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ADVISORY | Dodd-Frank Act

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ENHANCED PROTECTION FOR WHISTLEBLOWERS AGAINST EMPLOYER RETALIATION

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act). Amid the Act's hundreds of pages is a section, Section 922, that significantly enhances the protections available to whistleblowers. Not only will Section 922 fortify existing protections available to whistleblowers under the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), but also, and perhaps more importantly, it will create an entirely new retaliation-protection regime. Although much attention has been paid to the bounty provisions of the Dodd-Frank Act, less has been focused on the retaliation provisions, which could potentially impact relations between companies and their employees in significant ways.

Historical Significance of Sarbanes-Oxley Act Protections

The Sarbanes-Oxley Act for the first time provided specific whistleblower protection against employer retaliation based on the reporting of securities-related violations and various federal fraud crimes.[1] Through July 2010, more than 600 whistleblower complaints alleging retaliation have been adjudicated within the Department of Labor in accordance with the administrative framework established by the Sarbanes-Oxley Act.[2] The vast majority of these cases were voluntarily withdrawn by the whistleblowers or summarily decided or dismissed by the administrative law judges tasked with handling them. Of the small percentage of cases actually decided by the administrative law judges on the merits, only a handful of the decisions were favorable to the whistleblowers. It is, of course, impossible to know how many whistleblower retaliation cases have settled in the shadow of these administrative proceedings.

Impact of Dodd-Frank Act

The Dodd-Frank Act establishes an entirely new category of whistleblowers—those who give the SEC "original information" (as defined in the Act) and thereby qualify for a newly-enacted whistleblower bounty program. Under this program, whistleblowers are eligible to receive cash awards of 10% to 30% of the sanctions collected by the SEC. The precise requirements and parameters of the new bounty program are outside the scope of this advisory, which focuses on whistleblower retaliation claims.

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[1] For a more complete discussion of the whistleblower protection provisions in the Sarbanes-Oxley Act, *see* David Martin, Barbara Hoffman, *et al.*, "Protection for Whistleblowers Under the Sarbanes-Oxley Act," Covington & Burling Securities Update (Aug. 3, 2004), reprinted with modifications in BNA's *Corporate Accountability Report—Analysis & Perspective*, as "Protection for Whistleblowers Under the Sarbanes-Oxley Act," Vol. 2, No. 33 at 889 (Aug. 13, 2004) and *Wall Street Lawyer*, as "Whistleblower Protection Under the Sarbanes-Oxley Act," Vol. 8, No. 5 (Oct. 2004).

[2] Information on whistleblower retaliation cases brought under the Sarbanes-Oxley Act is available on the Department of Labor's website. *See* http://www.oalj.dol.gov/libwhist.htm (last visited July 28, 2010).

The Dodd-Frank Act also establishes a new retaliation-protection regime for such claims. The Act does not completely usurp the administrative adjudication process provided for under the Sarbanes-Oxley Act but, instead, creates a separate enforcement mechanism that parallels the existing regime. The Sarbanes-Oxley Act protects whistleblowers who provide information about certain violations of federal securities laws or various forms of fraud, including fraud against shareholders. The Dodd-Frank Act, in contrast, covers reports required or protected by the Sarbanes-Oxley Act, reports about violations of other laws subject to the SEC's jurisdiction, and reports to law enforcement officers about the commission of federal offenses.

Protection for Whistleblowers Under the Sarbanes-Oxley Act and the Dodd-Frank Act

The following table contains a comparison of the main provisions of the Sarbanes-Oxley Act and the Dodd-Frank Act.[3] In some cases, the Sarbanes-Oxley Act's protections have been amended by the passage of the Dodd-Frank Act.

	Sarbanes-Oxley Act (as amended to date)	Dodd-Frank Act
Scope of Protected Reporting	Whistleblowers are protected from retaliation for reporting violations of: ○ any rule or regulation of the SEC; ○ federal criminal provisions relating to securities, bank, mail, or wire fraud; or ○ any federal law relating to fraud against shareholders. Whistleblowers are protected from retaliation if they have provided such information to: ○ a federal regulatory or law enforcement agency; ○ a member or committee of Congress; or ○ a person with supervisory authority over the whistleblower.	Whistleblowers are protected from retaliation for making disclosures that are required or protected under: ○ the Sarbanes-Oxley Act; ○ the Securities Exchange Act of 1934 (Exchange Act), including Section 10A(m), which requires each public company audit committee to establish procedures for receiving and handling complaints regarding accounting or auditing matters and confidential, anonymous submissions by employees regarding questionable accounting or auditing matters; ○ 18 U.S.C. § 1513(e), which prohibits retaliation, including in connection with employment, against individuals for providing information to a law enforcement officer about the possible commission of a federal offense; and ○ any other law, rule, or regulation subject to the SEC's jurisdiction. Whistleblowers are also protected for making disclosures to the SEC

[3] This section summarizes the relevant provisions of the Dodd-Frank Act, as signed into law on July 21, 2010. It should be noted, however, that the SEC is required by the Act to promulgate additional regulations implementing the whistleblower provisions of the Act within 270 days of its passage. Moreover, the Office of the Inspector General of the SEC is directed to issue a report on the efficacy of the Act's whistleblower incentive provisions within 30 months of the Act's passage.

		pursuant to the new Dodd-Frank whistleblower bounty program.[4]
Statute of Limitations	180 days after the date of the violation or after the employee became aware of the violation.[5]	No more than o six years after the violation; or o three years after facts material to the right of action are known or reasonably should have been known by the employee. In any event, no action may be brought more than 10 years after the date of the violation.
Jurisdiction over Complaints	Whistleblowers must file an initial complaint with the Occupational Safety and Health Administration (OSHA) within the Department of Labor. If the Secretary of Labor fails to issue a final decision with respect to the complaint within 180 days, the whistleblower may bring an action in federal district court.	Whistleblowers may file an initial complaint in federal district court. There is no preliminary OSHA adjudication of these complaints.
Remedies	Reinstatement with equivalent seniority and back pay with interest. Reasonable attorneys' fees and related costs are also recoverable.	Reinstatement with equivalent seniority and two-times back pay with interest. Reasonable attorneys' fees and related costs are also recoverable.
Amendments to Sarbanes-Oxley Act by Dodd-Frank Act	The Dodd-Frank Act amended the Sarbanes-Oxley Act as follows: o increases statute of limitations from 90 to 180 days, as described above (see note 5); o eliminates an employer's ability to enforce waivers of whistleblowers' rights or remedies, or to require arbitration of claims of retaliation through pre-dispute agreements; o grants parties to retaliation cases in federal district court a right to trial by jury; and	N/A

[4] The Dodd-Frank Act also contains provisions protecting whistleblowers from retaliation for, among other things, providing information to the Commodities Futures Trading Commission or the Bureau of Consumer Financial Protection. *See* Dodd-Frank Act §§ 748 and 1057. These provisions are outside the scope of this advisory.

[5] The Sarbanes-Oxley Act originally contained a statute of limitations of 90 days. The Dodd-Frank Act increased this 90-day period to 180 days and extended the formulation to include the time period "after the date on which the employee became aware of the violation."

	○ clarifies that the Sarbanes-Oxley Act's retaliation provisions cover employees of subsidiaries and affiliates of public companies whose financial information is included in the consolidated financial statements of such public company.	

Comparison of Provisions and Implications

Scope of Protected Reporting Significantly Expanded

The scope of the protected disclosures underlying the retaliation cause of action in the Dodd-Frank Act is significantly broader than the scope of the protected disclosures set forth in the Sarbanes-Oxley Act. The Dodd-Frank Act's cause of action covers retaliation due to any disclosures "required or protected" under the Sarbanes-Oxley Act, the Exchange Act, 18 U.S.C. § 1513(e), and any other law, rule, or regulation subject to SEC regulation. Thus, any claim of retaliation that could have been brought by a whistleblower under the Sarbanes-Oxley Act can still be brought—under either the Sarbanes-Oxley Act or the Dodd-Frank Act. Moreover, various claims of retaliation which could *not* have previously been brought (because they fall outside the scope of the Sarbanes-Oxley Act's protections) can now be brought under the Dodd-Frank Act.

A few examples illustrate the point. Suppose a whistleblower disclosed to his or her supervisor a potential violation of the securities laws and was later terminated for this disclosure. This set of facts could give rise to a claim of retaliation under the Sarbanes-Oxley Act. It could also give rise to a claim of retaliation under the Dodd-Frank Act.

Suppose, instead, a whistleblower provided information to an FBI agent about a conspiracy hatched by his or her employer to create a monopoly in violation of the Sherman Antitrust Act and was later terminated for this disclosure. This could give rise to a claim of retaliation under the Dodd-Frank Act (because the disclosure was protected by 18 U.S.C. § 1513(e)), but could not be the basis for a retaliation claim under the Sarbanes-Oxley Act. Whereas the Sarbanes-Oxley Act focuses on protecting whistleblowers making disclosures of violations of the securities and various fraud laws, the Dodd-Frank Act significantly expands that focus to encompass a host of disclosures required or protected by additional federal statutes.

Finally, the Sarbanes-Oxley Act's provisions apply to public companies (*i.e.*, companies with a class of securities registered under Section 12 of the Exchange Act or required to file reports with the SEC under Section 15(d) of the Exchange Act) and, as clarified in the Dodd-Frank Act, the subsidiaries and affiliates whose financial information is included in the public companies' consolidated financial statements. The Dodd-Frank Act's provisions, on the other hand, apply to all companies. This means, for example, that an employee of a small, non-public company who reports to the SEC that individuals at the company are engaging in wire fraud and suffers an adverse employment action at the hands of his or her employer could bring a claim of whistleblower retaliation in violation of the Dodd-Frank Act in federal district court. This sort of lawsuit could come as quite a shock to the company, given that it was not otherwise subject to the SEC's oversight.

Statute of Limitations Extended

The time period during which a whistleblower may bring a complaint alleging retaliation has been increased from 180 days under the Sarbanes-Oxley Act (as amended by the Dodd-Frank Act) to as long as 10 years under the Dodd-Frank Act. This lengthy statute of limitations may bring with it a host of issues.

For example, there is a greatly increased possibility that whistleblowers bringing these claims no longer work for the employer alleged to have engaged in retaliation. Moreover, other personnel with knowledge of the alleged retaliation may no longer be employees, and the employer may no longer have the relevant employment and other records, making it difficult to determine whether the alleged retaliation actually occurred.

Imagine a retaliation case brought by a former employee, five years after the employee left the company, and eight years after the allegedly retaliatory employment action. If, for example, the allegedly retaliatory action involved a denied promotion, it may be extremely difficult to find the records, and personnel with sufficient recollection of events, to establish why the former employee was not promoted eight years before.

Jurisdiction Removed From OSHA

Whereas OSHA serves as a gatekeeper for complaints under the Sarbanes-Oxley Act's retaliation-protection regime, whistleblowers now have the opportunity to go straight into district court with their allegations under the Dodd-Frank Act. The implications of this change for companies could be significant. The rules of civil litigation in federal district court allow for extensive discovery and motion practice. This could result, among other things, in higher litigation costs, greater risk of confidential information being publicly disclosed, and an increased possibility of spin-off securities and other litigation.

Remedies Increased

Under the Sarbanes-Oxley Act, a whistleblower who succeeds in his or her claim of retaliation is entitled, among other remedies, to back pay with interest. Under the Dodd-Frank Act, a successful claimant can obtain up to two-times back pay with interest. This increase, coupled with the longer statute of limitations during which whistleblowers may bring claims (*i.e.*, up to 10 years instead of up to 180 days), may result in much higher awards of back pay for successful claimants. Successful claimants also remain entitled to reimbursement of reasonable attorneys' fees and other costs of litigation. These attorneys' fees and related costs will likely be higher due to the federal court venue and the higher back-pay awards (upon which attorneys' fees may be based). Finally, reinstatement is a remedy under both the Sarbanes-Oxley Act and the Dodd-Frank Act. The much longer statute of limitations provided by the Dodd-Frank Act may make the prospect of reinstatement, already difficult for employers, even more difficult given the longer passage of time.

Whistleblower Claims Increased

The Dodd-Frank Act's new whistleblower bounty program—providing for the payment of cash awards to whistleblowers—will likely increase the number of whistleblowers and, therefore, the number of employees who could claim that they were retaliated against for their whistleblowing activities.

Key Takeaways

The Dodd-Frank Act enhances the retaliation protections available to whistleblowers for reporting violations of federal securities, fraud, and other laws. It enhances certain parts of the Sarbanes-Oxley whistleblower regime, while creating a wholly independent, parallel enforcement mechanism. Some key takeaways for employers regarding these changes are:

- The whistleblower-protection provisions of the Dodd-Frank Act apply to all employers, not just public companies. Therefore, all companies (including subsidiaries of public companies) should ensure a "compliance culture" with robust processes in place to handle whistleblower grievances.
- A whistleblower alleging retaliation for reports that fall within the protections of the Dodd-Frank Act may bring an action in federal district court without first filing a complaint with OSHA. Therefore, companies should maintain procedures whereby whistleblowers who believe they have been retaliated against can complain internally, thereby reducing the likelihood they will take their retaliation claims directly to federal court.
- The procedures established by public company audit committees for handling accounting and related complaints pursuant to Section 10A(m) of the Exchange Act should be evaluated and perhaps broadened to pick up the kinds of reports protected by the Dodd-Frank Act.
- The new SEC bounty program creates a powerful financial incentive for whistleblowers to provide "original information" directly to the SEC. In response, companies should consider establishing (or bolstering) mechanisms that encourage and reward employees who internally report potential problems early, thereby preventing small problems from growing and minimizing the SEC's interest in enforcement actions down the road. Of some comfort for employers dealing with whistleblowers who, despite these mechanisms, go straight to the SEC with information is that until the whistleblower's identity is revealed, the employer cannot be said to have engaged in retaliatory conduct.

Attorneys in Covington's White Collar, Employment, Corporate, and Securities Litigation practice groups advise a range of clients on legislative and regulatory developments. You may contact any member of these practice groups or the undersigned, should you have any questions.

David Martin	202.662.5128	dmartin@cov.com
Nancy Kestenbaum	212.841.1125	nkestenbaum@cov.com
Barbara Hoffman	212.841.1143	bhoffman@cov.com
James Wawrzyniak	202.662.5663	jwawrzyniak@cov.com

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