



American Recovery and Reinvestment Act (ARRA) and Whistleblower Protections

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During these rough economic times with unemployment numbers climbing and corporate restructuring and layoffs being implemented, the federal government continues to expand employee protections and employer exposure at a breakneck pace. The recently enacted federal economic stimulus package – the American Recovery and Reinvestment Act of 2009 (ARRA) – adds new whistleblower protections for non-federal employees who report or disclose perceived misuse of stimulus funds. If an employer accepts stimulus funds, it should be aware of these new protections and take seriously any complaints of misuse of such funds. The ARRA essentially creates employee protection for complaints related to mismanagement, waste and abuse of stimulus funds. The ARRA prohibits a covered employer from taking adverse action against an employee who discloses, reports or complains about: (1) a gross mismanagement of a federal contract or grant¹; (2) a gross waste of stimulus funds; (3) a substantial and specific danger to public health and safety related to the use of the stimulus funds; (4) an abuse of authority related to the implementation of these funds; or, (5) a violation of any law, rule or regulation related to a federal contract, grant or award of the funds. To be covered, an employee must report the alleged wrongdoing to the ARRA Board, an inspector general, the Comptroller General, a member of Congress, a federal or state enforcement authority, a state or federal court, a grand jury, a federal agency, or even just to a person with supervisory authority. No formal complaint mechanism must be followed, and internal disclosures made by employees during the course of performing their job duties are in fact covered.

Procedurally, an affected employee must file a complaint with the Inspector General of the agency having jurisdiction over the covered funds. There is no explicit statute of limitations to file such a complaint. To meet ARRA's initial burden of proof, the employee merely needs to show that any of the above-listed protected activity was a contributing factor in the adverse employment action, which can be a termination, demotion, transfer or anything else considered retaliatory in nature. The employee meets the burden by presenting evidence of employer knowledge of the disclosure and a temporal proximity between the disclosure and the adverse action. An employer can rebut this showing only with "clear and convincing" evidence that it would have taken the same action notwithstanding the disclosure. That rebuttal is a high evidentiary hurdle for any employer to clear. Thus, if receiving stimulus funds, employers should immediately train their supervisors to report and investigate employee complaints related to the misuse of stimulus funds, document their findings and determinations, and ensure that any adverse employment action is not linked to the employee complaint.

The inspector general will investigate the employee's complaint and make a determination within 180 days (though such time period can be extended). A report will be submitted to the particular agency head who will make a final determination whether there is a sufficient basis for the complaint and can order the employer to take action to abate the reprisal, reinstate the employee, and pay costs and expenses, including attorney's fees, for bringing the complaint. Unlike other federal and state laws, this determination is not made by an administrative law judge. It is made by the agency head, who may or may not have experience with interpreting and applying legal standard to facts before arriving a

determination. An administrative order can be enforced in federal court and include, not only compensatory damages and attorney's fees, but also punitive damages for a willful failure to comply. The agency's determination may be appealed de novo to the Court of Appeals in the jurisdiction where the alleged retaliatory conduct occurred.

Once an affected employee has exhausted the administrative process of filing a complaint and received an agency determination, he or she may file a lawsuit in a federal district court, requesting a jury trial and seeking back pay, reinstatement, compensatory damages without limitation, and attorney's fees and costs. Employers must post notice of these new ARRA whistleblower protections and cannot seek to waive or otherwise restrict these rights, including through the use of an arbitration agreement. Therefore, the ARRA presents another manner in which employers have legal exposures in these tough economic times and employees who are terminated or laid off may be using the statute as leverage in their terminations.

¹ The contracts, grant, and funds covered by the Act include any contract, grant or other payment received by any non-federal employer if (1) any part of the funds are federal and (2) at least some of the funds are appropriated or otherwise made available by the Act.