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May-June 2011

Employer Update

SEC Expands Dodd-Frank's Anti-Retaliation Protections

By Allan Dinkoff

On May 25, 2011, the Securities and Exchange Commission approved regulations implementing the whistleblower bounty program and anti-retaliation provisions mandated by Section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The regulations expand significantly the scope of Dodd-Frank's anti-retaliation provisions beyond the express terms of the statute, and this has significant implications for employers.

The Statutory Scheme

The whistleblower provisions of Dodd-Frank are focused principally around creating a bounty program to provide whistleblowers with incentives to bring violations of the federal securities laws to the Commission's attention. The Act's anti-retaliation provisions are part of this statutory scheme, appearing in the same section of the Act as the bounty provisions.[1] The Act is specific in defining "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." Section 21F(a)(6).[2] This definition applies by its terms both to the bounty provisions and to the anti-retaliation provisions. The regulations apply this definition to the bounty program but create an entirely new definition of "whistleblower" for the anti-retaliation provisions that appears to go beyond the express terms of the statute.

Section 21F(h) protects "whistleblowers" from retaliation by their employer. It prohibits employers from retaliating against "whistleblowers" "because of any lawful act done by the whistleblower" in three enumerated instances: (i) providing information to the Commission, (ii) participating in any investigation or action undertaken by the Commission based on or related to information provided by the whistleblower, or (iii) making disclosures required or protected by the Sarbanes-Oxley Act of 2002. Clearly, under the express language of the statute, only "whistleblowers" as defined by the statute are entitled to the statute's anti-retaliation protections. Retaliation is then defined as adverse action against a "whistleblower" because the whistleblower engaged in certain specified activities.

The SEC Rules

The Commission wrote a new definition of "whistleblower" solely for purposes of the anti-retaliation provisions. The regulations define "whistleblower" in the anti-retaliation context as not only someone who makes disclosures to the Commission, but also someone who makes disclosures "required or protected under the Sarbanes-Oxley Act of 2002 . . . and any other law, rule, or regulation subject to the jurisdiction of the

Commission." Reg. 240.21F-2(b)(ii). The regulations thus expand the definition of "whistleblower" by ignoring the distinction between the definition of "whistleblower" and the whistleblower's activities. Expanding the definition of whistleblower has significant consequences given the scope of Sarbanes-Oxley.[3]

The disclosures protected by Sarbanes-Oxley are extremely broad. Significantly, Sarbanes-Oxley disclosures are protected even if they are not reported to the Commission, and the protected disclosures may extend way beyond matters related to violations of the federal securities laws. For example, section 806 of Sarbanes-Oxley protects individuals from retaliation if they made disclosures to "a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct)," assuming that the other prerequisites to Sarbanes-Oxley protections are met. It also protects employees who assist private litigants alleging violations of the federal securities laws and other specified anti-fraud statutes.

The exact parameters of Sarbanes-Oxley's whistleblower protections are still being thrashed out by the Department of Labor and the courts, but a recent *en banc* decision by DOL's Administrative Review Board ("ARB") adopts a very sweeping definition of protected activity. The statute protects a whistleblower who provides information "regarding conduct that the employee reasonably believes constitutes a violation" of enumerated federal statutes, which include wire fraud, mail fraud, bank fraud and securities fraud. A majority of courts, ARB panels and DOL administrative law judges have held that irrespective of which anti-fraud statute the whistleblower sought to rely upon, the fraud must involve fraud on shareholders to be protected by Sarbanes-Oxley.[4] Bucking this trend, the ARB recently held *en banc* in *Sylvester v. Parexel International LLC*[5] that Sarbanes-Oxley protects reports of fraudulent conduct that do not involve fraud on shareholders and that the fraud need not be material. The ARB's *Sylvester* decision is not the final word, but it is a warning that the law is very much in flux and is potentially very far reaching.

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Converting Sarbanes-Oxley claims into Dodd-Frank claims has significant consequences for those litigating these cases, because we can expect that employees generally will prefer to litigate under Dodd-Frank. First, suits under Dodd-Frank may be brought directly in federal district court without filing first with OSHA as required by Sarbanes-Oxley. Second, whistleblowers are entitled under Dodd-Frank to two times the amount of back pay otherwise owed while only back pay is available under Sarbanes-Oxley. Third, the statute of limitations is considerably longer under Dodd-Frank: suit must be brought within six years, or three years from when "facts material to the right of action are known or reasonably should have been known," but in no event more than ten years after the date of the violation. In contrast, whistleblowers pursuing claims under Sarbanes-Oxley must file a claim with OSHA within 180 days of the violation or the date on which the employee becomes aware of the violation.

The regulations make it explicit that violations of the Dodd-Frank anti-retaliation provisions can result in a Commission enforcement action. This was always the case because the anti-retaliation provisions were inserted into the Securities Exchange Act of 1934, and the SEC is authorized to bring enforcement actions for any violation of that statute. In addition, any violation of the, 34 Act is a criminal offense. In contrast, the SEC does not have authority to investigate violations of Sarbanes-Oxley § 806.[6]

What Employers Should Do

It remains to be seen whether the courts will uphold the Commission's new definition of "whistleblower." But irrespective of whether the statutory definition or the SEC's definition of "whistleblower" ultimately prevails, the stakes have been raised for employers. The basic rules for dealing with whistleblowers remain the same — managers of whistleblowers must be educated on what retaliation means and told in no uncertain terms that they may not retaliate. Any performance management or disciplinary action

must be reviewed first by HR and legal. HR and legal must satisfy themselves that any performance management or disciplinary action is being taken for non-retaliatory reasons, including ensuring that others similarly situated are being treated in a similar fashion. HR and legal also should be involved in decisions concerning compensation, performance reviews and promotion to ensure that whistleblowers do not have any legitimate claim that they are being treated less favorably because they came forward with concerns. It may be useful to set up a direct line of communication between whistleblowers and HR so the whistleblower can flag immediately any situation where he or she feels that they are being treated inappropriately, such as not being invited to client or networking events.

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1 Separate sections of Dodd-Frank have whistleblower provisions for reports to the Commodity Futures Trading Commission and the Bureau of Consumer Financial Protection.

2 Section 922(a) of Dodd-Frank adds section 21F to the Securities Exchange Act of 1934, and we will use here the '34 Act references.

3 At least one court adopted the Commission's expansive definition of "whistleblower" for purposes of Dodd-Frank's anti-retaliation provisions shortly before the Commission issued its final rules. *Egan v. TradingScreen, Inc.*, 2011 U.S. Dist. LEXIS 47713 (S.D.N.Y. May 4, 2011).

4 See, e.g., *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 354 (4th Cir. 2008); *Allen v. ARB*, 514 F.3d 468 (5th Cir. 2008); *Bishop v. PCS Admin.* (USA), Inc., No. 05 C 5683, 2006 WL 1460032, at *9 (N.D. Ill. May 23, 2006); *Plantone v. Flyi, Inc.*, ARB Case No. 04-154, ARB Case No. 2003-SOX-00027, at 15 (ARB Sept. 29, 2006); *Marshall v. Northrup*, AFJ Case No. 2005-SOX-00008 (ALJ June 22, 2005). But *see, e.g., Reyna v. Conagra Foods, Inc.*, Case No. 3:04-CV-39 (M.D. Ga. June 11, 2007).

5 ARB Case No. 07-123, ALJ Case Nos. 2007 SOX-039 & 2007-SOX-042 (May 25, 2011).

6 The SEC can, of course, investigate the violations about which the whistleblower complains and may view retaliation as obstructing its investigation, which carries serious consequences.