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## Whistleblowers and Dodd-Frank: Is Your Company Protected?

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Under the Dodd-Frank Act, whistleblowers have been given powerful financial incentives to report wrongdoing to the government. They can receive from 10-30% of any recovery over \$1,000,000 if they provide the government with original information of the suspected wrongdoing. Whistleblowers have also been armed with stronger anti-retaliation protections and can now bring a cause of action in federal court if their companies discriminate against them because of a report they filed with the government.

This new law poses unique compliance challenges for companies. Some employees, in hopes of receiving a large potential payout, may decide to rush to the government to report alleged misconduct instead of taking advantage of a company's internal reporting system. This may result in employees working at cross-purposes from their companies' compliance departments. In such cases, companies will have less of an opportunity to address potential problems when they do arise; in some cases, they may first learn about issues when contacted by government investigators. Dodd-Frank may also shorten the time compliance and legal departments will have to separate, triage and investigate claims. Having to deal with more claims in less time may create additional pressures for compliance departments who may already be operating at full capacity.

So how can a company encourage their employees to report potential problems internally first? This requires a re-assessment of the overall compliance program to ensure that they are adequate and focus on employee training (including anti-retaliation policies). The best defense to minimize the possibility of an unwanted government investigation is by having a strong compliance program in place. In addition, companies may want to consider reviewing the strength of their internal controls to ensure that their policies, practices and procedures are consistently applied and endorsed by the employees.

But these precautions may not be enough in an era rife with potential whistleblowers. To avoid potential exposure under Dodd-Frank's strict anti-retaliation provisions, companies should maintain strong anti-retaliation policies and document all claims investigated (whether they were made in good faith or not) and all interactions with a whistleblower. Having well-documented and contemporaneous business rationales to support all decisions made with respect to a potential whistleblower are critical. Companies should also consider obtaining signed statements from employees in exit interviews so as to avoid possible later claims of wrongdoing.

After Dodd-Frank, companies will also need to be more creative in terms of incentivizing compliance and internal reporting. There are many ways a company can create a culture of compliance and achieve employee buy-in into its compliance plan:

- Setting the tone from the top, by ensuring that the rules are well-defined, known, and enforced consistently and fairly;
- Rewarding compliance driven individuals. Companies may want to consider including compliance goals in their managers' annual performance evaluation metrics and rewarding those managers who achieve their goals with higher compensation (e.g., compensating managers who score high marks on anonymous ethics and compliance surveys of the employees who report to them);
- Setting up anonymous hotlines, surveys or other blind reporting methods to gain more candid feedback from employees. Confidentiality should be stressed; and
- Thinking outside-the-box for creative solutions (e.g., making managers sign certificates of compliance where they agree to report any misconduct that they are aware of to the company). Be careful, however, that your creative solutions do not raise the ire of U.S. regulators and that they do not run contrary to Dodd-Frank's nullification of any contract that attempts to abridge the rights and remedies of employees under the Act (e.g., having employees enter into contracts agreeing to give any financial rewards to charity).

Whatever incentives a company chooses, it is clear that loyal employees who see that compliance is a core value of the organization are more likely to comply with the rules and to make internal reports, particularly if they feel that their concerns will be taken seriously and that they will not be penalized for raising such concerns.

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