

November 26-December 2, 2010

Act creates extra protection for whistle-blowers

Among a spate of new regulations, many of which are still unclear, the Dodd-Frank Wall Street Reform and Consumer Protections act also promises to expand protections for whistle-blowers.

These increased protections, experts say, will have a significant impact on companies across the nation.

Kurt Powell, managing partner and head of the Labor and Employment Practice at law firm Hunton & Williams LLP, recently shared with Atlanta Business Chronicle some of the likely changes related to whistle-blowers to come out of the Dodd-Frank Act.



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Q *In what way does the Dodd-Frank Wall Street Reform and Consumer Protection Act address whistle-blowers?*

A Dodd-Frank creates new whistle-blower protections by prohibiting retaliation against any individual who provides information related to violations of the securities laws to the Securities and Exchange Commission; significantly expands the scope of existing whistle-blower rights under the Sarbanes-Oxley Act (SOX); and provides a “reward” program for those who report violations to the SEC.

Q *What protections did whistle-blowers have prior to the most recent financial reform?*

A Previously, whistle-blower protections were limited to employees of publicly traded companies who were retaliated against because they reported and had a reasonable belief that the company had engaged in some type of fraud related to shareholders.

Q *How does the Dodd-Frank Act expand those protections?*

A Dodd-Frank expands whistle-blower protections by extending coverage of SOX whistle-blower provisions to

include both publicly traded companies and any subsidiary or affiliate whose financial information is included in the consolidated financial statements. Dodd-Frank also provides for a new private right of action that an individual can bring directly in federal court and it provides for jury trials of such claims. These are just a few of the changes, but overall the risks significantly increased in such cases.

Q *What is the reward program for whistle-blowers established by the SEC?*

A Dodd-Frank creates an incentive and reward program to encourage reporting of violations. An individual who reports “original information” to the government which leads to a successful enforcement action by the SEC or DOJ is entitled to a reward of 10 percent to 30 percent of monetary sanctions exceeding \$1 million.

Q *What impact will these protections have on the number of reported claims?*

A It is difficult to determine the impact on the number of claims. In general, you would expect to see more claims and at the very least, companies will face greater risks when such claims are asserted.

Q *In what ways will these new rules impact companies?*

A Previously, there were numerous defenses a company could present in response to a whistle-blower claim under SOX. As a result, the vast majority of claims were unsuccessful. Now, companies face greater risks and have fewer defenses available to them. In addition, there are companies that were not previously covered by the SOX whistle-blower provisions that are now covered by Dodd-Frank provisions — particularly in the financial services and mortgage industry.

Q *How can companies protect themselves from whistle-blower claims?*

A Given the expanded protections available to employees and the increased risks associated with whistle-blower claims, companies should focus on robust compliance programs, management training and internal audit processes. Establishing the proper corporate culture and “tone at the top” of an organization is equally important.

Q *How can businesses review their compliance programs to prevent claims in the first place?*

A Companies should examine their compliance programs and reporting procedures. Corporate ethics and compliance initiatives need to have more impact than written procedures that simply “check the box.” Companies may have to convince a jury that their compliance and ethics programs were high priorities within the organization, so they should evaluate their practices with this in mind.

Q *What rights do companies in whistle-blower cases have? When might their actions be considered retaliation and how can that be avoided?*

A To avoid claims of retaliation, employers should focus on the fundamentals of sound management and have robust corporate compliance and audit function. The objective should be to “bake” compliance into the organization’s culture.

Q *What other issues related to the Dodd-Frank Act should employers watch closely and why?*

A The new regulations which will be issued pursuant to Dodd-Frank could have a tremendous impact on companies. We are monitoring the regulatory process for our clients, and companies should work closely with industry and employer associations to provide comment and input into this process before the regulations are finalized.

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