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Health Care Sector Experience With Compliance: A Model for Entities Receiving Covered Funds Under ARRA

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The American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5) includes enhanced whistleblower processes and protections that are designed to encourage employee disclosure of malfeasance with respect to a broad range of recipients of ''covered funds'' appropriated or made available under ARRA. These new whistleblower protections are designed to provide another layer of protection against the mismanagement, fraud, waste and abuse of Federal funding.

For certain industries that historically have received payment from Federal monies, such as the health care industry, ARRA imposes additional Federal statutory requirements and exposes them to familiar risks and consequences of being a recipient, directly or indirectly, of government funding as a result of submitting claims for items or services covered by Federal health care programs such as Medicare or Medicaid.

Employers in other industries will need to prepare for the risks and consequences associated with the new level of accountability, transparency, government monitoring and greater exposure to whistleblower, or *qui tam*, lawsuits resulting from ARRA and the funds available under it.

ARRA targets certain sectors affecting an array of businesses including defense, education, energy, environmental cleanup, government technology, health care, housing, hunger assistance, infrastructure projects, scientific research and transportation projects.

As part of its ''Additional Accountability and Transparency Requirements,'' detailed substantive and procedural provisions of Section 1553 encourage employee disclosures of mismanagement, waste, danger to public safety or health, abuse or unlawful activity concerning ''covered funds'' from a Federal government contract, grant or other payment that are appropriated or made available under ARRA.

ARRA includes a broad definition of employer. Specifically, 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.

Allen B. Roberts and Frank C. Morris Jr. of Epstein Becker & Green PC published a Client Alert *in February addressing the substantive and procedural whistleblower protections under the American Recovery and Reinvestment Act of 2009. This article adapts many sections of the Client Alert and provides insight into how affected industries can look to the health care sector for guidance on complying with federal oversight measures. Wendy Goldstein can be reached in New York at (212) 351-3737 or wgoldstein@ebglaw.com; Roberts can be reached in New York at (212) 351-3780 or aroberts@ebglaw.com; Daniel Gospin can be reached in Newark, N.J., at (973) 639-8545 or dgospin@ebglaw.com; and Morris can be reached in Washington at (202) 861-1880 or fmorris@ebglaw.com.*

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Further, ARRA covers a broad scope of subject matter of disclosures. Disclosures are protected if they contain information that the employee reasonably believes is evidence of: (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.

A broad class of recipients of protected disclosures exists under ARRA. 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. ARRA specifically protects disclosures made in the ordinary course of an employee's duties.

Further, 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.

Numerous Procedural Provisions. ARRA includes numerous procedural provisions. ARRA vests jurisdiction over whistleblower complaints in agencies that expend or obligate covered funds and 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 the United States Department of Labor and the Occupational Safety and Health Administration (OSHA).

Complaints under ARRA are to be filed with the inspector general of the appropriate government agency having jurisdiction with respect to the covered funds, who is then responsible for conducting an investigation and preparing a report of the findings of the investigation. 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. Further, 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, analogous to procedures before the Department of Labor's administrative law judges and its Administrative Review Board.

A complainant may initiate a lawsuit in a United States 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.

Administrative Agency Proceedings. Relief available in administrative agency proceedings or in court proceedings 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, including reasonable fees for attorneys and expert witnesses. There are no express caps or limits on damages.

An agency head is authorized to bring an enforcement action in the United States District Court where a reprisal was found to have occurred to obtain compliance with the terms of an order, together with injunctive relief, compensatory and exemplary damages and attorneys' fees and costs.

Any person—complainant or employer, alike—adversely affected or aggrieved by an agency order may seek review of the order in the United States Court of Appeals for the circuit in which the reprisal is alleged to have occurred. The standard of appellate 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.

ARRA confers additional employee 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. Each employer receiving covered funds is required to post a notice of the whistleblower rights and remedies provided by ARRA.

The placement of whistleblower protections with agencies responsible for covered funds and their inspectors general is potentially significant. Responsibility for investigations, determinations, and enforcement now resides with the very agencies charged with controlling the use of those funds. Many who may not have understood the wisdom of placing jurisdiction for whistleblowing concerning such matters as fraud on shareholders with the Department of Labor and OSHA now may see a different emphasis.

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, there are differences in timelines and opportunities to present evidence and develop defenses that employers will need to

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manage appropriately when met with whistleblower complaints concerning covered funds.

Non-Exclusive Provisions. 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 to prevent whistleblower claims under ARRA. As part of a comprehensive compliance program, it will be critical for employers to assure the existence of appropriate procedures to prevent and detect mismanagement, fraud, waste, situations creating public danger, abuse or unlawful activity concerning covered funds.

Health Care Industry. The health care industry is one business sector that will be better prepared to effectively manage covered funds, and also act as a model for other business sectors less familiar with the development of compliance initiatives necessary to internally prevent, uncover and address potential fraud, waste and abuse.

Historically, the health care industry has been the subject of significant government oversight, scrutiny and enforcement activity. In 2008, the United States recovered approximately $1.3 billion in settlements and judgments based on allegations of fraud against the Federal government, approximately $1.12 billion of which were related to health care.[1]

High levels of government oversight exist, in part, because many businesses involved in the health care sector receive, directly or indirectly funds from the Federal and state health care programs such as Medicare and Medicaid.

Much of the government enforcement activity that has led to large recoveries of Federal health care program funds is due, in large part, to actions commenced by whistleblowers, on behalf of the Federal government under the Federal Civil False Claims Act (FCA).

FCA's General Prohibitions. The FCA generally prohibits a person from ''knowingly'' submitting claims or making a false record or statement to secure payment of a false or fraudulent claim from the Federal government, or to conceal, avoid, or decrease an obligation to pay or transmit property to the Federal government.[2]

Violators are subject to a civil penalty for each claim of not less than $5,500 and not more than $11,000, plus three times the amount of damages sustained by the Federal government (i.e., treble damages). Enforcement of the FCA is strengthened by its powerful *qui tam* provisions, which permit private whistleblowers to retain fifteen to thirty percent of the proceeds of the suit.

Settlements often include a contractual obligation known as a Corporate Integrity Agreement (CIA) with the Department of Health and Human Services Office of Inspector General (OIG) imposing corporate compliance obligations on the settling party.

Entities in the health care sector also have been subject to state enforcement activity due, in part, to the Deficit Reduction Act of 2005 (DRA) (Pub. L. No. 109-171) that contained several provisions intended to bolster enforcement of Medicaid fraud and abuse.

Specifically, the DRA provides a financial incentive for states to enact false claims acts that substantially mirror the requirements of the FCA and further encourage *qui tam* actions and state intervention in such actions. Under the DRA, if a state brings an action under its state false claims law against a Medicaid provider, then the state will be entitled to receive ten percent of the Federal government's share of any amounts recovered under a state action brought under an approved state false claims law.[3] Since the DRA was signed into law on Feb. 8, 2006, 20 states have enacted false claims acts, which were approved by the OIG.

One result of the heighted government focus on the health care industry is the sector's general proactive approach to addressing the need for an effective corporate compliance program.

The health care industry relies on numerous sources for compliance guidances including CIAs, voluntary model corporate compliance guidances issued by the OIG that address the elements of an effective corporate compliance program as set forth in the United States Sentencing Guidelines,[4] OIG public resources for corporate responsibility and corporate compliance, including the role of Board or Directors in corporate compliance[5] and voluntary codes promulgated by industry trade associations. Further, the health care industry's experience with transparency, especially with state level reporting of product pricing, financial relationships with health care professionals, conflicts of interest and research results, provides practical operational experience.

Recipients of covered funds should identify whether such counterpart compliance resources exist for their respective industries while determining whether sources from other business sectors can provide useful guidance. The health care industry experience will serve as a useful model for industries as they begin to consider whether they will become recipients of covered funds and how to manage the risks associated therewith.

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[1] Nov. 10, 2008, Department of Justice press release ''More Than $1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008,'' available at http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html.

[2] 31 U.S.C. § 3729 *et seq*.

[3] Deficit Reduction Act, Pub. L. 109-171, §§ 6031-33 (2006) codified at 42 U.S.C. § 1396h(a).

[4] U.S. Sentencing Guidelines Manual § 8B2.1(b)(1)-(7) (2007).

[5] See http://oig.hhs.gov/fraud/complianceguidance.asp.