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A Timely Analysis of Legal Developments

ASAP

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The American Recovery and Reinvestment Act of 2009 (ARRA), recently signed into law by President Obama, provides for unprecedented levels of investment in infrastructure, energy, and research. While it offers many businesses the prospect of brighter economic days, it is important for businesses who receive those funds to know that it comes with strings attached. Among other things, the ARRA contains sweeping new protections for public and private employees who blow the whistle on gross mismanagement or waste of covered funds, creation of public health or safety risks, or violation of laws or regulations relating to the grant of the funds.

Stimulus Package Extends Whistleblower Protections to Employees

By Gregory C. Keating and Amy E. Mendenhall

The American Recovery and Reinvestment Act of 2009 (ARRA), recently signed into law by President Obama, provides for unprecedented levels of investment in infrastructure, energy, and research. While the government's outlay of nearly $500 billion in stimulus spending offers many businesses the prospect of brighter economic days, it is important for businesses who receive those funds to know that the ARRA contains sweeping new protections for public and private employees who blow the whistle on gross mismanagement or waste of covered funds, creation of public health or safety risks, or violation of laws or regulations relating to the grant of the funds.

What the ARRA Says (and Doesn't Say) About Protections for Whistleblowers

Section 1553 of the ARRA provides that non-federal employers who receive stimulus funds may not retaliate against an employee for providing information that the employee *reasonably believes* to be evidence of: (1) gross mismanagement of a contract related to covered funds; (2) gross waste of covered funds; (3) dangers to public health or safety related to the use of public funds; (4) an abuse of authority related to the use of covered funds; or (5) a violation of a law, rule, or regulation related to a contract or grant related to covered funds. *Non-federal* employers include all private employers as well as state and municipal employers.

Section 1553 contains many provisions that set it apart from other laws providing protection for whistleblowers. For example, Section 1553 establishes a wide range of agencies, individuals, and courts to whom an employee can report allegations of fraud or abuse, including: the Recovery Accountability and Transparency Board, a state or federal regulatory or law enforcement agency, the employee's supervisor, a court or grand jury, the head of a federal agency or their representatives, and even a member of Congress (something no other federal whistleblower statute has authorized before). Notably, the employee's report is considered a protected disclosure even when it is made in the ordinary course of his or her duties.

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Under section 1553, a covered employee may not be "discharged, demoted, or otherwise discriminated against" in retaliation for making the protected disclosure. However, the statute does not define what "otherwise discriminated against" means. If that provision is ultimately interpreted according to the standard for "materially adverse actions" announced in the 2006 United States Supreme Court case, *Burlington Northern v. White*,[1] then it will include any action that would dissuade a reasonable person from engaging in protected conduct. Following Burlington, courts have found that a wide range of actions qualify as "materially adverse" and constitute discrimination or retaliation even when they do not have a tangible economic effect. Even more disturbing, the *Burlington* standard expressly provides that the adverse action need not be an employment action, creating a myriad of potential new claims.

In addition to creating significant new protections for employees, important issues that remain undefined by the statute are also likely to increase litigation. For example, section 1553 does not establish a statute of limitations. Also, unlike other statutes affording protections to employees, section 1553 does not impose a statutory cap on damages. Finally, section 1553 does not even define broad new concepts such as "waste," "abuse" and "gross mismanagement." These are new terms that find no real footing in established federal whistleblower statutes.

Employees cannot waive the rights and remedies provided to them by section 1553. While it is common practice for employees to waive certain claims, such as discrimination claims, in exchange for severance or other benefits, an agreement to waive the rights afforded by section 1553 will not be enforceable. Agreements requiring the arbitration of disputes arising under section 1553 are also invalid.

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 covered by section 1553 can file a claim with the inspector general of the government agency that has jurisdiction over the covered funds. The inspector general must then investigate the claim and issue a report or determine that the claim is frivolous within 180 days.

A complainant has the burden of proof to demonstrate that the protected activity was a "contributing factor" in whatever reprisal he or she may have experienced. 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.

The head of the agency that has jurisdiction over the claim is responsible for deciding on the basis of the inspector general's report whether there is a sufficient basis to conclude that the employer has engaged in impermissible reprisal. Any person aggrieved by the agency head's decision may appeal that decision to the U.S. Court of Appeals in the jurisdiction in which the reprisal is alleged to have taken place. A complainant can also initiate a new civil action in a federal district court when: (1) the inspector general, in his discretion, discontinues the investigation; (2) the agency head issues an order denying relief on the grounds that the complaint is frivolous, does not relate to covered funds, or has been addressed in a separate agency action; or (3) 210 days have passed since the original submission of the complaint or 30 days have passed since the expiration of an extension of time.

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."

Taking a Proactive Approach to Potential Whistleblower Claims

Retaliation and whistleblowing claims are one of the fastest growing areas of employment litigation in the United States today. In just the last five years, the state and federal governments have created a host of new laws to protect whistleblowers. This most recent legislation dramatically raises the stakes for any public or private employer who anticipates accepting stimulus funds. When it comes to preventing and addressing whistleblower claims, a strong defense is always the best offense. Below, are some steps employers should take.

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What Practical Steps Should Employers Prepare to Take?

- Make sure you have a policy that includes prohibitions against discrimination and retaliation for reporting what employees reasonably believe to be wrongdoing of any kind – not just discrimination or harassment – and provide two avenues for reporting, one of which is outside of the employee's chain of command.
- Be sure that complaints and claims are promptly investigated by someone within or outside of the company who is knowledgeable about the subject matter of the complaint (*e.g.* finance, health, safety).
- Educate managers on compliance with any laws, rules, or regulations relating to the use of government funds in addition to providing comprehensive training on awareness and prevention of whistleblower retaliation.

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[1] 548 U.S. 53 (2006).

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