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Whistleblowers

Attorneys Agree Financial Overhaul Bill Has Vigorous Whistleblower Protections

With President Obama expected to sign the recently passed financial overhaul bill (H.R. 4173) July 21, attorneys told BNA that the law will put in place a host of vigorous whistleblower protections for workers in the financial services and other industries.

These protections, attorneys on both sides of the employment bar agreed, expand the types of workers eligible to bring certain whistleblower claims, allow some whistleblowers to bypass the administrative process and head straight to court, and implement an employee-friendly burden-shifting standard.

However, one management attorney warned, the expansion of retaliation protections, particularly the right to sue in court, could backfire against employees, resulting in summary judgment rulings against would-be whistleblowers.

Range of Financial Services Workers Covered. The Dodd-Frank Wall Street Reform and Consumer Protection Act (H.R. 4173), passed July 15 by the Senate (135 DLR A-12, 7/15/10), expands whistleblower protections to a wide range of financial services industry employees for the first time, and a separate provision allows employees proceeding under the Sarbanes-Oxley Act to sue in federal court, bypassing the administrative process, Jason M. Zuckerman, a principal with the Employment Law Group in Washington, D.C. told BNA July 20.

''Section 1057 of the Dodd-Frank Act is especially significant because of its broad scope—it covers almost any employee working in the financial services industry related to the extension of credit, including employees of privately held companies,'' said Zuckerman, who represents corporate whistleblowers.

A partner with Morrison and Foerster in McLean, Va., who represents management clients agreed, calling Section 1057 ''very, very broad in scope.''

''There are now industries covered by whistleblower legislation for the first time,'' Daniel Westman told BNA July 20.

Westman explained that whistleblower laws historically have been used in industries where there are significant public safety policies at stake, such as mining, aviation, and nuclear energy. ''Until the recent financial meltdown, there was not a strong feeling that the financial services industry implicated such public policies,'' Westman said.

Section 1057 protects these employees from retaliation for disclosing information about fraud or unlawful conduct related to consumer financial products, and covers employers that extend credit, service loans, provide real estate settlement services, and provide financial advice—including credit counseling to consumers, Zuckerman said.

Burden-Shifting Framework Employee-Friendly. Zuckerman added that Section 1057 prohibits employers from retaliating against employees who provide, or plan to provide, information the employee reasonably believes is related to conduct prohibited by the act to the new Bureau of Consumer Financial Protection or to law enforcement agencies.

The bill's troubling, ''groundbreaking'' whistleblower provisions were included without sufficient debate in Congress and are likely to impose significant new costs on employers, said Morrison & Foerster's Daniel Westman.

''Section 1057 also uses a very employee-friendly burden shifting framework and the claims are exempt from mandatory arbitration agreements,'' according to Zuckerman. He said that once an employee has shown by the preponderance of the evidence that the protected activity was a contributing factor in an adverse employment action, the employer must show by clear and convincing evidence that it would have taken the same action in the absence of the employee's whistleblowing activities to avoid liability.

But Felix J. Springer, a partner with Day Pitney in Hartford, Conn., who represents management, suggested the measure's burden-shifting framework might be too friendly to employees.

''You have a very low threshold for the plaintiffs to meet and a much more stringent burden for the employer—this is an unfortunate way for the law to be developing,'' Springer told BNA July 20. ''Section 1057

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troubles me the most because of the plaintiff-friendly burden shifting.''

Another provision, Section 922, creates a new private cause of action for employees who are retaliated against for conduct including giving original information that results in monetary sanctions against employers by the Securities Exchange Commission, assisting with the SEC's judicial or administrative investigations, or making required or protected disclosures under the Sarbanes-Oxley Act or other laws subject to the SEC's jurisdiction, according to Zuckerman. Under Section 922, plaintiffs can now pursue these claims in federal court, bypassing SOX's administrative complaint processes.

Westman charged that Section 922 lets alleged whistleblowers do an ''end run'' around SOX by allowing them to proceed straight to federal court and cautioned that this could backfire on plaintiffs by subjecting them to unfavorable summary judgment rulings.

''There may be more summary judgment rulings against plaintiffs as an unintended consequence—plaintiffs could lose cases in greater numbers,'' Westman warned.

Provisions Troubling, Management Attorney Says. Westman said the bill's troubling, ''groundbreaking'' whistleblower provisions were included without being sufficiently debated in Congress and are likely to impose significant new costs on employers.

''These provisions will impose on employers significant legal costs, human resources and training costs, and costs in investigating whistleblowers' allegations,'' Westman said.

In addition, successful plaintiffs will be entitled to remedies that include reinstatement, as well as double back pay, Westman said.

Westman speculated that the legislation's sweeping whistleblower provisions could have unintended negative economic impacts—such as deterring employers from hiring new employees. ''The more and more these [whistleblower laws] are enacted, the more the at-will employment regime is eroded,'' Westman said.

''There are debatable policy issues here—but is this the right solution—to submit new industries to the financial burden of complying with new whistleblower protections,'' Westman asked.

SOX 'Loophole' Eliminated. Zuckerman said that Section 929A clarifies that SOX whistleblower protections apply to employees of subsidiaries of publicly traded companies—thereby eliminating a ''significant'' loophole that he said some courts used to narrow the scope of SOX coverage by excluding such employees.

He added that Section 1079B of the act strengthens the False Claims Act's retaliation protections by expanding the range of protected conduct to include ''associational discrimination, '' meaning retaliatory conduct directed at ''associates'' of whistleblowers, and by clarifying that the statute of limitations for actions alleging fraud against the government is three years.

''This provides important clarity for claims under Section 3730(h) of the FCA because under prior U.S. Supreme Court precedent, the limitations period ranged from as little as three months to five or six years,'' Zuckerman said.

He explained that under the high court's decision in *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson*, 130 S. Ct. 1396 (2010), the most closely analogous state statute of limitations applied to FCA retaliation claims.

A White House official who did not wish to be identified told BNA July 20 that Obama is slated to sign the bill July 21.

BY JANET CECELIA WALTHALL

Text of the bill may be accessed at http://op.bna.com/dlrcases.nsf/r?Open=jcwl-87jl2n.

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