



Financial Services Employment Arbitration Q&A

Financial Industry in the Hot Seat with Democrats' Proposed Bill Expanding Whistleblower Protections

By *Cliff Fonstein and Meredith-Anne Berger*

Senator Tammy Baldwin (D-Wis.) and Representative Elijah Cummings (D-Md.) have co-sponsored a bill that streamlines and reinforces current whistleblower laws that affect Financial Service industry employers. In case there is any doubt that Wall Street has a target on its back, the press release announcing the new law stated: "The middle class has paid a steep price for the irresponsible actions of others, yet only one top banker went to jail for the financial crisis. If we strengthen and empower whistleblowers in the financial industry, we can do a better job of holding Wall Street accountable. These reforms will help us do that."

The proposed law, called the Whistleblower Augmented Reward and Non-Retaliation Act of 2016 ("WARN Act of 2016"), harmonizes the different whistleblower statutes applicable to Financial Services employees.¹ It significantly increases the potential monetary recovery for whistleblowers under some current statutes, allows for a private right of action for retaliation, and provides a number of other protections for whistleblowers.

For example, the proposed law applies the plaintiff-friendly burdens of proof offered in the Dodd-Frank Act: the plaintiff need only prove that blowing the whistle was a "contributing factor" to the adverse employment action, rather than the heightened "but for" causation standard, and the employer must show by "clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior."² The bill allows whistleblowers who win their cases a potential recovery of twice the amount of back pay and interest, in addition to court costs, attorneys' fees, and expert witness fees as well as compensatory damages and punitive damages of up to \$250,000.

Significantly, under the proposed law, whistleblowers could recover a large bounty for certain violations of law, applying the Dodd-Frank bounty rates to other whistleblower statutes affecting Financial Services employees. The purpose of this uniform application of the higher Dodd-Frank bounty is to give Wall Street employees an incentive to blow the whistle because current statutory caps on awards might seem de minimis to Wall Street employees whose pay often greatly exceeds some of the current statutory caps on awards. Currently, for example, awards under the FDIC are capped at 25% of the recovery or fine, or \$100,000, whichever is less. The new law would increase potential bounties to 10-30% percent of the collected

¹ Strangely, the bill's authors chose to call the proposed law the WARN Act, which will prompt yet another opportunity for confusion as another extensive set of state and federal "WARN" laws cover reductions in force.

² See Dodd-Frank, § 1057.

finances, penalties, restitution, or forfeiture without a cap. With fines reaching into the billions for large financial institutions in recent years, the potential recovery could be a persuasive incentive for whistleblowers to act. Reporting would also be subject to a more generous deadline of 90 days after the conduct is discovered, with a presumption of timeliness unless the employer can show that disclosure was deliberately postponed due to culpability, interfering with an internal investigation, or an attempt by the whistleblower to profit.

Finally, the bill would prohibit employers from requiring employees to waive their rights to blow the whistle or from communicating with the government about employers' allegedly illegal conduct. Employees would no longer be bound by any waivers, and pre-dispute arbitration agreements would be void in whistleblower actions.

While the WARN Act of 2016 faces a tough road ahead, especially with the current makeup of the House and Senate, the bill has been referred to committee. Stay tuned for updates on this legislation from the Financial Services Team and Whistleblower Team.

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