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Will Your Company Blow It? *New Whistleblower Laws May Generate More Litigation*

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Special to the Legal

Laws that protect whistleblowers from retaliation have played a major role in exposing fraud and wrongdoing at accounting firms, financial institutions and banks in recent decades, from Swiss bank UBS to the former accounting behemoth, Arthur Andersen. And many of the employees — and their lawyers — who have reported the wrongdoing have reaped millions of dollars in "bounty" for their complaints.

For better or worse, whistleblower litigation is expected to grow tremendously in 2011 and beyond, spurred in large part by a new federal law, the Dodd-Frank Wall Street Reform and Consumer Protect Act. The Dodd-Frank Act and other legal developments have greatly expanded the incentives to bring such suits and the anti-retaliation protections for whistleblowers who report alleged fraud or unlawful conduct.

Plaintiffs lawyers are gearing up for the expected onslaught of whistleblower litigation, and some law firms have seen a tenfold increase in calls from potential plaintiffs, according to a recent report in the *Wall Street Journal*.

This article outlines the new whistleblower protections in the Dodd-Frank Act, as well as other existing and expanded whistleblower laws that apply to the banking and accounting industries. It then sets forth recommended actions employers can take to mitigate the risk of whistleblower claims by employees.

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DODD-FRANK DETAILS

The Dodd-Frank Act significantly expands incentives and protections for employee whistleblowers in the financial services sector by:

- Creating a new incentive for whistleblowers to reap rewards of up to 30 percent of penalties imposed in enforcement actions by the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC);
- Establishing new protections for employees who register complaints with the SEC or the CFTC;
- Adding new anti-retaliation protections for whistleblowers in consumer financial services businesses; and
- Expanding existing whistle blowing protections.

UNPRECEDENTED INCENTIVES FOR WHISTLEBLOWERS

A key provision in Section 922 of the Dodd-Frank Act incentivizes employees, and others with knowledge of wrongdoing, to come forward to the SEC with information about violations of securities laws within a company. Under this new law, whistleblowers are entitled to collect 10 to 30 percent of the total penalty imposed by the agency if:

- The whistleblower provides "original information" about a securities law violation to the SEC;
- That information leads to a successful enforcement action; and
- Penalties of $1 million or more are imposed in the enforcement action.

The ultimate award to the whistleblower will be dependant on a number of factors, includin, the significance of the information provided, the degree of assistance provided, and the government's interest in deterring violations of the Dodd-Frank Act.

Importantly, the Dodd-Frank Act also creates a nearly identical incentive for whistleblowers who provide information to the CFTC of violations of the Commodity Exchange Act.

NEW ANTI-RETALIATION PROTECTIONS

In addition to strong financial incentives, the Dodd-Frank Act also protects employees against retaliation for whistleblowing. Specifically, Section 922 creates a private cause of action for employees who suffer adverse employment actions (terminations, discipline, non-promotions or other unfavorable treatment) in retaliation for:

- Providing or trying to provide information to the SEC or CFTC in accordance with the new law;
- Assisting or trying to assist in any investigation based on tips the whistleblower has provided; or
- Making disclosures that are required or protected under the Sarbanes-Oxley Act.

Employees can bring retaliation claims under Section 922 directly in federal court. Remedies for retaliation include reinstatement; double back pay with interest; and litigation costs, expert witness fees and reasonable attorney fees. The anti-retaliation provisions do not authorize punitive damages.

Unlike retaliation actions under other financial reform laws, such as Sarbanes-Oxley, an employee has no duty to exhaust administrative remedies before bringing a retaliation action.

In further contrast to many other whistleblower laws, the Dodd-Frank Act does not require an employee to advise his or her employer that he or she believes the employer is engaging in fraudulent conduct or to take part in any internal problem-resolution mechanisms. In effect, the act eliminates any incentive for an employee to take action within the company to correct the wrongdoing.

NEW PROTECTIONS IN CONSUMER FINANCIAL SERVICES

Section 1057 of the Dodd-Frank Act introduces new protections for employees of businesses offering consumer financial products or services, including businesses that extend credit; service and/or broker loans; extend or broker leases of personal or real property; provide real estate settlement services; engage in deposit-taking activities; transmit or exchange funds by or on behalf of a consumers; provide check cashing services; or offer financial advisory services.

These new whistleblower protections prohibit retaliation against an employee for the following, among other things:

- Providing, or preparing to provide, information to an employer, the government and/or the newly created Bureau of Consumer Protection about any act or omission the employee reasonably believes to be a violation of the Dodd-Frank Act or any other law subject to the jurisdiction of the Bureau of Consumer Protection;
- Testifying, or agreeing to testify, against an employer about a violation of the Dodd-Frank Act or any other law subject to the jurisdiction of the Bureau of Consumer Protection;
- Filing or instituting any proceeding under any federal consumer financial law; and
- Objecting to or refusing to participate in any activity, policy, practice or assigned task that the employee (or other such person) reasonably believed to be in violation of any law, rule, order, standard or prohibition, subject to the jurisdiction of or enforceable by the Bureau of Consumer Protection.

An employee who successfully demonstrates retaliation is entitled to remedies that may include reinstatement, backpay, compensatory damages and attorney fees and litigation costs, including expert witness fees.

Retaliation complainants under Section 1057 of the Dodd-Frank Act have a burden-shifting test that is favorable to whistleblowers. To state a prima facie case of retaliation, a complainant need only show, by a preponderance of the evidence, that his or her protected activity was a "contributing factor" in the adverse employment action. Once an employee has met his or her burden, the employer must show, by clear and convincing evidence, that it would have taken the same action in the absence of the employee's protected conduct in order to escape liability.

Retaliation claims under this section are subject to a 180-day statute of limitations and the claim must be filed initially with the U.S. Department of Labor (DOL), which has a duty to investigate the complaint and has to authority to order preliminary reinstatement.

Either the employee or the employer can request a hearing before the DOL. After the complainant exhausts his or her administrative remedies, or if the DOL fails to issue a final order within 210 days of the filing of the complaint, the complainant may bring a lawsuit in federal court and is entitled to a trial by jury.

EXPANDING EXISTING PROTECTIONS

In addition to creating new incentives and new causes of action for whistleblowers, the Dodd-Frank Act also strengthens existing whistleblowing law. The Sarbanes-Oxley Act's whistleblowing protections have been amended to expressly provide to many employees of subsidiaries of publicly traded companies and ratings organizations.

Additionally, the Dodd-Frank Act amends Sarbanes-Oxley such that any predispute arbitration agreement is unenforceable and clarifies that Sarbanes-Oxley plaintiffs have a right to a jury trial.

FEDERAL FALSE CLAIMS ACT

The federal False Claims Act was enacted in 1863 to thwart fraud against

the federal government during the Civil War. It includes "qui tam" or whistleblower provisions, which allow citizens with evidence of fraud against the government in contracts, purchasing or otherwise, to sue on behalf of the government to recover the amounts fraudulently taken. It also includes an anti-retaliation provision which prohibits an employer from retaliating against an employee who has reported or investigated a claim under the False Claims Act.

Citizens who initiate a qui tam claim under the False Claims Act may be awarded a portion of the funds recovered, typically between 15 and 25 percent. In addition, an employee who suffers retaliation for bringing a qui tam suit may recover damages from the retaliation, including two times the value of his or her lost wages and benefits and attorney fees and costs.

About half of the states have their own mini-versions of the False Claims Act.

IRS WHISTLEBLOWER PROGRAM

The IRS has greatly expanded its whistleblower program in recent years to encourage and reward individuals who report tax fraud and tax violations by individuals and corporations. The law provides for two levels of recovery to whistleblowers. First, if the taxes and other amounts in dispute exceed $2 million, and other qualifications are met, the IRS will pay the whistleblower between 15 and 30 percent of the amount collected. If the target of the complaint is an individual, his or her annual gross income must be more than $200,000. Second, for whistleblowers whose reports do not meet these thresholds, the IRS may — at its discretion — award up to 15 percent of the recovery, with a maximum payout of $10 million.

The most infamous case to date under the IRS whistleblower program is the prosecution of Swiss megabank UBS AG in 2009. UBS, the world's largest manager of private wealth, entered into a deferred prosecution agreement with U.S. authorities in which it paid a criminal fine of $780 million and admitted helping its clients evade U.S. taxes. Ironically, the whistleblower, who engaged in much of the wrongdoing he reported, was imprisoned for his criminal conduct and therefore ineligible to recover any award under the program.

NEW JERSEY CEPA

New Jersey has one of the nation's most comprehensive whistleblower laws, the Conscientious Employee Protection Act (CEPA).

In general, CEPA protects both public and private employees working in New Jersey from retaliation by their employer for opposing, objecting to, or refusing to participate in actions by the employer that the employee reasonably believes are illegal or in violation of public policy. A successful employee can recover lost wages and benefits, emotional distress damages, punitive damages and attorney fees and costs, in addition to equitable relief such as reinstatement. Actions must be brought in state or federal court within one year of the alleged violation.

PENNSYLVANIA WHISTLEBLOWER LAW

The Pennsylvania Whistleblower Law protects public employees, and employees of private entities that receive public funding, from discrimination because the employee "makes a good faith report or is about to make a report, verbally or in writing, to the employer or appropriate authority [of] an instance of wrongdoing or waste."

Such claims must be brought within 180 days of the alleged retaliation, and a prevailing employee may recover lost wages and benefits, other actual damages and attorney fees and costs.

Recommended steps companies can take to avoid whistleblower liability. Companies should consider the following actions to avoid whistleblower claims:

- Adopt and enforce a policy that protects whistleblowers from retaliation and encourages employees to step forward if they are aware of unlawful or fraudulent conduct by anyone relating to the company's business. (New Jersey and some other states mandate the posting of such policies.)
- Train managers and human resources professionals about whistleblower protections to ensure the company does not retaliate against reasonable, good-faith reports by employees.
- Provide incentives to employees to encourage internal whistleblower reports. Some companies pay employees a significant dollar amount for revealing unlawful conduct, fraud or waste, which demonstrates their openness — and non-retaliation — to such reports. It is much easier to deal with and resolve internal complaints than to handle government investigations of reports to public agencies.
- Do not retaliate against employees who do bring forward complaints of unlawful conduct, fraud or wrongdoing.
- Conduct regular compliance surveys of employees to identify any alleged wrongdoing, fraud, illegal conduct or unethical behavior. Have employees sign off on comprehensive surveys on these topics every six months or annually.
- Require regular internal audits and other compliance reviews to identify and prevent unlawful conduct. •

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