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LEGAL ALERT



Legal Alert: Whistleblower Provisions in American Recovery and Reinvestment Act May Impact Employers

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The recently enacted American Recovery and Reinvestment Act (ARRA) contains whistleblower provisions that apply to non-federal employers who will receive funds under the ARRA. These provisions prohibit the employers from discharging, demoting, or discriminating against an employee for disclosing, to a covered entity, (1) gross mismanagement of an agency contract or grant relating to covered funds; (2) a gross waste of covered funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds; (4) an abuse of authority related to the implementation or use of covered funds; or (5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds. All qualified employers are required post notice of the rights and remedies provided under this section.

An employee who believes that he or she has been subjected to a reprisal by the employer may submit a complaint regarding the reprisal to the appropriate inspector general. Within 180 days after receiving the complaint, the inspector general must investigate the complaint and either (1) issue a report of his or her findings or (2) make a determination that the complaint is frivolous or does not relate to covered funds. The inspector general has the authority to grant extensions of time to perform the investigation and to decline to investigate a complaint.

Once the inspector general has completed his or her report and submitted it to the agency head, the agency head will determine whether there is sufficient basis to conclude that the employer has subjected the complainant to prohibited reprisal. The head of the agency will either issue an order denying relief, or one or more of the following: (1) order the employer to take affirmative action to abate the reprisal; (2) order the employer to reinstate the person to the position that the person held before the reprisal (including back pay, compensatory damages, and employment benefits); or (3) order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorney fees and witness fees) that were incurred by the complainant for bringing the complaint.

An employee may bring a civil action against his or her employer when he or she has exhausted all administrative remedies with respect to the complaint of reprisal. An employee is deemed to have exhausted all administrative remedies when the head of an agency (1) issues an order denying relief in whole or in part, (2) has not issued an order within 210 days after the

submission of a complaint, or (3) decides not to investigate or to discontinue an investigation, and there is no showing that such delay or decision is due to the bad faith of the complainant. Then the employee may bring a *de novo* action at law or equity against the employer to seek compensatory damages and other relief available in the appropriate federal district court.

An employer may not attempt to waive the rights and remedies provided for under the whistleblower provision by any agreement, policy, form, or condition of employment, **including by any predispute arbitration agreement**. However, this does not include an arbitration provision in a collective bargaining agreement.

Employers' Bottom Line:

This new provision expands covered employers' potential liability for whistleblower claims. For example, the law permits prevailing whistleblowers to recover compensatory damages, which, unlike those available under the 1991 Civil Rights Act, are not capped based on the employer's size. Further, if the employer fails to comply with an administrative order granting relief under this provision, a court may enforce the order and grant relief, including injunctive relief, compensatory and exemplary (that is, punitive) damages, and attorney fees and costs.

Additionally, as noted above, claims under this provision are not subject to arbitration under a predispute arbitration agreement (such as a mandatory arbitration agreement in an employee handbook).

We will continue to keep you updated on developments under this new law. If you have any questions regarding the issues discussed in this Alert, please contact the author, Valeria Cometto, vcometto@fordharrison.com or 404-888-3844.