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May Employees "Waive" Goodbye to Whistleblower Protections Post Dodd-Frank?

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The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), signed into law in 2010, has brought changes to the whistleblower landscape. Dodd-Frank § 922 amended the Securities Exchange Act of 1934 ("Exchange Act") and Sarbanes-Oxley Act of 2002 ("SOX") by adding new provisions specifically geared towards providing whistleblower protections. However, much debate has ignited over whether an employee is allowed to release prospective and/or existing whistleblower claims under SOX (post-Dodd-Frank).

Prior to Dodd-Frank, SOX was the primary source of whistleblower protections for employees from their publicly traded employers. SOX § 806 (codified at 18 U.S.C. § 1514A) protects employees by prohibiting employer-retaliation against employees in response to a whistleblower claim, and also affords such employees a legal avenue to pursue against their retaliatory employers. The question turns to whether employees may waive their whistleblower protections, say in a severance agreement with an employer.

Dodd-Frank § 922, which amended SOX § 806, contains a "no-waiver" clause, which provides, in part, that "[t]he rights and remedies provided for in this section *may not be waived* by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement."[1] Although most recognize that § 922 amended SOX to prohibit certain types of waivers, the crux of the debate centers upon whether this prohibition only applies to *prospective* waivers – that is, employees waiving *future* whistleblower claims – or applies to present waivers as well – that is, employees waiving *current* whistleblower claims. If the § 922 prohibition only applies to *prospective* waivers, then employees would be entitled to release any *existing* whistleblower claims they have. To resolve this debate, we must first evaluate the Exchange Act.

Dodd-Frank § 922 added § 21F to the Exchange Act, which provides whistleblower protections to a wider group of employees than covered by SOX, but fails to include an employee no-waiver provision. Some argue that this lack of a no-waiver provision means employers can require employees to waive their whistleblower protections.[2] However, the SEC has discounted this notion, commenting that a no-waiver provision is already set forth under § 29(a) the Exchange Act, which provides that "any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder . . . shall be void."[3] As such, including a no-waiver provision in § 21F would have been futile, as § 29(a) already prohibits employers from requiring employees to waive any whistleblower protections they are afforded. However, courts in New York have determined that this prohibition is not against *all* types of employee waivers. As discussed in *Dresner v. Utility.com, Inc.*,[4] § 29(a)'s prohibition only applies to *prospective* waivers, thereby prohibiting the release of *future* claims, but does not prohibit employees from releasing *existing* claims they have.

While uncertainty still exists as to how Dodd-Frank's § 922 no-waiver provision is applied within the SOX context, delving into SOX § 806 supports the notion that this no-waiver provision applies in the same way that Exchange Act § 29(a) applies; namely to prohibit *prospective* waivers only. For example, once a claim is filed under SOX, the Occupational Safety and Health Administration ("OSHA") needs to approve any settlement. Furthermore, the OSHA Whistleblower Investigations Manual states that settlements are desirable in many whistleblower cases.[5] This manual also refers to the "non-waivable right to engage in any future activities protected under the whistleblower statutes administered by OSHA,"[6] thereby drawing a distinction between present and future claims. When read together, OSHA's manual language and settlement system are strong indications that Dodd-Frank § 922 does not prohibit employees from releasing *existing* whistleblower claims under SOX.

In sum, the SEC interprets Dodd-Frank's "no-waiver" language, which was added to SOX § 806, in the same manner that it interprets Exchange Act § 29(a), which the Commission reads as a prohibition on *prospective* waivers only. Despite the statutory language suggesting a broader interpretation, it appears that individuals are thereby free to waive *existing* whistleblower claims they may have.

If you or your company would like more information regarding employment law, email James G. Ryan at jryan@cullenanddykman.com or call him at 516-357-3750.

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[1] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010).

[2] *See* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, File No. S7-33-10, at 19 (effective Aug. 12, 2011), *available at* http://www.sec.gov/rules/final/2011/34-64545.pdf.

[3] *Id*. at 19-20.

[4] 371 F. Supp. 2d 476, 490 (S.D.N.Y. 2005).

[5] *See* Occupational Safety and Health Admin., Whistleblower Investigations Manual, at 4-3 (2011), *available at* https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf.

[6] *Id*. at 6-11.