incentives for whistleblowers, among other provisions.

New “victim” whistleblower protection for financial services employees

Section 1057 of the Dodd-Frank Act creates a new private right of action for employees in the financial services industry who are retaliated against for disclosing information about unlawful conduct related to the offering or provision of a consumer financial product or service.

Who is covered?

This section of the Dodd-Frank Act covers employees of businesses that offer or provide consumer financial products or services primarily for personal, family or household purposes, including businesses that:

- ▶ extend credit or service loans or broker leases;
- ▶ provide real estate settlement services or perform real estate or personal property appraisals;
- ▶ engage in deposit-taking activities, transmit or exchange funds, or otherwise act as custodian of funds or any financial instrument used by or on behalf of consumers;

- ▶ sell, provide or issue stored value or payment instruments;
- ▶ provide check cashing, check collection, or check guaranty services;
- ▶ provide payments or other financial data processing products or services to a consumer by any technological means;
- ▶ provide financial advisory services to consumers on individual financial matters or relating to proprietary financial products or services;
- ▶ collect, analyze, maintain, or provide consumer report information or other account information to be used in connection with decisions regarding the offering or provision of a consumer financial product or service; and
- ▶ collect debt related to any consumer financial product or service.

What conduct is protected?

Protected activity under this section of the Dodd-Frank Act includes:

- ▶ providing or attempting or causing to provide information to an employer, the newly created Bureau of Consumer Financial Protection (the “Bureau”), or any other state, local, or federal government authority or law enforcement agency relating to any violation of the laws subject to the jurisdiction of the Bureau;
- ▶ testifying or intending to testify in, or filing, instituting or causing to be filed or instituted, any proceeding under any federal consumer financial law; and

- ▶ refusing to participate in any activity the financial services employee reasonably

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believes is in violation of any laws subject to the Bureau's jurisdiction.

How is this law enforced?

An employee who believes he or she has been unlawfully terminated or discriminated against in retaliation for engaging in protected activity has 180 days from the date of the alleged violation to file a complaint with the U.S. Secretary of Labor (the "SOL"). To prevail on such a claim, the complainant must demonstrate that protected conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. An employer can defeat such a claim by demonstrating by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of the complainant's protected conduct.

Notably, this burden of proof is more employee-friendly than other federal anti-retaliation laws where the employee must demonstrate that the protected conduct was a "determining" or "significant" factor in the unfavorable personnel action, and the employer must articulate a legitimate, non-discriminatory reason for the unfavorable personnel action in order to shift the burden back to the complainant.

Employees may remove claims brought under this section to federal court if the SOL does not issue a final order within 210 days after the complaint was filed, or within 90 days after the date of receipt of a written determination by the SOL. Either party to such an action may request a jury trial.

What remedies may be awarded to these whistleblowers?

Remedies for violations of this section of the Dodd-Frank Act may include:

- ▶ an order requiring the employer take affirmative action to abate the violation;
- ▶ reinstatement;
- ▶ back pay;
- ▶ compensatory damages;

- ▶ attorneys' and expert witness fees; and
- ▶ litigation costs.

Employers cannot contract out of this whistleblower protection

Section 1057 of the Dodd-Frank Act also expressly prohibits enforcement of any pre-dispute arbitration agreements (except those in collective bargaining agreements) and any pre-dispute agreements to waive rights or remedies provided by this section.

New financial incentives and private rights of action for whistleblowers

The Frank-Dodd Act amends the Securities Exchange Act of 1934 (the "SEA") and the Commodities Exchange Act (the "CEA"), providing major payouts to qualifying whistleblowers, and creating a new private right of action for whistleblowers who suffer unlawful retaliation.

Qualifying whistleblowers may be awarded upward of \$100,000

Sections 922 and 748 of the Dodd-Frank Act amend the SEA and the CEA, respectively, to provide significant financial incentives to would-be whistleblowers. Under these sections, whistleblowers who voluntarily report to the SEC or the Commodity Futures Trading Commission (the "CFTC") "original information" that leads to the recovery of more than \$1 million in sanctions shall be awarded between 10-30% of the collected monetary sanctions. "Original information" means information derived from the independent knowledge or analysis of the whistleblower, which is not known by the SEC or CFTC from a source independent of the whistleblower, and where such information is not derived from allegations made in judicial or administrative hearings, governmental reports, hearings, audits or investigations, or news media, unless the whistleblower is a source of the information.

Private right of action for securities and commodities whistleblowers

Who is protected?

Similar to Section 1057 which creates a private right of action for employees who are retaliated against for reporting, or participating in the investigation, or prosecution of fraudulent or unlawful conduct related to the offering or provision of a consumer financial product or service for personal, family, or household use, Sections 922 and 748 create a new private right of action for employees who are retaliated against for reporting, or participating in the investigation, or prosecution of violations of securities and commodities law.

What employer conduct is prohibited?

Employees who have suffered an adverse employment action (including employment termination, demotion, suspension, threats, harassment, or other discrimination in the terms and conditions of employment) because of their protected conduct can bring retaliation claims under these amendments. Employees protected by the SEA (as amended) have up to six years after the retaliatory conduct or three years after becoming aware of such conduct (not to exceed ten years after the alleged conduct occurred) to bring such a claim. Employees protected by the CEA (as amended) have up to 2 years to bring such a claim.

What remedies may be awarded to these whistleblowers?

Employees who prevail in such lawsuits may be awarded:

- ▶ reinstatement;
- ▶ two times back pay with interest for claims brought under the amended SEA, and straight backpay with interest for claims brought under the amended CEA;
- ▶ compensation for litigation costs;
- ▶ expert witness fees, and reasonable attorneys' fees.

Expansion of Sarbanes-Oxley's whistleblower protection

The Dodd-Frank Act also amends the Sarbanes-Oxley Act ("SOX").

180 day statute of limitations

Section 922(c) increases the statute of limitations for SOX whistleblower claims from 90 to 180 days after the employee became aware of the employer's retaliatory conduct, and clarifies that employees are entitled to have their retaliation claims tried before a jury.

Employers cannot contract out of this whistleblower protection

This section of the Dodd-Frank Act also expressly prohibits enforcement of any pre-dispute arbitration agreements (except those in collective bargaining agreements) and any pre-dispute agreements to waive rights or remedies provided by this section.

Subsidiaries or affiliates also covered

Section 929A of the Dodd-Frank Act amends SOX to extend whistleblower protection to

subsidiaries or affiliates of publicly traded companies whose financial information is included in the consolidated financial statements of such companies.

Expansion of the False Claims Act's whistleblower protection

The Dodd-Frank Act also expands the category of individuals and the scope of conduct protected by the False Claims Act.

Protection against associational discrimination

The amendment to the False Claims Act (the "FCA") protects against associational discrimination. Specifically, the FCA previously protected "lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter." As amended by the Dodd-Frank Act, the FCA protects "lawful acts done by the employee, contractor, agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter."

Three year statute of limitation

The Dodd-Frank Act also clarifies that individuals have three years from the date of an employer's alleged retaliatory conduct to bring civil actions under the FCA.

Conclusion

Given the newly created incentives and expanded protection for whistleblowing, employers are advised to consult with counsel before making any adverse personnel decisions for employees who have engaged in activities protected by the Dodd-Frank Act. Employers may also consider revising and strengthening their internal reporting procedures to encourage employees to first raise any concerns directly with their employer before bringing legal claims in court or to a regulatory body.

If you would like to discuss these issues further or have questions about this *Alert*, please contact one of the attorneys listed above. ■