

Taking Stimulus Money Requires Following Rules

The American Recovery and Reinvestment Act of 2009 (ARRA) is infusing billions of dollars into the private sector. To ensure that the monies are actually used for their intended purpose, Congress added a powerful whistleblower provision into the law.

The provision protects employees who report suspected employer misuse of the stimulus monies and allows them to sue for damages and job loss if they suffer retaliation for reporting perceived abuse of the federal monies.

If your business anticipates receiving stimulus monies or will be sub-contracting with an entity that does so, you are susceptible to one of these new whistleblower claims. All managers in the organization should be educated about these new requirements. Key provisions are summarized below.

PROHIBITED EMPLOYER CONDUCT

ARRA prohibits private sector, state, and local government employers from retaliating against any employee who discloses information which the employee reasonably believes is evidence of any one of the following:

- (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 (this includes the competition for a contract or negotiation of a contract) or grant, awarded or issued relating to covered stimulus funds.

The reach of the new whistleblower law is very broad. It not only applies to entities directly receiving stimulus monies, but also to certain entities that do business with such entities. The new law applies to any employer who is:

- (1) the contractor, subcontractor, grantee, or recipient of the covered funds;
- (2) any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds; or
- (3) a State or local government receiving the funds and any contractor or subcontractor of that governmental entity.

The law permits (and encourages) an employee who suspects misuse of stimulus monies to report this information to any one of the following entities: the Recovery Accountability and



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Transparency Board, an Inspector General of the agency disbursing the covered funds, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person who has supervisory authority over the employee or who is authorized by the employer to investigate, discover, or terminate misconduct, a court or grand jury, the head of a Federal agency, or their representatives.

COMPLAINT PROCEDURES

Once a retaliation complaint is lodged, an investigation will follow. The results will be given to the employee, the individual's employer, the head of the agency responsible for the covered funds, and the Recovery Accountability and Transparency Board. If the agency head determines that the Inspector General's report supports a finding of whistleblower retaliation, the agency may order reinstatement of the employee, as well as back pay, compensatory damages, employment benefits, and attorneys' fees and costs reasonably incurred. Where the inspector general decides not to conduct or continue an investigation or if the agency denies relief or fails to issue an order within 210 days after initial submission of the complaint, the employee may nevertheless file a lawsuit against the employer in federal court. This is similar to the process long used by the EEOC.

PROVING THE CLAIM

The employee must convince the agency that his or her whistleblower disclosure was a "contributing factor" in the alleged retaliation. The employee can meet this burden by showing that the decision maker charged with the retaliation knew of the disclosure or that there was a close temporal proximity between the disclosure and the retaliation.

To defeat the claim, the employer must demonstrate by clear and convincing evidence, that it would have taken the same action even if the protected disclosure had not occurred.

If an employer fails to comply with the agency's decision, the agency can bring suit in federal court to enforce the order. The court is empowered to award the employee with the full array of employment damages, including injunctive relief, compensatory and punitive damages,

attorneys' fees and court costs.

NEW EMPLOYER NOTICE

The new law has a posting requirement. Employers receiving covered funds are required to post a notice in the workplace about these rights and remedies. The government is in the process of creating this new notice.

Employers should also consider adding this new protection to employee handbooks and other personnel policy and procedure manuals. In the event a claim is lodged, the employer will want to have a policy like this to point to as evidence of the business' commitment to follow the law, much like an EEO policy statement.

ALTERNATIVE DISPUTE PROGRAMS IMPACTED

The new law contains a provision which explicitly prohibits employers from including these new claims under an existing or newly enacted employer program for alternative dispute resolution.

These rights and remedies cannot be waived by agreement, policy, form, or condition of employment, including by any pre-dispute arbitration agreement. The only exception is for unionized employees covered by a union contract which channels disputes to arbitration before a labor arbitrator.

WHAT SHOULD EMPLOYERS BE DOING?

It is recommended that companies and governmental entities who receive covered funds review existing policies and procedures and, if necessary, implement new ones, to ensure that they have:

- (1) appropriate auditing mechanisms to track and monitor the use of the stimulus funds;
- (2) an anti-retaliation policy (add this subject to an existing one);
- (3) an internal complaint procedure for reporting and investigating evidence of misuse, and
- (4) a training program to familiarize all members of management and all supervisory employees about these new whistleblower provisions. This training should emphasize the importance of proper internal handling of such complaints and how the supervisor's behavior can create liability for the business when a complaint of this nature is mishandled. Ignorance of the law is no defense.

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