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New Expansive Whistleblower Protection Contained In American Recovery and Reinvestment Act of 2009

On February 17, 2009, President Obama signed into law the largest economic stimulus bill since the Great Depression – The American Recovery and Reinvestment Act of 2009 (the "Act"). While a number of the Act's provisions have garnered a lot of attention, a less well-known provision (Section 1553) expands significantly the arsenal of claims available to disaffected employees of businesses receiving stimulus funds. While modeled after other whistleblower statutes enforced by the Department of Labor, the Act contains various pro-employee provisions not generally found in other such statues.

The Act Broadly Protects Employees of Businesses Receiving Stimulus Funds

The Act's whistleblower provision applies to a broad range of employers that receive stimulus funds under the Act including any: (i) "contractor, subcontractor, grantee, or recipient" of stimulus funds; (ii) "professional membership organization, certification or other professional body" receiving stimulus funds; (iii) "licensee of the Federal government" receiving stimulus funds; (iv) "person acting directly or indirectly in the interest of an employer receiving covered funds"; and (v) any contractor or subcontractor of the state or local government receiving stimulus funds. The Act prohibits any such employer from retaliating against an employee who discloses information that the employee reasonably believes evidences:

- gross mismanagement of an agency contract or grant relating to stimulus funds;
- gross waste of stimulus funds;
- substantial and specific danger to public health related to the implementation or use of the stimulus funds;
- an abuse of authority related to the implementation or use of stimulus funds; or
- a violation of law, rule or regulation related to an agency contract or grant, awarded or issued relating to stimulus funds.

Notably, unlike the anti-retaliation provisions found in Sarbanes-Oxley ("SOX") (which protect only the reporting of fraud or violation of SEC regulations), the Act applies to complaints of "gross mismanagement", "gross waste" or an "abuse of authority." Thus, the sort of employee concerns that can bring the employee within the Act's coverage are exceedingly vague and therefore present the potential for significant abuse.

Employee disclosures to supervisors, state or federal regulatory or law enforcement agencies, members of congress, courts, grand juries, or an inspector general (discussed further below) are protected.

Employee-Friendly Process, Remedies and Burdens of Proof

The Act requires employees who believes that they have been subjected to a prohibited reprisal to submit a complaint to "the appropriate inspector general." The Inspector General Act of 1978 authorized the appointment of inspectors general to various federal agencies. The Act allocates funds for a variety of these federal agencies to disburse (*e.g.,* Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and

Urban Development, Interior, Justice, Labor, Transportation, Veterans Affairs, Environmental Protection, General Services Administration, NASA, National Science Foundation, Small Business Administration, Social Security Administration, and Corporation for National and Community Service). Therefore, it is the inspector generals of these agencies to whom complaints should be made. Unless the complaint is "frivolous, does not relate to the covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve such complaint", the inspector general will investigate the claim and submit a written report within 180 days to the employee, employer, the head of the appropriate agency and the Recovery Accountability and Transparency Board (a body established to "coordinate and conduct oversight of covered funds to prevent fraud, waste, and abuse.")

Within 30 days of receiving the inspector general's investigative findings, the head of the agency shall determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, employment benefits, compensatory damages, and attorney fees. If an employer does not obey an agency's order of relief, the agency may file an action in federal court to enforce the order on behalf of a prevailing employee. (Notably, this provision may be in response to an enforcement problem under SOX recently elucidated in *Bechtel v. U.S. Dep't. of Labor*, 448 F.3d 469 (2d Cir. 2006) – a case arising under SOX in which the Court of Appeals held that § 806 of that statute did not confer power on the district court to enforce a preliminary order reinstating Bechtel). If the agency prevails in the court action, the federal court may award exemplary damages to the employee. (Notably, exemplary damages are not available under SOX). If an agency head has denied relief in whole or in part or has failed to issue a decision within 210 days of the filing of a complaint, the complainant can bring a *de novo* action in federal court, which shall be tried by a jury at the request of either party.

The Act sets forth an extremely employee-friendly burden of proof compared to other federal anti-retaliation statutes. In the first instance, to prevail in a whistleblower claim under the Act, an employee need only demonstrate that the protected conduct was a "contributing factor" to the reprisal. The Act specifically provides that an employee can meet the "contributing factor" standard by demonstrating that "the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal" or that the decision-maker knew of the protected disclosure. By contrast, under other federal anti-retaliatory statutes such as the provision included within Title VII, a plaintiff-employee must establish that the impermissible consideration was a "determining" or "significant" factor in the employer's decision, which arguably represents a higher burden of proof. Even those whistleblower statutes – such as the one included in SOX, similarly requiring proof only that retaliation was a "contributing factor" – do not go so far as to specify that timing alone or knowledge of the protected activity by the decision-maker alone is sufficient to establish the existence of a "contributing factor."

Once the employee meets this burden, an employer can avoid liability by demonstrating by "clear and convincing evidence" that it would have taken the same action in the absence of the employee engaging in protected conduct. This high burden, although like the standard in SOX, is in sharp contrast to that under Title VII's *McDonnell Douglas* framework whereby an employer need only articulate a legitimate, non-discriminatory reason in order to shift the burden of proving retaliation back to the employee.

Other Key Provisions

Employers should be cognizant of two other key elements in the Act's whistleblower protection provision. First, the Act requires employers to post a "notice of the rights and remedies provided under this section." The Act provides no further guidance regarding this posting and does not expressly empower the Department of Labor or anyone else to develop the posting. In the absence of any further refinement through regulations, an employer may be best served by simply posting a copy of Section 1553 in its entirety. Second, the Act invalidates pre-dispute arbitration agreements with respect to claims brought under the Act. The Act does exempt any "disputes arising under [a] collective bargaining agreement" from its anti-arbitration provision.

Conclusion

Because of the Act's enormous scope and employee-friendly whistleblower protection provision, any employers who receive direct or indirect stimulus funds must be extremely careful in managing employees who have engaged in protected activity, even those whose complaints are viewed as specious. Employers also must be careful to abide by the notice-posting requirement described above.

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