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Waivers of **Whistleblower Claims** After Dodd-Frank

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) brought many changes to the whistleblower legal landscape. There seems to be some lingering confusion about the enforceability of a release of an employee's Sarbanes-Oxley Act of 2002 (SOX) or Dodd-Frank whistleblower claim.

Dodd-Frank unquestionably amended SOX to prohibit certain waivers. But there is a strong argument that this prohibition applies only to prospective waivers, and therefore allows employees to release whistleblower claims as part of severance or separation agreements.

Prior to the enactment of Dodd-Frank, SOX was the main source of whistleblower protection for employees of public companies alleging certain types of financial impropriety. Section 806 of SOX (codified at 18 U.S.C. §1514A) prohibits retaliation based on certain specified whistleblowing activities. It provides that a person alleging discharge or discrimination in violation of the section may file a complaint with the Secretary of Labor, or bring an action in federal court following administrative delay. 18 U.S.C. §1514A.

Section 922 of Dodd-Frank added §21F to the Securities Exchange Act of 1934. Section 21F provides additional whistleblower protection to a broader group of employees, covers a broader range of whistleblowing activities and incentivizes reporting to the government through a bounty program. 15 U.S.C. §78u-6. Section 922 also amended the whistleblower provisions of SOX. Section 922 provides, in part:

> Section 1514A of title 18, United States Code [i.e., Section 806 of SOX], is amended by adding at the end the following: (e) NONENFORCEABILITY OF CERTAIN PROVISIONS WAIVING RIGHTS AND REMEDIES OR REQUIRING ARBITRATION OF DISPUTES.—
>
> (1) WAIVER OF RIGHTS AND REMEDIES.—The 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.
>
> (2) PREDISPUTE ARBITRATION AGREEMENTS.—No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.

Dodd-Frank, Pub. L. No. 111-203 §922, 124 Stat. 1376 (2010). (In addition, §1057 of Dodd Frank (12 U.S.C. §5567) added whistleblower protections for financial services employees, and §748 of Dodd-Frank (7 U.S.C. §26) amended the Commodity Exchange Act by add-

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ing whistleblower protections. Both contain no-waiver provisions nearly identical to §922.) A surface reading of amended §806 of SOX suggests to some that "the rights and remedies" under the SOX anti-retaliation provision may not be waived at all. But a deeper look at SEC comments and waiver case law strongly supports an argument that §806 of SOX only prohibits prospective waivers, and an employee releasing claims in a severance agreement should be able to validly release existing whistleblower claims.

In this connection, the Dodd-Frank whistleblower protections that were added to the Exchange Act do not include a new no-waiver provision. When the Securities Exchange Commission released final rules implementing the anti-retaliation provisions of Dodd-Frank, codified at Section 21F of the Exchange Act, it addressed the absence of a no-waiver provision of whistleblower claims. Securities and Exchange Commission, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," Exchange Act Release No. 34–64545, 101 S.E.C. Docket 630, at *6, 9 (May 25, 2011). In response to the SEC's proposed rule, one commentator suggested that the SEC include a no-waiver provision in the §21F regulations. Letter to SEC (Dec. 2, 2010), available at http://www.sec.gov/comments/s7-33-10/s73310-27.pdf. The letter stated that the purpose of the amendments adding no-waiver provisions to SOX and the Commodities Exchange Act was "to prevent employers from adding waiver language to employment agreements, separation agreements, and other agreements signed during the course of employment…" Id. at 1. It reasoned that the same concerns that ostensibly led congress to prohibit waivers of SOX claims and Commodities Exchange Act claims apply with the same force to Dodd-Frank claims, and assumed the application to SOX and not Dodd-Frank was the result of a "drafting error." Id. The SEC dismissed this comment, noting that a no-waiver provision was unnecessary because waivers are already prohibited under the Exchange Act.

After a SOX claim has been filed, OSHA (or an administrative law judge or Administrative Review Board, depending on the stage of proceedings) **must approve any settlement.**

> With regard to the comment expressing concern that entities might require employees to waive their anti-retaliation rights under Section 21F, we believe that possibility is foreclosed by the Exchange Act. Specifically, because Section 21F is codified in the Exchange Act, it is covered by Section 29(a) of the Exchange Act, which specifically provides that "[a]ny 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." Thus, under Section 29(a), employers may not require employees to waive or limit their anti-retaliation rights under Section 21F.
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> SEC Release at *9.

The response to the commentator clearly sets forth the SEC's position. The SEC reasoned that the no-waiver provision of SOX (as added by Dodd-Frank) applies in the same manner as the no-waiver provision of the Exchange Act. Thus, the Exchange Act and the case law applying it provide the foundation for analyzing the applicability of SOX waivers.

Section 29(a) of the Exchange Act applies to prospective waivers and prohibits attempts to circumvent compliance with laws. 15 U.S.C. §78cc. But, courts have held that §29(a) does not prohibit releases in connection with existing disputes or claims that have already matured. For example, in *Lancer Offshore v. Dominion Income Mgmt.*, No. 01 CIV. 4860(LMM), 2002 WL 441309 (S.D.N.Y. March 20, 2002), plaintiffs purchased stock from defendants, and then learned of allegedly fraudulent statements. Plaintiffs told defendants they were contemplating legal action, and the parties then entered into a Settlement and Release Agreement, releasing claims, including those under the federal securities laws. Plaintiffs then sued, arguing that the Settlement and Release Agreement was not a bar because it was void under §29(a) of the Exchange Act. The court disagreed:

> [I]t is well settled that Section 29(a) only invalidates releases between parties which, in attempt to circumvent compliance with the federal laws, are anticipatory waivers of compliance with the Exchange Act. Releases of claims under the federal securities laws are valid as to mature, ripened claims of which the releasing party had knowledge before signing the release[.]
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> …
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> The Settlement and Release,…clearly states that it is a release of all claims, "past or present," thus making it a release of mature, ripened claims. Nothing in the Settlement and Release suggests that it is an anticipatory waiver of compliance with securities laws, thereby violating Section 29(a).

Lancer Offshore, 2002 WL 441309 at *5-6 (citations and internal quotation marks omitted).

In *Mullen v. New Jersey Steel*, 733 F. Supp. 1534, 1547 (D.N.J. 1990), a former employee brought a securities fraud claim based on a stock option agreement. Following the termination of his employment, he executed a severance agreement that included a release of claims, and he argued that his claim could go forward because the release was void under §29(a). The court rejected his argument. It held: "[Section 29(a)] concerns waiver of future violations; there is a distinction between a waiver of future claims and a waiver of mature claims of which the releasing party had knowledge." In *Dresner v. Utility.com*, 371 F. Supp. 2d 476 (S.D.N.Y. 2005), the court held that broad releases signed in connection with a merger closing did not preclude plaintiff's securities fraud claims because it was a prospective waiver, and explained the importance of the distinction:

> Courts have held that Section 29(a) does not prohibit parties from executing valid releases in connection with securities fraud claims that have already matured. That interpretation enables parties to reach binding settlements to resolve existing securities fraud disputes. The releases at issue here did not constitute a settlement of an existing dispute, but rather purported prospectively to waive plaintiffs' rights to pursue causes of action of which they were not yet aware.

Dresner, 371 F. Supp. 2d at 490.

Since the SEC takes the position that §29(a) has the same effect as the no-waiver language added to SOX, the SOX no-waiver language should be construed like §29(a). As a result, like §29(a), the SOX no-waiver language should also bar prospective waivers only. Just as Exchange Act claims may be released despite the §29(a) no-waiver provision, parties should also be able to release SOX claims despite the no-waiver language.

OSHA Settlements

The viability of a release of a whistleblower claim is further bolstered by the SOX administrative scheme. After a SOX claim has been filed, OSHA (or an administrative law judge or Administrative Review Board, depending on the stage of proceedings) must approve any settlement. 29 C.F.R. §1980.111 (2013). Accordingly, OSHA procedures contemplate settlement of claims. The OSHA Whistleblower Investigations Manual states that voluntary resolution of disputes is, in fact, desirable in whistleblower cases. The manual provides criteria by which to review private settlements, states that it will not approve a provision restricting participation in protected activity in the future and refers to the "non-waivable right to engage in any future activities protected under the whistleblower statutes administered by OSHA." Occupational Safety & Health Admin., Whistleblower Investigations Manual, at 6-11 (2011), available at www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf. This further supports the argument that there is a distinction between prospective waivers and waivers of matured claims.

The Administrative Review Board has noted that the Dodd-Frank no waiver provision cannot mean that SOX settlements are unlawful. In *Gonzalez v. JC Penney*, Nos. 10-148, 2010-SOX-045, 2012 WL 4714684 (Dept. of Labor Admin. Rev. Bd. Sept. 28, 2012), the former employee filed a complaint with OSHA and then settled with her former employer, asking OSHA to approve the settlement and dismiss her complaint, which it did. She then tried to rescind the settlement, and argued that the no-waiver provision of Dodd-Frank barred the settlement. The Administrative Review Board rejected this argument:

> Gonzales also contends, without the support of legal argument, that the Dodd-Frank Act, 124 Stat. 1376 (July 21, 2010), prohibits the settlement of whistleblower complaints on the basis that settlements constitute a waiver of rights under the Act. This contention, however, is belied by the regulations promulgated to enforce the Act. The Department of Labor amended the SOX regulations after passage of the Dodd-Frank Act, but the regulations continue to provide for the settlement of SOX whistleblower cases.

Id. at *6.

Conclusion

Given the enhanced litigation risks, when employees depart (especially for those who have engaged in protected activity known to the employer), many employers wish to obtain releases of all claims including whistleblower claims. While §806 of SOX (as now amended by Dodd-Frank) may be discouraging on its face, a more robust analysis supports the view that §806 is concerned with prospective waivers only. Thus, an employer may not ask all of its employees to waive future whistleblower claims at the inception of employment, and of course employees cannot be prevented from reporting information to the government with or without a waiver or release. But the SEC comments, cases interpreting the Exchange Act and the OSHA settlement regime strongly support the argument that Dodd-Frank does not apply to bar employee releases of existing whistleblower claims.