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Rise In Whistleblower Protections Inspires New Firm Practices

By **Maria Chutchian**

Law360, New York (June 01, 2012, 10:21 PM ET) -- As Congress expands whistleblower protections to include millions more American workers, plaintiffs and defense law firms alike are beefing up their practices to respond to what they expect to be a boom in whistleblower litigation.

At least three law firms have announced whistleblower practices in recent weeks. Plaintiffs firms Cohen Milstein Sellers & Toll PLLC and Constantine Cannon LLP have broken off the whistleblower component of their existing practices into new groups, and defense firm Williams Mullen has combined its whistleblower experts with its white collar attorneys.

Financial disasters continue to erupt on Wall Street, and law firms on both sides of the aisle are aiming to take advantage of the new value regulators have placed on private citizens who are willing to report financial fraud and other misconduct at their workplaces, attorneys say.

"There's been a change in the acceptance of whistleblowers that started with [the financial misconduct on] Wall Street," Gordon Schnell of Constantine Cannon said.

For some, the launch of a whistleblower practice is a logical extension of the services they already provide, whether in antitrust, white collar, employment, securities or health care law. But now, some experts say, even the firms that haven't begun dabbling in whistleblower actions will likely branch out in an effort to keep up with the changing whistleblower statutes.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 has been the most prominent law to encourage whistleblowers recently, but it's just the cherry on top when it comes to whistleblower protection statutes, which are increasing among both the federal and state governments, attorneys say.

Under Dodd-Frank, people who provide the U.S. Securities and Exchange Commission information that leads to a successful outcome can receive awards between 10 and 30 percent of any judgment greater than \$1 million and can bring any retaliation claims to federal court without first exhausting administrative remedies.

The law also broadened the range of employees who are covered under the whistleblower provisions to include people who work at subsidiaries of companies that trade on the New York Stock Exchange, a class of workers that was not protected before.

While Dodd-Frank was a boon for whistleblowers, the effort to expand protections started to gain steam years ago, with the passage of the Tax Relief and Health Care Act in 2006.

Since then, the American Recovery and Reinvestment Act of 2009, the Patient Protection and Affordable Care Act of 2010, and the Food Safety Modernization Act of 2011 have all included whistleblower protections.

"Altogether, that's about 65 million new employees who, in the private sector, have coverage," said Government Accountability Project President Louis Clark. "That's all happened in six years, so it's a dramatic change and law firms are aware of this, so that's quite a good reason, I think, for them to have a practice in this area."

The expansions are likely to result in more whistleblower actions in all venues, from federal regulatory agencies to the courts, and not too many firms have established practices at the moment, Clark said. Some firms have incorporated whistleblower work into other practice areas for many years, but are now breaking the work off into separate practice groups to respond to the need.

Cohen Milstein Sellers & Toll PLLC unveiled its new whistleblower practice two weeks ago. Managing partner Steven Toll said the practice meshed well with its regular caseload of securities fraud, employment, civil rights and antitrust matters.

He said the firm decided to launch the practice after being approached by Gary Azorsky and Jeanne Markey, who had previously worked for Berger & Montague PC. While at their prior firm, the pair landed a number of settlements involving various pharmaceutical companies, including two \$280 million settlements in False Claims Act suits against Dey Inc. and Roxane Laboratories Inc.

On the defense side, Williams Mullen is pulling in whistleblower experts to work alongside its white collar attorneys. Mary Pivec, co-chair of the whistleblower practice, said the firm's attorneys in other practice areas had some experience representing employers against retaliation claims, but as Congress continues expanding whistleblower protection provisions, the firm decided to expand its service in anticipation of a substantial growth in such claims.

Pivec noted that 2011 was the "year of the whistleblower" before the U.S. Department of Labor's Administrative Review Board, where fired employees who blew the whistle on their employers had substantial success surviving motions for summary judgment in cases before the DOL alleging retaliation. That was especially true in cases that focused on whether the whistleblower's statements were protected under the act in question, she said.

Now, with so many protection provisions, such claims are much more likely to succeed, she said. "If it's anywhere in ballpark, you're going to assume a statement is protected," Pivec said.

Firms that focus exclusively on whistleblowing, as well as securities and employment firms, are those that will continue to focus on whistleblower actions, according to Jordan Thomas, chairman of the whistleblower practice at Labaton Sucharow LLP. However, he says, most of those firms have already incorporated these types of lawsuits into their services.

"I expect the primary players whom you expect to do this work have already announced their interest ... I don't expect too many more major players to join the field," he said.

Still, Thomas said more firms may express an interest in developing a whistleblower practice as awards are handed down in the first SEC whistleblower suits under Dodd-Frank. Though the act was passed two years ago, those cases can take up to four years to reach a conclusion, which means some big awards are yet to be announced.

Nicholas Woodfield, a principal at the Employment Law Group, said both plaintiff and defense firms would have to respond to the increasing number of whistleblower protection

provisions soon to be able to provide their clients with the advice and representation they need.

The need for adequate services is especially prudent now that legislators realize they can detect large-scale financial scandals like Enron or Bernard Madoff before they happen as laws are updated to encourage people to come forward with their suspicions of wrongdoing, Woodfield said.

"I definitely believe there's a trend toward it and I think the political atmosphere in this country is forcing the issue to the forefront," he said. "Everyone who's cognizant of lawmaking realizes this is going to impact their clients eventually."

--Editing by Jocelyn Allison and Elizabeth Bowen.

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