The “gold standard” bill that would protect internal whistleblowers

Roger Hamilton-Martin, 15 April 2016

US courts disagree whether Dodd-Frank protects individuals from retaliation if they only report misconduct to their employer. But in Congress, there are moves afoot to end the uncertainty and provide internal whistleblowers with unambiguous protection.

Since the introduction of the Dodd-Frank Act in 2010, courts have been divided on whether the law’s whistleblower provisions extend to employees that only report misconduct internally and not to the US Securities and Exchange Commission. The US Court of Appeals for the Fifth Circuit says Dodd-Frank only protects those who report matters to the SEC; the Second Circuit disagrees.

A bill introduced in the House of Representatives in February, however, could end the debate because it would – without ambiguity – extend Dodd-Frank whistleblower protections to employees who blow the whistle internally.

If passed, the Whistleblower Augmented Reward and Nonretaliation (WARN) Act would remove the narrow definition of a whistleblower from existing legislation. According to the Government Accountability Project (GAP), a whistleblower watchdog that worked with Democratic Representative Elijah Cummings and Senator Tammy Baldwin on the bill, it would prohibit companies from discriminating against employees who report wrongdoing through internal compliance programmes.

GAP considers the bill to be a “gold standard” for whistleblower protections. Louis Clark, head of GAP, told Just Anti-Corruption: “The legislation needs fine tuning, and we think Congress is up for doing that.”

Jordan Thomas, chair of Labaton Sucharow’s whistleblower representation practice, told Just Anti-Corruption that the WARN Act could, if enacted, become a “landmark” law for whistleblowers.

What’s the problem with Dodd-Frank?

At the heart of the confusion is Dodd-Frank’s seemingly narrow definition of a whistleblower, which the legislation describes as an individual who provides information on wrongdoing to the SEC.
But, according to lawyers who defend whistleblowers, the law’s anti-retaliation provisions provide protection to a broader definition of whistleblower. That’s because Dodd-Frank says individuals are also protected when they make disclosures covered by an older law, the Sarbanes-Oxley Act of 2002, which covers those who internally report wrongdoing.

The SEC has even issued clarifying regulations that say Dodd-Frank’s anti-retaliation protections apply to individuals who report potential violations to persons or institutions other than the SEC, including companies.

In recent years, the commission has filed amicus briefs in 14 whistleblower lawsuits saying as much. The majority of courts have viewed the language of the statute as ambiguous enough to defer to the SEC’s reading.

In September 2015, the Second Circuit held in Berman v Neo@Ogilvy that Dodd-Frank Act protections apply to internal whistleblowers, in deference to SEC interpretive guidance. This created the split with the Fifth Circuit, which ruled in July 2013 in Asadi v GE Energy that the act’s anti-retaliation provisions limited protection to whistleblowers reporting to the SEC, rejecting the regulator’s guidance.

Lawyers are also split on which interpretation is correct.

David Marshall, a lawyer who represents whistleblowers, told Just Anti-Corruption: “If you take an extremely strict view of statutory construction, then you might say that it’s unambiguous. But I don’t think that’s the most reasonable interpretation of the language. I think that clearly whoever wrote the law didn’t think about this and didn’t make it clear.”

Lawyers defending companies in whistleblower cases, however, tend to take a different view. Steven Pearlman, a partner in Chicago at Proskauer Rose and co-head of the firm’s whistleblowing and retaliation group, told Just Anti-Corruption that the Fifth Circuit was right in finding that internal reporting is not protected under Dodd-Frank, as there is no ambiguity in the statute.

“The statute is very clear,” he said. “It has a definition of whistleblowers, and that definition requires reporting to the SEC. I don’t see the ambiguity that the SEC or the Second Circuit says exists.”

There has been talk of the matter going to the Supreme Court but Louis Clark at GAP said the highest court is unlikely to review the dispute in the short term. “It took us 25 years to get a [whistleblower] case to the Supreme Court, and we won it last year,” he said. “I think [with] Dodd-Frank, it’ll be 30 years before a case goes to the Supreme Court on this issue.”

What’s at stake

Lawyers said it is important to reach a consensus on the issue because Dodd-Frank is a more appealing law for whistleblowers than an older act that covers much of same ground, the Sarbanes-Oxley Act. Dodd-Frank provides greater compensation – double the amount of salary lost if dismissed – and longer time-frames – six years – for bringing retaliation claims.

Protecting internal whistleblowers can benefit companies too. Incentivising internal reporting gives companies an opportunity to control the timing and content of any self-disclosure of misconduct to the government, rather than having to respond to a subpoena from the SEC following a tip-off to the securities regulator.

Getting WARN through Congress

The WARN Act seeks to resolve the problem with Dodd-Frank by unambiguously protecting internal whistleblowers, and by also making it illegal for companies to attempt to stifle employees with confidentiality agreements and other gag orders.

Some firms have sought “new ways to retaliate against employees who blow the whistle,” Senator Baldwin told Just Anti-Corruption in an email. Firms have tried to require employees to sign agreements that would prohibit them from receiving an award for whistleblowing, “Thus removing a major incentive to file a tip,” she said.

A main challenge for passing the bill, however, will be getting it through the committee process. The power to schedule hearings rests with the majority Republican party. The bill was referred to the Subcommittee on
Commodity Exchanges, Energy, and Credit on 22 March.

The difficulty will be getting a Democratic bill through a current Republican majority Congress. Senator Baldwin and Representative Cummings told Just Anti-Corruption: “We hope that Republicans who have supported whistleblowers in the past will join our efforts to protect financial whistleblowers and improve the ability of law enforcement to prosecute financial crimes.”

David Marshall, of Washington, DC, law firm Katz Marshall & Banks, said employees are far more likely to speak up if they know that they are protected against retaliation.

He said the bill’s passing “would advance the interests of the investing public, whose ability to participate safely in the financial markets often depends on the willingness of employees to raise concerns with their employers about perceived securities-law violations.”

Some lawyers pointed out that the adoption of the bill would lead to greater litigation risk for employers. Lloyd Chinn, a partner and co-head of Proskauer Rose whistleblowing and retaliation practice, told Just Anti-Corruption: “It’s a broader cause of action. More activity is covered by the statute.”