

EMPLOYMENT LAW

A L E R T

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Whistleblower Provisions in the American Recovery and Reinvestment Act

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The American Recovery and Reinvestment Act of 2009 (“the Act”) was passed on February 17, 2009 as part of President Obama’s economic stimulus package. Included in the Act is a whistleblower provision, which provides a cause of action to employees who allege that they have been subject to retaliation for reporting mismanagement of stimulus funds.

Who is Covered?

The whistleblower provision protects any “employee of any non-Federal employer receiving covered funds.” “Non-Federal employer” is defined broadly to include a “contractor, subcontractor, grantee, or recipient,” if that entity is an employer, and “any person acting directly or indirectly in the interest of an employer receiving covered funds.” Consequently, any private employer (or state or local government) that receives stimulus funds under the Act will be subject to liability if that employer “discharge[s], demote[s], or otherwise discriminate[s] against” an employee who makes a protected disclosure.

What Kinds of Disclosures Are Protected?

An employee is protected from retaliation for disclosing:

- 1) Gross mismanagement of an agency contract or grant related 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.

As this list makes clear, the scope of protected conduct is broad. Although there is some qualifying terminology that could conceivably narrow the reach of whistleblower claims (such as the requirement that disclosures relate to “gross” mismanagement or waste, or a “substantial and specific” danger to

health and safety), in practice, employers will have to consider any allegation of wrongdoing in connection with the receipt or use of stimulus funds as potentially protected conduct.

Moreover, there does not appear to be any requirement, as there is for some other types of whistleblower claims, that the employee make an initial complaint “in-house” and give the employer an opportunity to correct the perceived wrongdoing. Rather, a protected disclosure can be made to any number of persons or entities. The Act specifically protects disclosures made “in the ordinary course of an employee’s duties, to 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 or grand jury, the head of a Federal agency, or their representatives ...”

What Kinds of Employer Conduct Are Prohibited?

The Act provides that an employee who makes a protected disclosure “may not be discharged, demoted, or otherwise discriminated against” in retaliation for making that disclosure. Although it is not entirely clear what actions would be construed as “otherwise discriminat[ing] against” a whistleblower, the Act is likely to be construed in conjunction with U.S. Supreme Court precedent, to prohibit any action by an employer that would dissuade a reasonable person from engaging in protected conduct.

How Will These Claims Be Resolved?

Importantly, the Act requires an exhaustion of administrative remedies before a lawsuit can be filed in court. Whistleblower complaints must first be submitted “to the appropriate inspector general,” meaning the inspector general of the government agency with authority over the stimulus funds in question. Upon receiving a complaint, the inspector general has 180 days to submit a report of findings. Within 30 days of receiving the inspector general’s findings, the appropriate agency head will determine whether there has been a violation and order appropriate relief. If the agency head has denied relief or has failed to issue a decision within the appropriate time period, an employee can initiate a lawsuit in United States District Court. Although the Act provides that employers may rebut a claim of unlawful retaliation, it does not establish a framework within which the employer will present its evidence to the inspector general or agency head. Subsequent regulations may address this issue.

In determining whether there has been a violation, the Act also provides for an employee-friendly burden of proof. Specifically, the complaining party is only required to show that the protected conduct was “a contributing factor in the reprisal,” rather than a substantial or primary factor. Furthermore, the Act specifically provides that both 1) the knowledge of a decision-maker about the complainant’s protected conduct and 2) the period of time between the protected conduct and the adverse employment action, will be considered circumstantial evidence of retaliation.

Exposure and Other Concerns

If a violation is found, the Act provides for damages including reinstatement, back pay, compensatory damages, and attorneys’ fees. Further, the Act specifically states that whistleblower claims are not subject to pre-dispute arbitration agreements, except for collective bargaining agreements. The language of the Act also indicates, arguably, that whistleblower claims cannot be released in a post-employment

severance agreement. Finally, the Act does not provide a statute of limitations for whistleblower claims, although this issue might be addressed in forthcoming regulations.

Employers who have received federal funds in the past are likely familiar with existing whistleblower claims, such as those in the False Claims Act. The new whistleblower provisions are broader for two reasons: 1) more types of employee conduct are considered protected, and 2) the sheer size and scope of the stimulus bill means that more employers will be affected. They also differ from existing federal whistleblower claims in that they are not confined to a specific agency for enforcement; rather, each agency that dispenses federal funds is responsible for investigating and resolving whistleblower claims with respect to the funds it dispenses.

Employers should have measures in place to monitor and document the use of stimulus funds received under the Act. Just as importantly, statements by employees which could be construed as allegations of wrongdoing with respect to stimulus funds should be documented and addressed to the extent practicable.

If you have any questions about this alert, please call one of our labor attorneys listed below.

Bass, Berry & Sims Labor and Employment Attorneys

Karen L.C. Ellis

(615) 742-6226

kellis@bassberry.com

Robert W. Horton

(615) 742-7708

rhorton@bassberry.com

Alonda W. McCutcheon

(615) 742-7717

amccutcheon@bassberry.com

Annie Warnock Neal

(615) 742-6517

aneal@bassberry.com

Leslie G. Sanders

(615) 742-7711

lsanders@bassberry.com

Davidson French

(615) 742-6240

dfrench@bassberry.com

Lin B. Howard

(615) 742-7927

lhoward@bassberry.com

Carolyn V. Moore

(615) 742-7944

cmoore@bassberry.com

William N. Ozier

(615) 742-6232

bozier@bassberry.com

Tim K. Garrett

(615) 742-6270

tgarrett@bassberry.com

L. Lymari Martinez

(615) 742-7903

lmartinez@bassberry.com

Michael S. Moschel

(615) 742-6297

mmoschel@bassberry.com

Justin A. Page

(615) 742-7786

jpage@bassberry.com

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315 Deaderick Street • Suite 2700 • Nashville, TN 37238-3001 • (615) 742-6200

The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103-3672 • (901) 543-5900

1700 Riverview Tower • 900 S. Gay Street • Knoxville, TN 37902 • (865) 521-6200