# Extracted from *Law360*:

# Say Goodbye to Dodd-Frank Whistleblower Claims

**By Robert P. Riordan and Brooks Suttle, Alston & Bird LLP**

Law360, New York (April 10, 2014, 2:34 PM ET) -- The Dodd-Frank Wall-Street Reform and Consumer Protection Act was ushered in with much fanfare in 2010, and appropriately so. Dodd-Frank was passed rapidly through Congress in the wake of the great financial collapse of 2008 and established a great many rights and requirements designed to, among other things, prevent financial fraud, promote economic stability and protect investor confidence in the markets.

For their part, employment lawyers have tended to focus on the new whistleblower remedy that was created by Dodd-Frank, as well as the changes the law made to the already-existing whistleblower provisions under the Sarbanes-Oxley Act. With respect to the latter, the Dodd-Frank extended the time by which a SOX claimant must file an administrative complaint; made clear that jury trials are available in SOX cases if ultimately pursued in court; and provided a no-waiver rule in regard to whistleblower claims.[1]

But, while many practitioners seem to have come away with the belief that this same no-waiver rule also applies to claims brought pursuant to the new whistleblower remedy created by Dodd-Frank, this is not the case. Although the proper interpretation of the no-waiver rule established by Dodd-Frank with respect to SOX claimants has been little explored to date, it is evident nonetheless that SOX's no-waiver rule does not apply with respect to Dodd-Frank whistleblower claims.[2]

While much general reference is made to Dodd-Frank, it is important to recognize that the law in large measure made changes and additions to already-existing codes. As previously mentioned, for example, Dodd-Frank amended SOX to include several new provisions within the already-existing code. Similarly, the whistleblower provisions set out in Section 922(a) of Dodd-Frank were not designed to stand alone, but rather were inserted into the already-existing Securities Exchange Act as a new Section 21F, and subsequently codified at 15 U.S.C. § 78u-6(h)(1)(A).[3]

At the time Dodd-Frank was enacted, the SEA contained its own provision addressing the wavier of claims brought under the SEA. That decades-old provision provides that "[a]ny condition, stipulation or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."[4]

Courts interpreting this provision have routinely held that it invalidates releases which amount to anticipatory waivers of compliance with the SEA.[5] By contrast, courts have consistently concluded that a release of SEA-grounded claims about which the releasing party had knowledge, or had notice of the need for inquiry prior to signing the release, will be enforced.[6] Indeed, at least one court has concluded that the mere fact that a person is asked to execute a release is sufficient to put them on notice of a potential claim, such that the release will be upheld if a claim is subsequently brought.[7]

At the time Congress enacted Dodd-Frank, the release provision of the SEA and numerous cases interpreting it were in full view. Under such circumstances, Congress is presumed to have acted with knowledge of the existing provision and how it has been interpreted by the courts.[8] Under these circumstances, it can hardly be questioned that Congress intended to permit waivers of Dodd-Frank whistleblower claims and the fact that Congress chose arguably different treatment for SOX whistleblowers is of no import.[9]

In fact, the U.S. Securities and Exchange Commission has addressed this very issue. During the course of taking comments upon its proposed rules to be enacted in connection with Dodd-Frank, the SEC addressed one comment that called for the commission to create a rule regarding the release of the law's whistleblower claims that mirrored the new no-waiver provision established by Congress in regard to the release of SOX whistleblower claims. Declining to create such a rule, the SEC instead pointed to the existence and adequacy of the long-standing SEA release provision.[10]

Struggling to find an escape, some Dodd-Frank whistleblower claimants have argued that, in light of the important policy considerations involved, a release of Dodd-Frank whistleblower claims should not be found enforceable absent court or administrative supervision and approval at the time the release is given. In making this argument, such claimants point to a substantial body of law calling for a similar process in relation to the release of claims brought under the Fair Labor Standards Act.[11] Such an argument, however, fails upon close examination.

The FLSA release cases grew out of decades-old U.S. Supreme Court jurisprudence wherein the high court found that, given the utter absence of express congressional intent in the FLSA or elsewhere, it was required to look to context and policy considerations to determine the law's release issue.[12] By contrast, when Congress enacted Dodd-Frank, it spoke clearly as to its intent regarding the release of the law's whistleblower claims by creating the whistleblower remedy as part of the SEA, thereby rendering it subject to the existing SEA release provision.

While the contours of the no-waiver rule established by Congress in relation to Sarbanes-Oxley whistleblower claims remain to be explored, there is no such lack of clarity in regard to the release of Dodd-Frank whistleblower claims. Employers should act with confidence in regard to such releases and potential claimants who have signed a release should think twice before pursuing a Dodd-Frank whistleblower claim and exposing themselves to potential frivolous litigation sanctions.[13]

*Robert Riordan is a partner and Brooks Suttle is an associate in Alston & Bird's Atlanta office, where both are members of the firm's labor and employment group.*



[1] Pub. L. 111-203 at § 922(c).

[2] The differing approaches Congress took with respect to Sarbanes-Oxley whistleblowers, as compared to Dodd-Frank whistleblowers, are of more than academic interest. Whistleblower claims under Sarbanes-Oxley must be brought with the Department of Labor within 180 days of adverse employment action. 18 U.S.C. § 1514A (b)(2)(D). With respect to the whistleblower remedy created by Dodd-Frank, however, an aggrieved person may bring a claim up until a minimum of three years after the adverse employment action. Pub. L. 111-203 at § 922(a) (creating new Sec. 21F to the Securities Exchange Act setting forth limitations periods at § (h)(1)(B)(iii)). A dismissed employee who executed a severance agreement and release on his way out the door might develop "buyer's remorse" after the time by which a Sarbanes-Oxley whistleblower claim must be brought, but prior to the expiration of rights under Dodd-Frank. In such a case, the issue of the enforceability of a release in the face of a Sarbanes-Oxley whistleblower claim will not be presented, and the employer will be left with attempting to enforce the release against only a Dodd-Frank whistleblower claim. Even were both types of claims available, the Dodd-Frank whistleblower claim allows for the doubling of a back pay award, not available under Sarbanes-Oxley, such that enforcing the release of a Dodd-Frank claim remains valuable even were the Sarbanes-Oxley release found unenforceable.

[3] As such, it is probably more accurate to refer to plaintiffs bringing claims pursuant to Section 21F as "Exchange Act whistleblowers" rather than "Dodd-Frank whistleblowers," although the latter term seems the more commonly-used.

[4] See SEA at § 29(a).

[5] See generally Lancer Offshore Inc. v. Dominion Income Mgmt. Corp., No. 01 CIV. 4860(LMM), 2002 WL 441309, *5 (S.D.N.Y. Mar. 20, 2002) (unpublished opinion).

[6] See Murtagh v. Univ. Computing Co., 490 F.2d 810, 816 (5th Cir. 1974) ("Notwithstanding the provisions of the securities laws expressly voiding any private agreement waiving compliance with provisions of the laws, settlements of claims arising from acts which are violations of the securities laws are not void as a matter of law. . . ."); Dresner v. Utility.com, 371 F.Supp. 2d 476, 490 (S.D.N.Y. 2005)

(noting that "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."); Mullen v. N.J. Steel Corp., 733 F.Supp. 1534, 1547 (D.N.J. 1990) (upholding a release contained in a former employee's severance agreement with regard to securities fraud claims because § 29(a) "concerns waiver of future violations" and "there is a distinction between a waiver of future claims and a waiver of mature claims of which the releasing party had knowledge.").

[7] See Moseman v. Van Leer, 263 F.3d 129, 134 (4th Cir. 2001).

[8] See Lorillard v. Pons, 434 U.S. 575, 580-81 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."). See also Ryan v. Gonzales, 133 S. Ct. 696, 703 (2013) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.") (citation omitted); In re Depascale, 496 B.R. 860, 873 (Bankr. N.D. Ohio 2013) ("In interpreting a statute, courts may presume that a lawmaking body acted against the backdrop of existing jurisprudence unless it specifically negates such jurisprudence."). Cf. In re Frame, BR 09-41010, 2009 WL 8725111 (Bankr. D. Minn. Sept. 23, 2009) (refusing to re-interpret a statute contrary to decisions made prior to the statute's amendment because "Congress is presumed to be aware of existing case law pertinent to the legislation it enacts and could have resolved the issue when it amended [the statute at issue], but did not.").

[9] Indeed, courts have not hesitated to recognize fundamental distinctions between Sarbanes-Oxley and Dodd-Frank whistleblower claims and related provisions, and have interpreted them independently. See, e.g,. Ahmad v. Morgan Stanley & Co., Inc., No. 13 CIV 6394 PAE, 2014 WL 700339 (S.D.N.Y. Feb. 21, 2014).

[10] The SEC remarked as follows:
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. . . . Thus, under Section 29(a), employers may not require employees to waive or limit their anti-retaliation rights under Section 21F.
Implementation of the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934, Release no. 34-64545 at pp. 19-20 (May 25, 2011).

[11] The prohibition of private FLSA waivers emerged from Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) and D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946), wherein the Supreme Court addressed whether waivers of claims for liquidated damages are permitted by section 16(b) of the FLSA. The rule of O'Neil and Gangi was picked up and expanded upon in the Eleventh Circuit case of Lynn's Food Stores, Inc. v. U.S. By and Through U.S. Dep't of Labor, Emp't Standards Admin., Wage Hour Div., 679 F.2d 1350 (11th Cir. 1982). The holding of Lynn's Food Stores has been adopted in many jurisdictions over the years, though the Fifth Circuit has recently declined to follow Lynn's Food Stores in all cases. See Martin v. Spring Break Prods., LLC, 688 F.3d 247 (5th Cir. 2012). See also, Martinez v. Bols Bearing Equip. Co., 361 F.Supp. 2d 608, 623–26 (W.D. Tex. 2005) (conducting a thorough review of the history of the FLSA, its amendment by the Portal–to–Portal Act of 1947 and the Fair Labor Standards Amendments of 1949, and the varying interpretations reached by courts on the waiver issue).

[12] See Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945) and D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946). There the Supreme Court addressed whether waivers of claims for liquidated damages are permitted by section 16(b) of the FLSA. The Court noted that such an analysis should ordinarily begin and end with the statute itself, with no consideration of policy concerns. O'Neil, 324 U.S. at 705 ("the question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute."). As the FLSA was originally enacted, however, "[n]either the statutory language, the legislative reports nor the debates indicate[d] that the question at issue was specifically considered and resolved by Congress." 324 U.S. at 705-06. For that reason, and only for that reason, was it necessary for the Court to consider the policies underlying the statute in order to try to divine Congress' intent with regard to waivers of FLSA claims. See O'Neil, 324 U.S. at 705–06 ("In the absence of evidence of specific Congressional intent, it becomes necessary to resort to a broader consideration of the legislative policy behind [a statutory provision] as evidenced by its legislative history and the provisions in

and structure of the Act.”).

[13] It is important to note that the release issues here considered should not affect the bounty program also established by Dodd-Frank as part of the SEA. Nothing about the enforceability of Dodd-Frank whistleblower releases in the employment setting should prevent claims being made to the SEC in connection with its bounty program.