

# EMPLOYMENT LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## **HITECH Act Fund Recipients at Risk for Whistleblower Claims**

**March 29, 2010**

There are often "strings attached" to receiving federal funds. A significant "string" attached to recent funding for adoption and implementation of electronic health records ("EHR") creates increased exposure for whistleblower complaints.

Over the past several months, healthcare entities have begun to receive federal funds under the Health Information Technology for Economic and Clinical Health (HITECH) Act to assist in the adoption and implementation of electronic health records. These funds, provided under the federal government's stimulus package, put healthcare entities receiving HITECH Act funds at risk for employee whistleblower claims arising under the American Recovery and Reinvestment Act of 2009 ("ARRA").

### **ARRA's Extensive Whistleblower Protections**

The ARRA whistleblower protections are very broad in scope. The protections apply to employees of non-federal employers receiving funds under ARRA. Not unlike many whistleblower statutes, ARRA's provisions prohibit covered employers from discharging, demoting, or discriminating against, an employee who engages in certain protected conduct. The scope of the protected conduct, however, is quite broad. Protected conduct includes disclosing:

- 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 covered funds.

These protections are unprecedented in broadening the scope of protected conduct. Covered disclosures under ARRA include, but are not limited to, those made to Congress, an inspector general, any state or federal regulatory or law enforcement agency, a court or grand jury, a person with supervisory authority over the employee, or a person working for the employer who has authority to investigate misconduct. Unlike most other whistleblower laws, disclosures made in the ordinary course of an employee's duties are protected. In other words, an employee that mentions concerns to management about "gross mismanagement" or "waste of funds" in the routine course of performing other duties may be able to claim that he or she engaged in protected activity.

ARRA's whistleblower protections are also unique in their investigative and enforcement procedures. The claims are investigated by the inspector general (IG) of the agency which provided the ARRA funding. The IG has 180 days to investigate the complaint and submit a report of findings. Based on the IG report, the agency head must then determine whether prohibited retaliation occurred. If a violation is found, the agency head may require the employer to take affirmative action to stop the retaliation; reinstate a terminated employee with backpay; pay the employee employment benefits, compensatory damages and other "make whole" relief; and/or pay the employee's attorneys' fees and related costs. The agency head may order this relief without any sort of evidentiary hearing or administrative appeal. Furthermore, there are no caps on the damages recoverable under ARRA. If the agency head finds no violation, or if the employer refuses to comply with the agency head's order of relief, civil court action may follow.

### Impact on HITECH Act Fund Recipients

Because the HITECH Act is a provision of ARRA, non-federal employers receiving HITECH Act funds are covered by the ARRA whistleblower protections. This poses a significant and unique problem for HITECH Act fund recipients. The adoption and implementation of EHR technology is a complicated and ongoing process. A healthcare entity is likely to go through various modifications and revisions before arriving at a successful EHR system. This sort of "trial and error" scenario may make healthcare entities highly susceptible to accusations of "gross mismanagement" or "waste of covered funds" under ARRA, which obviously increases the risk of whistleblower claims. Accordingly, HITECH Act fund recipients must take action to combat this risk.

Covered entities must ensure that they abide by ARRA's requirement that a notice of ARRA whistleblower rights and remedies be posted in the workplace. Entities should also consider implementing strategies and procedures for the effective and compliant use of HITECH Act funds. Finally, it is vital for management to understand the type of employee activity that is protected and the care that must be taken in dealing with employees who engage in that activity. Thus, the development of policies and procedures to be used in the event that an employee engages in protected activity is crucial to the avoidance of whistleblower claims.

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

### Bass, Berry & Sims Labor and Employment Attorneys

**L. Lydari Cromwell**  
(615) 742-7903  
lcromwell@bassberry.com

**Robert W. Horton**  
(615) 742-7708  
rhorton@bassberry.com

**Michael S. Moschel**  
(615) 742-6297  
mmoschel@bassberry.com

**Justin A. Page**  
(615) 742-7786  
jpage@bassberry.com

**Davidson French**  
(615) 742-6240  
dfrench@bassberry.com

**Lin B. Howard**  
(615) 742-7927  
lhoward@bassberry.com

**Annie Warnock Neal**  
(615) 742-6517  
aneal@bassberry.com

**Leslie G. Sanders**  
(615) 742-7711  
lsanders@bassberry.com

**Tim K. Garrett**  
(615) 742-6270  
tgarrett@bassberry.com

**Alonda W. McCutcheon**  
(615) 742-7717  
amccutcheon@bassberry.com

**William N. Ozier**  
(615) 742-6232  
bozier@bassberry.com

*The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.*

*To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.*

150 Third Avenue South, Suite 2800 • Nashville, TN 37201 • (615) 742-6200  
The Tower at Peabody Place • 100 Peabody Place, Suite 900 • Memphis, TN 38103 • (901) 543-5900  
1700 Riverview Tower • 900 South Gay Street • Knoxville, TN 37902 • (865) 521-6200