COVID Whistleblower Protection Act Would Provide Robust Protection for Disclosures About Pandemic-Related Appropriations

Article By
Jason Zuckerman
Zuckerman Law
Whistleblower Protection Law Blog

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The multi-trillion-dollar federal spending to address COVID-19, including the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) and the Paycheck Protection Program Flexibility Act of 2020 (PPP) create a multitude of opportunities for fraud. And indeed the SEC and DOJ recently initiated civil and criminal proceedings to combat COVID-19 related fraud. See Fighting COVID-19-Related Financial Fraud (SEC) and Combatting COVID-19 Fraud (DOJ). To protect whistleblowers that courageously come forward to report waste, fraud, and abuse in pandemic-related appropriations, Senator Kamala Harris and Representatives Speier and Raskin introduced the COVID–19 Whistleblower Protection Act. This legislation is critical to safeguard the massive government spending to address COVID-19.

As discussed in a summary of the bill issued by the sponsors,

The multi-trillion dollar COVID-19 relief effort is unprecedented in our nation's history and Congress must ensure that robust accountability measures are put in place in order to guard against waste, fraud, and abuse. No one is better positioned to observe and report the misuse of these critical dollars than the women and men who work for entities that
receive COVID-19 relief funds—from government contractors to frontline workers. Unfortunately, all too often employees who come forward to report wrongdoing experience retaliation.

Ensuring adequate whistleblower protections for private workers managing pandemic relief funds will ensure that the federal investment serves its intended purpose rather than line the pockets of profiteers or fuel dangerous workplace practices. It’s our best option for viable, desperately needed oversight. That’s why Senator Kamala D. Harris (D-CA) and Representatives Jackie Speier (D-CA) and Jamie Raskin (D-MD) have introduced legislation to establish strong whistleblower protections for the employees of entities that receive federal COVID-19 relief funds.


Protected Whistleblowing

The CWPA would protect a broad range of whistleblower disclosures, including disclosing, being perceived as disclosing, or preparing to disclose to an officer or entity information that the employee, former employee, or individual seeking employment reasonably believes would require the employee to violate this Act, or that the employee, former employee, or individual seeking employment reasonably believes is evidence of misconduct that violates, obstructs, or undermines any statutes, rules, or regulations with respect to any Coronavirus pandemic-related program, project, or activity, including—

(A) gross mismanagement of an agency contract, subcontract, grant, or subgrant relating to covered funds;

(B) a gross waste of covered funds;

(C) a substantial and specific danger to public health or safety;

(D) an abuse of authority related to the distribution, implementation, or use of covered funds, including conflict of interest or partiality; and

(E) a violation of any statute, rule, or regulation related to an agency contract, subcontract (including the competition for or negotiation of a contract or subcontract), grant, or subgrant, awarded or issued relating to covered funds.

Prohibited Retaliation

The bill would bar a wide range of retaliatory acts, including “discharging, demoting, blacklisting, or acting or failing to take an action in a manner prejudicial against, or otherwise discriminating against in any way (including in the hiring process and including by the threat of any such action or inaction) a protected individual.” A whistleblower suffering reprisal for engaging in CWPA-protected
conduct could bring a complaint at the U.S. Department of Labor within 3 years of learning of the alleged reprisal.

**Remedies**

A prevailing whistleblower would be entitled to make-whole relief, including:

- reinstatement;
- double back pay with interest;
- uncapped compensatory damages; and
- attorneys’ fees, litigation costs, and expert witness fees.

In addition, an employer that is found to have violated the CWPA could be required to pay a monetary fine in an amount determined by the head of the agency or a court of competent jurisdiction.

**Proving a Violation**

The CWPA would apply the legal burdens of proof employed in Whistleblower Protection Act individual right of action appeals. An employee would establish causation by proving that the official taking the personnel action knew of the disclosure and the personnel action occurred within a period of time where a reasonable person may conclude that the disclosure was a contributing factor in the personnel action.

The employer would be able to avoid liability only if it were to prove by clear and convincing evidence that it would have taken the same personnel action in the absence of the employee's protected whistleblowing. To determine whether an employer meets its burden via clear and convincing evidence, judges evaluate (1) the strength of the employer's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision; and (3) whether the employer takes similar actions against similarly-situated employees who are not whistleblowers.

**Adjudication of CWPA Claims**

A CWPA claim would be filed initially with OSHA, which would investigate the claim. If OSHA were to determine that there is reasonable cause to believe that a violation occurred, OSHA would order relief, including reinstatement of the whistleblower.

Either party would be able to appeal OSHA’s determination by requesting a de novo hearing before the DOL Office of Administrative Law Judges (OALJ), but an employer’s objection to an order of preliminary relief would not stay the order of reinstatement. The whistleblower would have the option to remove a CWPA retaliation claim to federal court and try the case before a jury 210 days after filing the claim at the DOL.

CWPA retaliation claims would be exempt from mandatory arbitration and the
statute would bar employers from enforcing non-disclosure agreements or other restrictions that impede whistleblowing.

**Prohibition Against SLAPP Suits**

The CWPA contains a critical provision that would bar employers from bringing SLAPP suits to dissuade whistleblowers from pursuing CWPA retaliation claims. In particular, the CWPA provides: “Notwithstanding any other provision of law, an individual shall be immune from civil and criminal liability with respect to a disclosure by the individual if the individual would be protected from reprisal under subsection (a) for making the disclosure. The individual shall bear the burden of proving that the individual would be protected from reprisal under subsection (a) for making the disclosure.”

**Purpose of the CWPA**

A press release announcing the introduction of the CWPA expresses the intent of the sponsors:

“The American people must be able to trust that pandemic relief funds are providing much-needed assistance to the American people,” said Senator Harris. “Those working to help manage these funds have an obligation to speak truth when they see wrongdoing, and deserve to be protected when they do. I am proud to introduce the COVID-19 Whistleblower Protection Act—this critical legislation ensures relief funds are used for their intended purpose, and not abused by corporate executives.”

“Whistleblowers are truth tellers. They have moral compasses and their conviction saves American taxpayer billions of dollars each year. Frontline workers have been the true heroes of this pandemic, and we must protect those who have the courage to come forward to uncover waste, fraud, and abuse. I am proud to introduce the COVID-19 Whistleblower Protection Act to ensure employees who come forward to report wrongdoing related to the pandemic can do so with confidence that the law is on their side and the recognition they deserve for their grit and fortitude,” said Congresswoman Jackie Speier, co-chair of the of the bipartisan Whistleblower Protection Caucus.

“As the COVID-19 pandemic devastates lives and livelihoods across the nation, our people desperately need the financial aid provided by the CARES Act and other pandemic response bills,” said Representative Raskin. “We cannot afford to have these precious relief dollars swept up by scammers, conmen and cheats. We must give real protection to whistleblowers who are brave enough to speak out when they see our tax dollars being misused or stolen. I’m proud to join my colleagues in introducing this legislation so we can tell potential whistleblowers we have their backs when they bravely speak up for America’s taxpayers and all those so badly hurt by COVID-19.”

The CWPA is endorsed by American Civil Liberties Union, ACORN 8, Government Accountability Project, National Whistleblower Center, Public Citizen, Public