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Employment Alert

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Financial Regulators Set Out To Get Their Man: Federally Mandated Bounties and Anti-Retaliation Provisions Designed to Regulate the Financial Services Industry

President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act") into law on July 21, 2010, with the objective of ushering in a new era of financial regulation and transparency. However, with more than 2,000 pages and amending approximately 20 statutes, parts of the Act are less than transparent. The Act's range is broad and encompasses not only the usual group of financial services employers, but it extends to mortgage brokers and insurance adjusters as well. Portions of the Act, including those discussed below, went into effect immediately. However, in contrast to its stated objective, portions of the Act have left more questions than answers as to what long-term impacts the legislation will have on the financial industry. A few of the Act's highlights are described below.

Bounty Provisions

Much attention has been given to what critics and supporters of the Act refer to as the "bounty" it provides to individuals who report illegal conduct to either the Securities and Exchange Commission ("SEC") or the Commodities Futures Trading Commission ("CFTC"). In short, the Act requires the SEC or the CFTC to provide a monetary reward to one or more whistleblowers that provide voluntarily "original information" that leads to a judicial or administrative action that results in monetary sanctions exceeding $1 million. Given that the whistleblower(s) may be entitled to recover an amount between 10 percent and 30 percent of the total amount of such sanctions—including penalties, disgorgement and interest—the potential financial incentive on a million-dollar case can be worth at least $100,000 to $300,000. These agencies, however, retain ultimate discretion to set the actual amount of the reward (provided it is in the pre-determined range) and, in some instances, may also deny the reward entirely if the whistleblower(s) do not submit information in a form satisfactory to the agency.

Additional Changes to the Securities Exchange Act of 1934

Congress has acted specifically to protect those employees who engage in one or more of the following whistleblower activities under the Exchange Act:

- Provide information to the SEC in connection with the statutory awards and protections otherwise provided for in the Act
- Initiate, testify in, or assist in any investigation, judicial action or administrative proceeding of the SEC
- Make disclosures that are mandated or protected under the Sarbanes-Oxley Act of 2002 ("SOX"), the Exchange Act or any other rule or rule subject to enforcement by the SEC

Employees may bring an independent, private cause of action directly in federal court for up to six years after the date the violation occurred, or within three years after the date when facts material to the right of action are known or reasonably should have been known to the employee. However, an action cannot be brought beyond a 10-year period of when the alleged violation occurred. More important, employees who have suffered an adverse employment action because of their protected activity are entitled to reinstatement with the same seniority status that would have been achieved absent the retaliation, double damages on any back pay awarded, litigation costs and attorney's fees. From a defense perspective, numerous problems can arise as a result of the significantly expanded limitations periods, such as the loss of documents and the departure of key personnel. An employer has to plan ahead for such contingencies.

Changes to SOX

The Dodd-Frank Act amends SOX's anti-retaliation provisions in a number of important ways:

- First, the Act specifically clarifies that SOX's whistleblower protections extend to employees of subsidiaries and affiliates of a publicly traded company. This resolves the ongoing issue of whether SOX applied only to the direct employees of the publicly traded company.
- Second, the Act effectively doubles the statute of limitations for filing an administrative complaint with the United States Department of Labor to the longer of: (i) 180 days after the adverse employment action violation or (ii) 180 days after the date on which the employee became aware of the adverse action.
- Third, the Act amends SOX by affording aggrieved employees the right to a federal jury trial and, thereby, removes any confusion or judicial discretion on this point.
- Last, and perhaps most important, Dodd-Frank invalidates any agreements that would require pre-dispute arbitration of a SOX civil whistleblower dispute and makes clear that SOX's anti-retaliation provisions cannot be waived through private agreement between an employee and a covered entity. The latter is significant because, on its face, the Act's bar on such waivers appears to apply to both general releases and settlement agreements, although the Act is confusing on the latter issue.

Conclusion

While the Act underscores the importance of maintaining a strong internal compliance program, where employees feel comfortable making reports of alleged wrongdoing, the employer may find itself competing with the promise of a bounty that the Act describes, *i.e.*, employees may side-step the employer's compliance program in favor of the promise of a bounty. In some instances, the Act raises more questions on critical questions than it provides. As an example, while the Act provides for jury trials for SOX cases, a question remains of whether this requirement applies retroactively to pending cases or only to prospective cases. Additionally, employers must be mindful that the Act precludes pre-dispute agreements to arbitrate. Some commentators have raised the issue of whether the Act's broad prohibition against pre-dispute agreements to arbitrate claims may invalidate the entire agreement if these particular provisions are included. While, arguably, a blue-penciling of the prohibited terms by the trier of fact may save such agreements, this is an issue that may reach the courts because of the Act's broad language.

What Employers Can Do

- Develop and implement a strong compliance program that encourages employees to bring their complaints to the attention of the company before they seek to involve federal investigators; remember that no complaint is too trivial to investigate
- Develop and implement sufficient data-retention policies as the statute of limitations has been significantly increased
- Review your arbitration agreements
- Review your release agreements
- If it is determined that an employee cannot waive a violation in a release provision, then consider ways of getting the employee to assert in an agreement that he/she knows of no wrongdoing

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