

CLIENT
Alert

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Client Alert—Government Contractors

Promising to “stimulate” further scrutiny and prosecution of public and private government contractors, Congress enacted the American Recovery and Reinvestment Act of 2009 (“ARRA”) on February 17, 2009. Among other things, ARRA creates new whistleblower provisions for employers receiving funds from ARRA (commonly known as the economic stimulus package).¹ ARRA follows last year’s regulatory crackdown on procurement fraud and represents yet another legal risk which government contractors should analyze and take steps to mitigate.

Specifically, ARRA:

- Creates a new cause of action for any employee who alleges he or she was subject to reprisal for “whistleblowing” about gross mismanagement or waste of stimulus funds made available by ARRA.
- Protects the employee from reprisal for disclosures to a broad group of governmental authorities or to any of the employee’s supervisors.
- Requires an employer violating the whistleblower protections to pay compensatory damages, including back pay and all costs and expenses, including attorneys’ fees, and to reinstate the employee to his or her prior position.
- Supplements last year’s new federal regulations on procurement fraud which require government contractors to—in a marked change from existing law—affirmatively disclose to the relevant agency’s inspector general all “credible evidence” of a violation of federal law involving (among other things) fraud, conflict of interest, bribery, gratuities or a violation of the civil False Claims Act.²

¹ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 297-302 (2009).

² See 73 Fed. Reg. 67,064 (Nov. 12, 2008); National Law Journal, March 9, 2009.



ARRA Whistleblower Provisions for Government Contractors

Contractors and their compliance counsel should take note of the following principal requirements and key terms contained in ARRA's whistleblower provisions:

Covered Parties

The new protections apply to all private contractors, state and local governments, and other non-federal employers that receive "covered funds." Covered funds include any contract, grant, or other payment which in whole or in part was appropriated or made available by the "stimulus package." 1223 Stat. 302.

Scope of Protected Conduct

ARRA protects employees of "non-Federal employers"³ from retaliation for disclosing information which the employee reasonably believes constitutes evidence of:

- Gross mismanagement of an agency contract or grant relating to covered funds;
- Gross waste of covered funds;
- A substantial and specific danger to the public health or safety related to the implementation or use of covered funds;
- An abuse of authority related to the implementation or use of covered funds;
- 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.

Employees may submit such protected information to a broad range of entities, including the following: the Recovery Accountability and Transparency Board; an inspector general of an agency that expends or obligates covered funds; the Comptroller General; a member of Congress; a state or federal regulatory or law enforcement agency; a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); a court or grand jury; the head of a federal agency; or a representative of the listed persons and entities. Unlike many other

³ "(4) The term 'non-Federal employer'--(A) means any employer--(i) with respect to covered funds--(I) the contractor, subcontractor, grantee, or recipient, as the case may be, if the contractor, subcontractor, grantee, or recipient is an employer; and (II) 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 (ii) with respect to covered funds received by a State or local government, the State or local government receiving the funds and any contractor or subcontractor of the State or local government; and (B) does not mean any department, agency, or other entity of the federal government." 123 Stat. 301-02.

whistleblower laws, the ARRA specifically protects internal disclosures and disclosures made by employees in the scope of performing their job duties.

“Reprisals” on Employees

The new law defines “reprisal” to include discharge, demotion and other discrimination. 123 Stat. 297. If “reprisal” is read consistently with other statutes precluding retaliation, it would include any action that would dissuade a reasonable person from engaging in the protected activity.⁴ If construed in such fashion, a “reprisal” may include oral or written reprimands, lateral transfers or reassignment of duties, even where there are no tangible economic consequences.

Burden

To prevail in an action under the ARRA, an employee must prove the protected conduct was a “contributing factor” to the reprisal. ARRA specifies the contributing factor test may be satisfied through circumstantial evidence showing that the official undertaking the reprisal knew of the protected disclosure, or that there is a temporal proximity between the time of the disclosure and the time of the reprisal. An employer may avoid liability only by showing, by clear and convincing evidence, that it would have taken the same action in the absence of the protected disclosure.

Procedure

To invoke ARRA’s protections, an employee who believes he or she was terminated or otherwise discriminated against because of a protected disclosure must file a complaint with the appropriate Inspector General. If the Inspector General finds the complaint has merit, he or she will submit a report to the employee, the employer, and the appropriate agency. The agency will then determine what action to take, if any, to remedy the reprisal. If the head of the agency denies relief in whole or in part, and does not issue an order within 210 days, the complainant may bring a de novo action in federal court and may request a jury trial.

ARRA expressly provides that predispute arbitration agreements do not apply to claims brought under these provisions. Moreover, ARRA is not exclusive, meaning employees may pursue claims in multiple judicial and administrative venues depending on the basis for their claims.

⁴ See *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (establishing standard for retaliation under Title VII, “a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.”) (internal quotation omitted); *Rodgers v. Hawley*, 14 Fed. Appx. 403, 411 (6th Cir. 2001) (“Retaliatory conduct [for exercising constitutional rights] is actionable under the First Amendment when it would dissuade a person of ordinary firmness from continuing to engage in protected conduct.”).

Risk Management/Compliance

In light of the broad protections offered to employees under ARRA, contractors receiving covered funds should take proactive steps now to prevent whistleblower claims under ARRA and to ensure their corporate compliance programs have kept current with changes in this dramatically-changing regulatory environment. As part of a comprehensive compliance program, contractors should review and update existing procedures and policies to prevent, detect and remediate instances of mismanagement, fraud, waste, or unlawful activity concerning covered funds and remain vigilant as government prosecutors and private whistleblowers begin using these and other new enforcement tools.

FIRM CONTACT INFORMATION

For more information regarding ARRA's whistleblower protections or how your organization should proactively address the government's heightened prosecutorial focus on procurement fraud, please feel free to contact your regular Kutak Rock LLP contact or any member of our Governmental Disputes Group:



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