

March 9, 2009

Economic Stimulus Package Creates New Whistleblower Protections for Employees of Government Contractors

On February 17, 2009, President Obama signed the American Recovery and Reinvestment Act of 2009 (the "Act"), which includes significant protection against retaliation for employees who purport to blow the whistle on a host of abuses related to the use of stimulus funds. Similar to the protections provided under the Sarbanes-Oxley Act of 2002 ("SOX") for employees who report corporate fraud, remedies under the Act include reinstatement, back pay, compensatory damages, lost benefits, attorneys' fees and costs of litigation. Employers who plan to bid on projects funded in whole or in part with stimulus money should be aware of, and prepare to comply with, the Act.

Whom Does the Act Cover?

The Act applies broadly to any "non-federal employer" that receives stimulus funds. "Non-federal" employers are defined to include contractors, subcontractors, professional membership organizations, agents or licensees of the federal government, any person acting in the interest of an employer receiving stimulus funds, and state or local governments and their contractors or subcontractors. Federal employees are specifically exempted from the Act's coverage.

What Action Is Prohibited?

The Act provides that covered employers may not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosures to the Recovery Accountability and Transparency Board, the employee's supervisor, a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a federal agency, or an agency's inspector general that the employee reasonably believes is evidence of the following:

- (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.

Similar to the protections afforded to whistleblowers under SOX, the Act protects internal disclosures to the employee's supervisor or any other person working for the employer with the authority to investigate, discover or terminate misconduct. See 18 U.S.C. § 1514A(a). The Act provides broader protection than SOX, however, because it extends to disclosures by an employee made in the ordinary course of his or her duties, as opposed to disclosures made in connection with an investigation of fraud. *Id.* Once a protected disclosure has been made, the employee receives broad protection from retaliatory action. Although the Act does not define the full range of actions that would constitute retaliation, it is likely that

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the federal agencies and courts enforcing the Act will rely upon existing employment discrimination law for guidance.

How Is the Act Enforced?

An employee who believes that he or she has been subjected to reprisal in violation of the Act may submit a complaint to the inspector general for the agency responsible for the federal contract. The Act does not, however, provide for a limitation on the time within which the employee is required to file a complaint. Under federal law, therefore, it is likely that the statute of limitations for such claims will be governed by state law limitations periods applicable to similar claims. See *North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995) (applying state limitations period to Worker Adjustment and Retraining Notification Act claims).

Once a complaint is filed, the inspector general for the affected agency must investigate the claim, unless it determines that the action is frivolous, unrelated to the covered funds, or has already been filed with another state or federal agency. If an investigation is conducted, the inspector general is required to submit findings of fact to the agency head for a determination as to whether there has been a violation of the statute. Under the Act, the employee's burden of proof is relatively low: the employee must demonstrate that the protected disclosure was a contributing factor in the alleged retaliatory action. The use of circumstantial evidence, such as evidence that the person responsible for the alleged reprisal knew of the disclosure or that the reprisal occurred within a short time after the disclosure, is expressly permitted by the Act. Once the employee has satisfied his or her burden, the employer may rebut the employee's showing only by introducing clear and convincing evidence that it would have taken the same action absent the disclosure.

If a covered employer is found to have retaliated against the complaining employee, the agency head has authority to award reinstatement, back pay, compensatory damages, lost benefits, attorneys' fees, and costs. If relief is denied, in whole or in part, if no decision has been issued within 210 days of filing the complaint, or if the agency head decides not to investigate or to discontinue an investigation, the employee may file a de novo civil action in federal district court seeking identical relief. By contrast, an employer that is adversely affected by an order in favor of the employee may seek judicial review in the United States court of appeals for the circuit in which the alleged retaliation occurred.

Notably, the new legislation expressly prohibits a waiver of the rights or remedies created by the Act through an agreement, a policy or a condition of employment, including predispute agreements to arbitrate. There is an exception, however, for arbitration provisions in collective bargaining agreements, which are enforceable as to disputes arising under those agreements.

Practical Tips for Employers

Employers that plan to perform or bid on contracts funded under the Act should take appropriate steps to evaluate their internal policies and procedures to ensure compliance. For example, because the Act extends coverage to internal disclosures made by employees in the ordinary course of their duties, employers should reexamine their internal mechanisms for employees to report alleged fraud or abuse, as well as the procedures governing investigation of such claims and nonretaliation policies.

Furthermore, because the Act provides that claims may not be waived by agreement, covered employers should consider the potential for claims before taking adverse employment action, including demotion or discharge, against an individual employee or before carrying out a reduction-in-force. Covered employers

should be aware that severance agreements, or even settlement agreements reached in litigation, may not be effective to resolve such claims.

The Act also requires covered employers to post notice to employees of the rights and remedies available to them under the new legislation. The form and contents of the required notice will likely be promulgated in forthcoming regulations under the Act.



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