

Stimulus Package Brings Sweeping Whistleblower Protections Affecting Employers Receiving Covered Funds

by **Allen B. Roberts** and **Frank C. Morris, Jr.**

February 2009

Private and public employers receiving funds under the recently enacted federal stimulus package may face new responsibilities and increased risks of whistleblower complaints. Knowing how new substantive and procedural requirements will affect you and how to respond appropriately will be key to compliance and averting—or managing—risks and potentially high-profile litigation.

Intended to stimulate the economy and create jobs, the American Recovery and Reinvestment Act of 2009 (“ARRA”) provides nearly \$500 billion for spending—much of it spreading to employers across diverse lines. There is particular emphasis on investment to increase economic efficiency by spurring technological advances in science and health, and investment in transportation, environmental protection and other infrastructure to provide long-term economic benefits. In addition to aiding state and local governments and assisting the unemployed and struggling families, ARRA targets certain sectors affecting an array of businesses:

- Defense
- Education
- Energy
- Environmental cleanup
- Government technology
- Healthcare
- Housing
- Hunger assistance
- Infrastructure projects
- Scientific research
- Transportation projects

In connection with the massive federal expenditures, there are safeguards against

fraud, waste and abuse. As part of its “Additional Accountability and Transparency Requirements,” ARRA includes whistleblower protections that are deeper and different from those that are familiar to many employers under the whistleblower protections, procedures and remedies administered by the Occupational Safety and Health Administration (“OSHA”) and the U.S. Department of Labor.

Detailed substantive and procedural provisions of Section 1553 encourage employee disclosures of mismanagement, waste, danger to public health or safety, abuse or unlawful activity concerning “covered funds” from a federal government contract, grant or other payment that are appropriated or made available under ARRA.

Substantive Provisions

- *Broad Definition of Employer* – The new whistleblower protections affect employers receiving covered funds as (1) a contractor, subcontractor, grantee or recipient; (2) a professional membership organization, certification or other professional body, agent or licensee of the federal government, or a person acting in the interest of an employer receiving covered funds; or (3) a state or local government with respect to covered funds and any contractor or subcontractor with respect to those covered funds.
- *Broad Scope of Subject Matter of Disclosures* – Disclosures are protected if they contain information that the employee reasonably believes is evidence of:
 - (1) the 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.
- *Broad Class of Recipients of Protected Disclosures* – Disclosures are protected if made to: the Recovery Accountability and Transparency Board, an inspector general of an agency that expends or obligates covered funds, the Comptroller General, a member of Congress, a state or federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand

jury, the head of a federal agency, or a representative of the listed persons.

- *Broad Scope of Protection* – Addressing an issue left open to construction under certain other whistleblower statutes, protected activity specifically includes disclosures made in the ordinary course of an employee’s duties.
- *Broad Scope of Prohibited Reprisals* – The definition of reprisal includes discharge, demotion and other discrimination, and it can be expected to be read coextensively with U.S. Supreme Court guidance to include any action that would dissuade a reasonable person from engaging in protected activity. If so broadly construed, such prohibited conduct may include oral or written reprimands, lateral transfers or reassignment of duties, even where there are no tangible economic consequences.

Procedural Provisions

- *Jurisdiction* – ARRA vests jurisdiction over whistleblower complaints in agencies that expend or obligate covered funds. It adopts procedures relatively familiar in federal contracting, but new to those accustomed to whistleblower procedures under such laws as Sarbanes-Oxley and 16 other statutes administered by OSHA and the U.S. Department of Labor.
- *Investigations* – Complaints are to be filed with the inspector general of the appropriate government agency having jurisdiction with respect to the covered funds. The inspector general is then responsible for conducting an investigation and preparing a report of the findings of the investigation.
- *Burdens of Proof* – A complainant carries the burden of proof by demonstrating that the protected disclosure was a “contributing factor” in the reprisal. ARRA expressly allows proof by circumstantial evidence, including the decision-maker’s knowledge of the disclosure and the timing of the reprisal relative to the disclosure. To defend successfully, the charged employer must demonstrate with clear and convincing evidence that it would have taken the action constituting the reprisal in the absence of the disclosure.
- *Determinations* – Decision-making authority resides with the head of the agency concerned with the covered funds. On the basis of the investigative report of the inspector general, the agency head is to determine whether there is sufficient basis to find a prohibited reprisal. There is no express statutory provision for an evidentiary hearing or administrative appeal, such as the procedures before the U.S. Department of Labor’s administrative law judges and its Administrative Review Board.
- *Lawsuits* – A complainant may initiate a lawsuit in a U.S. District Court, seeking a trial de novo before a jury, once administrative remedies have been exhausted by way of discontinuance of the inspector general’s investigation,

issuance of an agency head's order denying relief or passage of more than 210 days after initial submission of the complaint or an authorized extension of time.

- *Remedies* – The agency head is authorized to direct relief that includes affirmative action to abate the reprisal, reinstatement with back pay, compensatory damages, employment benefits and other terms and conditions of employment to restore the person to the position that would have prevailed had there been no reprisal, and an award of costs and expenses, with reasonable fees for attorneys and expert witnesses. There are no express caps or limits on damages, and similar relief is available if a lawsuit is brought.
- *Judicial Enforcement of Agency Action* – Where a reprisal has been found to have occurred, an agency head is authorized to bring an enforcement action in the U.S. District Court to obtain compliance with the terms of an order, together with injunctive relief, compensatory and exemplary damages and attorneys' fees and costs.
- *Judicial Review* – Any person, complainant or employer alike, adversely affected or aggrieved by an agency order may seek review of the order in the U.S. Court of Appeals for the circuit in which the reprisal is alleged to have occurred. The standard of review is the customary standard set forth in the Administrative Procedure Act, authorizing the court to decide relevant questions of law, interpret statutory provisions and determine the meaning and applicability of agency action.
- *Waiver of Rights* – Employee substantive and procedural rights and remedies may not be waived by any agreement, policy, form or condition of employment, and predispute arbitration agreements will not be valid, unless contained within a collective bargaining agreement.
- *Notice Posting* – Each employer receiving covered funds is required to post a notice of the whistleblower rights and remedies provided by ARRA.

Implications for Employers

ARRA reflects a legislative determination to treat ARRA whistleblower complaints differently than under the 17 diverse federal whistleblower laws grouped for investigation and determination by OSHA and the U.S. Department of Labor. The placement of whistleblower protections with agencies responsible for covered funds and their inspectors general is potentially significant. Agencies that expend or obligate covered funds are now charged with responsibility not only for those funds, but also for the claims of employees who allege they have suffered reprisals for blowing the whistle on gross mismanagement, gross waste, dangers to public health or safety, abuse of authority, or violations of laws, rules or regulations concerning covered funds. Apart from the forum being different from that of whistleblower laws

administered by OSHA and the U.S. Department of Labor, there are differences in timelines and opportunities to present evidence and develop defenses that employers will need to manage appropriately when met with whistleblower complaints concerning covered funds. With these changes, it remains to be seen whether employers charged with reprisals against ARRA whistleblowers will be subject to different scrutiny and accountability.

ARRA's whistleblower provisions are not exclusive. This means individuals may proceed simultaneously in multiple state or federal administrative or judicial proceedings, depending upon the underlying statutory or common law basis of each claim, including claims under state or federal whistleblower statutes and claims of wrongful discharge for violation of a clear mandate of public policy available in some states.

Employers receiving covered funds should take proactive steps now to prevent whistleblower claims under ARRA. As part of a comprehensive compliance program, it may be worthwhile to assure appropriate procedures are in place to prevent and detect mismanagement, fraud, waste, situations creating public danger, abuse or unlawful activity concerning covered funds. Broadening existing hotline or other reporting channels and complaint procedures to cover matters under ARRA may be in order. ARRA also may occasion review and updating of policies and related orientation, training and monitoring programs, with specific regard to employee whistleblower issues that accompany the receipt of covered funds.

For more information about this Client Alert, please contact:

Allen B. Roberts
New York
(212) 351-3780
Aroberts@ebglaw.com

Frank C. Morris, Jr.
Washington, DC
(202) 861-1880
Fmorris@ebglaw.com

* * *

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

© 2009 Epstein Becker & Green, P.C.

ATLANTA • BOSTON • CHICAGO • HOUSTON • LOS ANGELES • MIAMI
NEW YORK • NEWARK • SAN FRANCISCO • STAMFORD • WASHINGTON, DC

Attorney Advertising

www.ebglaw.com

