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Arbitration Agreements and Whistleblower Protections

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The **Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010** directed the SEC to establish a "bounty program" for certain individuals who voluntarily provide the SEC with original information that leads to successful SEC actions resulting in monetary sanctions over $1,000,000. Dodd-Frank also prohibits employers from taking retaliatory action against employees who report potential violations to the SEC and authorizes an employee to bring a private action in federal court alleging retaliation. If successful, the employee may be entitled to reinstatement, double back pay, litigation costs, expert witness fees, and attorneys' fees. *See* 18 U.S.C. § 1514A.

Dodd-Frank also provides that pre-dispute arbitration clauses are invalid and unenforceable. *See id.* at § 1514A(e)(2). This means companies and their executives or employees cannot agree to arbitrate Dodd-Frank whistleblower claims. But does this prohibition apply to employment contracts negotiated and entered into pre-Dodd-Frank? Based upon a handful of district court rulings, the answer is: possibly.

Most recently, in *Khazin v. TD Ameritrade Holding Corp.*, Civil Action No. 13-4149 (SDW)(MCA), 2014 U.S. Dist. LEXIS 31142 (D.N.J. Mar. 11, 2014), the court granted the defendants' motion to compel arbitration on the basis that the arbitration agreement at issue was contained in an employment agreement that pre-dated Dodd Frank. The court reasoned that to disregard a pre-Dodd-Frank arbitration provision "would fundamentally interfere with the parties' contractual rights and would impair the predictability and stability of their earlier agreement." The court also emphasized the "strong federal policy in favor of the resolution of disputes through arbitration" and cited a number of other federal courts that have reached a similar result. *See Weller v. HSBC Mortg. Servs. Inc.*, No. 13-00185, 2013 U.S. Dist. LEXIS 130544, 2013 WL 4882758, at *4 (D. Colo. Sept. 11, 2013); *Blackwell v. Bank of Am. Corp.*, No. 11-2475, 2012 U.S. Dist. LEXIS 51991, 2012 WL 1229673, at *4 (D.S.C. Mar. 22, 2012), *report and recommendation adopted*, No. 11-2475, 2012 U.S. Dist. LEXIS 51447, 2012 WL 1229675 (D.S.C. Apr. 12, 2012); *Henderson v. Masco Framing Corp.*, No. 11-0088, 2011 U.S. Dist. LEXIS 80494, 2011 WL 3022535, at *3 (D. Nev. July 22, 2011); *Taylor v. Fannie Mae*, 839 F. Supp. 2d 259, 263 (D.D.C. 2012).

Several cases, however, view the prohibition on arbitration clauses from a different prospective and conclude that the prohibition has retroactive effect. *See Pezza v. Investors Cap. Corp.*, 767 F. Supp. 2d 225, 234 (D. Mass. 2011); *Wong v. CKX, Inc.*, 890 F. Supp. 2d 411, 422–23 (S.D.N.Y. 2012). In *Pezza*, the court followed the U.S. Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994), which directs courts to examine whether the statute at issue is

one “affecting contractual or property rights” (and thus should not be applied retroactively) or is “conferring or ousting jurisdiction” (and thus may be applied retroactively). The court found that 18 U.S.C. § 1514A(e)(2) is more analogous to the latter because it “takes away no substantive right but simply changes the tribunal that is to hear the case.” The court in *Wong* found the court’s decision in *Pezza* persuasive and came to this same conclusion.

Employment agreements and their impact on whistleblowing activity is a hot topic at the SEC as well. Last year, a law firm that represents whistleblowers sent a letter to the Commissioners urging them to take action against what they believe were actions intended to prevent employees from reporting potential corporate violations to the SEC. *See http://kmblegal.com/wordpress/wp-content/uploads/130508-Letter-to-SEC-Commissioners.pdf.* (alerting SEC of the use of settlement and severance agreements as a means to prevent reporting and whistleblower claims). Recent comments by Sean McKessy, Chief of the SEC’s Office of the Whistleblower, suggest the Commission may have taken those concerns to heart. Mr. McKessy warned, “[W]e are actively looking for examples of confidentiality agreements, separat[ion] agreements, [and] employment agreements that … in substance say ‘as a prerequisite to get this benefit you agree you’re not going to come to the commission or you’re not going to report anything to a regulator.” http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts. Mr. McKessy also said that the SEC not only will penalize companies, but the “lawyers who drafted” such an agreement or language. *Id.* These comments warn employers and their lawyers to proceed with caution (if at all) when they are thinking about using an employment agreement as a means to curtail or deter Dodd-Frank reporting and claims.

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