

NEWSSTAND

McCaskill Amendment Provides New Whistleblower Protections

Spring 2009

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (ARRA), a bill that contained an unprecedented investment in the faltering U.S. economy. The ARRA also contained a robust whistleblower provision, Section 1553, that was introduced by Senator McCaskill (D-Mo.) (the "McCaskill Amendment").

That provision covers both private and public employers that are recipients of stimulus funds. The McCaskill Amendment encourages public and private employees to disclose fraud, waste, gross mismanagement, public health and safety risks, and violations of law or regulations relating to "covered funds." Below are key highlights of the whistleblower provisions that are part of the McCaskill Amendment.

Covered Employers

The new whistleblower protections apply to private contractors, state and local governments, and other non-federal employers that receive a contract, grant or other payment appropriated or made available by the ARRA.

Protected Disclosures and Conduct

Like other whistleblower protection statutes, the McCaskill Amendment requires that employees satisfy certain requirements in order to be protected. Employee disclosures are protected under Section 1553 if they contain information that the employee reasonably believes is evidence of one or more of the following:

- the gross mismanagement of an agency contract or grant relating to covered funds;
- a gross waste of covered funds;
- a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
- an abuse of authority related to the implementation or use of covered funds; or
- 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 stimulus funds.

One significant feature of the law is that internal disclosures are fully protected. Section 1553 also protects disclosures made by employees in the course of performing their job duties, also known as "duty speech." It is expected that courts evaluating the reasonableness of an employee's belief that wrongdoing has occurred will apply the standard employed in analogous whistleblower protection laws, such as Section 806 of the Sarbanes-Oxley Act, which requires that the evaluation be based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.

Broad Class of Recipients of Protected Disclosures

In addition to protecting internal disclosures and "duty speech," the McCaskill Amendment protects employee disclosures to the following broad class of recipients:

- the Recovery Accountability and Transparency Board;
- an inspector general;
- the Comptroller General;
- a member of Congress;

- a state or federal regulatory or law enforcement agency;
- a person with supervisory authority over the employee;
- a court;
- a grand jury;
- the head of a federal agency; or
- a representative of the listed persons.

Prohibited Acts of Retaliation

Under Section 1553, a covered employee may not be “discharged, demoted, or otherwise discriminated against” in retaliation for making the protected disclosure. The McCaskill Amendment, however, does not define the term “otherwise discriminated against,” leaving open broad interpretations of retaliation. This clause likely will be read coextensively with U.S. Supreme Court guidance relating to “materially adverse actions” to include any action that would dissuade a reasonable person from engaging in the protected activity. Accordingly, the McCaskill Amendment would appear to leave open to litigation a wide range of actions, such as oral or written reprimands, lateral transfers or reassignments of duties that might be alleged as “materially adverse” even if they do not have tangible economic consequences.

Investigation and Litigation Under Section 1553

Whistleblower claims under Section 1553 will be administered by the individual agencies responsible for overseeing or distributing the covered funds at issue. An employee can file a claim with the inspector general of the government agency that has jurisdiction over the covered funds. Once a claim is filed, the inspector general must investigate the claim and issue a report or determine that the claim is frivolous within 180 days.

Key Procedural Provisions and Remedies

Burden of Proof

The employee has the burden of proof to demonstrate that the protected activity was a “contributing factor” in whatever retaliation he or she may have experienced. The ARRA specifically allows proof by circumstantial evidence, including the decision-maker’s knowledge of the disclosure and the timing of the reprisal relative to the disclosure. For an employer to successfully defend the claim, it must show by clear and convincing evidence that it would have taken the same action even in the absence of the protected disclosure.

Determinations

Decision-making authority resides with the head of the agency controlling the covered funds. On the basis of the inspector general’s investigative report, the agency head determines whether there is sufficient basis to find a prohibited reprisal. There is no express statutory provision providing for an evidentiary hearing or administrative appeal.

Enforcement of Agency Action and Available Remedies

The relief available under Section 1553 includes not only compensatory damages, but also reinstatement, back pay, repayment of benefits, attorneys’ fees and an order that the employer take “affirmative action to abate the reprisal.” The ARRA does not contain any express caps or limits on damages. Where a retaliatory act has been found to have occurred, an agency head is authorized to bring an enforcement action in the U.S. District Court to obtain compliance with the terms of an order.

Judicial Review

Any person, complainant or employer adversely affected or aggrieved by an agency order may seek review of the order in the U.S. Court of Appeals for the circuit in which the reprisal is alleged to have occurred. As set forth in the Administrative Procedures Act, the reviewing court is authorized to decide relevant questions of law, interpret statutory provisions and determine the meaning and applicability of agency action.

No Waiver of Rights

Employee substantive and procedural rights and remedies may not be waived by any agreement, policy, form or condition of employment, and predispute arbitration agreements will not be valid unless contained within a collective bargaining agreement.

No Exclusivity

The ARRA's whistleblower provisions are not exclusive. Consequently, individuals may proceed simultaneously in multiple state or federal administrative or judicial proceedings, depending on the underlying statutory or common law basis of each claim. This includes claims under state or federal whistleblower statutes, in addition to claims of wrongful discharge for violation of public policy available in some states.

Posting Notice

Each employer receiving covered funds is required to post a notice of the whistleblower rights and remedies provided by the ARRA.

Practical Steps for Employers

Retaliation and whistleblowing claims have become increasingly prevalent throughout the United States. In order to prevent and address whistleblower claims, employers should consider taking the following steps to establish a strong defense to potential employee claims. As a prophylactic measure, employers should have a comprehensive compliance program with strongly worded policies that mandate not only compliance, but ethical business practices.

In addition, corporate policies should encourage all employees to help prevent and detect mismanagement, fraud, waste, situations creating public danger, abuse or unlawful activity concerning covered funds, and prohibit against discrimination and retaliation for reporting what employees reasonably believe to be wrongdoing relating to any of the aforementioned categories of protected disclosures. Similarly to well-drafted antidiscrimination policies, employees should be provided with multiple avenues of reporting any alleged wrongdoing, including one that is outside of the employee's direct line of supervision.

Further, employers should educate managers and supervisors on compliance with applicable laws, rules and regulations relating to the use of funds appropriated or made available by the ARRA, as well as training on awareness and prevention of whistleblower retaliation.

Finally, employers should make certain that complaints and claims made by whistleblowers are promptly, thoroughly, and fairly investigated by someone who is knowledgeable about the subject matter of the complaint with appropriate guidance and assistance from those who are experienced in the investigation of workplace misconduct.