MORRISON | FOERSTER

Legal Updates & News

Legal Updates

Sweeping New Whistleblower Law May Cover All Employers Who Receive Stimulus Funds

February 2009
by Daniel P. Westman, Vanessa R. Waldref

Related Practices:

- Corporate
- Employment and Labor
- Financial Services Law
- Government Contracts
- Public Companies & Corporate Governance

The economic stimulus bill (titled the American Recovery and Reinvestment Act of 2009, or "the Act") was passed by Congress on February 12, 2009 and signed into law by President Obama on February 17, 2009. With little public notice, the Act adopted new whistleblower protections for employees of private employers and state and local governments who disclose waste, fraud, gross mismanagement, or a violation of law related to stimulus funds. Employers who receive funds made available by the stimulus bill should become familiar with the Act's broad whistleblower protections, for the purpose of minimizing their exposure to whistleblower claims.

Covered Employers

The Act's whistleblower provisions cover "non-Federal employers" who receive "covered funds." Who is included within the definition of a "non-Federal employer" is not clear. The federal government and its agencies are clearly excluded from that definition. However, given the overall intent of the Act to ensure that stimulus funds are not wasted, prudent employers should assume that the whistleblower provisions apply to any employer who receives a contract, grant, or other payment appropriated or made available by the stimulus bill, including private employers, federal government contractors and subcontractors, and state and local governments and their contractors and subcontractors.

Protected Conduct Includes Internal and External Disclosures Relating to Stimulus Funds

Protected conduct under the Act's whistleblower provisions includes a disclosure of information by an aggrieved employee to a person with supervisory authority over the employee, a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a federal agency, or an inspector general. The employee must reasonably believe the disclosed information is evidence of:

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

Although the Act does not define "reasonable belief," other whistleblower protection laws, such as Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, apply a standard of objective reasonableness, which evaluates the reasonableness of a belief based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.

Unlike analogous whistleblower laws that extend to private employers, the Act's whistleblower provisions expressly cover internal disclosures, including disclosures made by employees in the ordinary course of performing their job duties.

Historically, federal and state whistleblower laws have been written to distinguish between the types of complaints protected in the government sector and those protected in the private sector. Typically, whistleblower laws protecting government sector employees were broadly written to protect concerns about mismanagement, waste, and abuse with respect to public funds. In contrast, whistleblower laws protecting private sector employees were more narrowly drawn to protect only concerns about public health or safety, or violations of law. Because the Act involves the provision of public funds to employers in both the government and private sectors, the Act protects both the broad subjects of protected complaints usually found in government sector whistleblower laws, as well as the narrower subjects of protected complaints enumerated in most private sector whistleblower laws. Accordingly, the Act greatly expands the subject matters of protected complaints in private sector employment to include the categories of mismanagement, waste, and abuse with respect to stimulus funds.

Employers Saddled with High Burden of Proof

The Act prohibits a broad range of retaliatory employment actions, including termination, demotion, or any other material acts. The U.S. Supreme Court's decision that defines retaliation under Title VII to include any act that would dissuade a reasonable person from engaging in protected conduct may cause the Act's definition of retaliatory conduct to be broadly construed. *See Burlington N. & Santa Fe R.R. Co. v. White*, 548 U.S. 53 (2006).

To prevail in a whistleblower action, an aggrieved employee must establish by a preponderance of the evidence that the protected conduct was a "contributing factor" in the reprisal. The "contributing factor" standard is lower than the "substantial factor" standard articulated in other employment laws. The Act clarifies that the "contributing factor" element can be proved through temporal proximity or by demonstrating that the decision-maker knew of the protected disclosure. An employer can avoid liability only by demonstrating by "clear and convincing" evidence that it would have taken the same action in the absence of the employee engaging in the protected conduct. The "clear and convincing" standard is much higher than the preponderance-of-the-evidence standard.

Administrative Exhaustion Requirement and Private Right of Action

Actions brought under the stimulus bill's whistleblower provisions must be filed with the Inspector General of the appropriate government agency. Unless the inspector general determines that the action is frivolous, does not relate to covered funds, or has been resolved in another federal or state administrative proceeding, the inspector general must conduct an investigation and make a determination on the merits of the whistleblower retaliation claim no later than 180 days after receipt of the complaint. Within 30 days of receiving an 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, compensatory damages, and attorneys' fees, and can require the employer to engage in unspecified "affirmative action to abate the violation." If an agency files an action in federal court to enforce an order of relief for a prevailing employee, the court may also award exemplary damages.

If an agency head has denied relief in whole or in part or has failed to issue a decision within 210 days of the employee's filing of a complaint, the complainant may bring a *de novo* action in federal court, and either party may demand a jury trial. The Act expressly states that predispute arbitration agreements do not apply to these whistleblower provisions.

Employer Best Practices

In addition to the whistleblower provisions in the stimulus bill, employers engaged in government contracts should be aware of potential whistleblower liability under the False Claims Act, 31 U.S.C. § 3730 (h), and analogous state legislation, that prohibits retaliation against an employee who has taken actions "in furtherance of" a False Claims Act enforcement action. In addition, employees of private employers may have a state law claim for wrongful discharge in violation of public policy, which in many states is a tort claim that provides access to a jury trial and punitive damages. Employers should implement and consistently follow procedures that document the legitimate, non-discriminatory, and non-retaliatory reasons for employment actions to avoid costly whistleblower litigation.