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FINANCIAL OVERHAUL BILL PROVIDES NEW WHISTLEBLOWER PROTECTIONS

The Dodd-Frank Wall Street Reform and Consumer Protection Act, signed into law by President Obama last week, greatly expands protections for employees who claim they have been retaliated against for blowing the whistle on financial misconduct by their employer.

Section 1057 of the new Act covers employers – public or private companies --who extend credit, service loans, provide real estate settlement services, and provide financial advice – basically the whole financial services industry. It protects employees in this sector from retaliation for disclosing information about fraud or illegal conduct related to consumer financial products. It adopts a very employee-friendly burden-shifting framework: once the employee has shown by a preponderance of the evidence that the protected disclosure was a contributing factor in the adverse employment action, the employer has to prove by clear and convincing evidence that it would have taken the action absent the employee's whistle-blowing activity to avoid liability.

Section 922 expands the anti-retaliation protections of the Sarbanes-Oxley Act, which covers publicly held companies, to allow whistleblower plaintiffs to skirt the administrative investigation process and lodge their complaint directly in federal court. Section 922 also clarifies that SOX protections apply to the subsidiaries of public companies.

We think these new provisions will greatly increase the number of whistleblower retaliation claims against banks, and drive up human resources, training and investigation costs, as well as legal expenses.

Practice Pointers:

- Have a clearly communicated whistleblower policy, encouraging employees to speak up about perceived misconduct, and providing a guarantee of no retaliation. Consider a third party telephone hotline to ensure credibility and confidentiality.
- Investigate all employee complaints promptly, thoroughly and confidentially, and report the results back to the whistleblower.
- Train managers to listen to employee complaints; make clear that retaliation will not be tolerated.
- Managers should partner with HR to address employee performance and conduct problems promptly and honestly, and document carefully.

For more information about this or other employment compliance issues, please call us, or visit our website.