THE
NATIONAL LAW REVIEW

# Federal Stimulus Law Includes New Whistleblower Protections

Sills Cummis & Gross P.C.
Article By
Sills Cummis & Gross
Sills Cummis & Gross P.C.

- Labor & Employment
- Civil Rights

- All States

Sunday, May 17, 2009

On February 17, 2009, President Barack Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Act"). While the primary purpose of the Act is to stimulate the American economy in response to the economic downturn, employers that receive funds under the Act should also be aware that it contains expansive new whistleblower protections for employees.

**Coverage**

The Act's whistleblower provisions apply to the employees of "any non-Federal employer" that receives "covered funds" under the Act. The Act defines the term "covered funds" as "any contract, grant, or other payment received by any non-Federal employer if (A) the Federal Government provides any portion of the money or property that is provided, requested, or demanded; and (B) at least some of the funds are appropriated or otherwise made available by this Act."

Given this definition, the Act's whistleblower provisions appear to apply not only to direct recipients of stimulus funds, but also to employers that contract with those recipients and, as a result, indirectly receive such funds.

**Protected Conduct**

The Act bars a covered employer from discharging, demoting, or otherwise discriminating against an employee "as a reprisal for disclosing" information that the employee "reasonably believes" evidences: "(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."

The Act protects employees who make this disclosure to the Recovery Accountability and Transparency Board established by the Act, "an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, ... a court or grand jury, [or] the head of a Federal agency, or their representatives." Employees are also protected if they make the disclosure "in the ordinary course of [their] duties," or if they report their allegations to anyone "with supervisory authority over" them at work or to anyone "working for the employer who has the authority to investigate, discover, or terminate misconduct."

**Establishing Reprisal**

An employee establishes "reprisal" under the Act by demonstrating that his or her disclosure was a "contributing factor" in an employer's subsequent adverse action. The Act expressly states that an employee may satisfy this burden by presenting evidence: (1) that the person "undertaking the reprisal knew of the disclosure"; or (2) that the "reprisal" occurred within a sufficiently short period of time after the disclosure "such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal." An employer may rebut this evidence by presenting "clear and convincing" evidence that the employer "would have taken the action constituting the reprisal in the absence of the disclosure."

**Waiver and Releases**

The Act provides that its whistleblower protections "may not be waived by any agreement, policy, form, or condition of employment, including by any predispute arbitration agreement." The Act further provides, "no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of a dispute arising under this section." Therefore, whistleblower claims under the Act cannot be waived in a release or separation agreement and pre-dispute contractual provisions requiring an employee to arbitrate claims under the Act are unenforceable (except if they are contained in a collective bargaining agreement).

**Filing a Claim**

In order to pursue a claim under the Act, an employee must first file a complaint with an inspector general of the government agency that "awarded the contract or issued the grant" at issue. The inspector general must initiate an investigation unless he or she "determines that the complaint is frivolous, does not relate to covered funds," or is already the subject of another judicial or administrative proceeding. After the investigation, the inspector general must issue a report setting forth the results.

The agency may then deny relief or take one or more of the following actions: (1) order the employer to cease the reprisal; (2) order reinstatement of the employee to the position he or she held before the reprisal, with "the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person" had the reprisal not

occurred; and/or (3) order the employer to “pay the [employee] an amount equal to the aggregate amount of all costs and expenses (including attorneys’ fees and expert witnesses’ fees) that were reasonably incurred by the [employee] for, or in connection with, bringing the complaint regarding the reprisal.”

If the agency denies relief or does not timely issue a decision, the employee may file a claim in federal district court. The Act authorizes district courts to grant injunctive relief, and award compensatory and exemplary damages as well as attorneys’ fees and costs.

**Complying with the Act**

The Act requires employers receiving covered funds to post a notice regarding the rights and remedies provided by the whistleblower provisions of the Act. Such employers should also update their policies in light of the new employee protections. They should investigate promptly any allegation regarding the misuse or mismanagement of the funds. In addition, employers should remain mindful of state and local laws, which may provide employees with additional whistleblower protections.