

Stimulus-Related Whistleblowing:

More Red Tape for Connecticut's Municipalities or a Legitimate Protection of Public Funds?

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The American Recovery and Reinvestment Act of 2009 (ARRA), commonly referred to as the Stimulus Bill, was passed by Congress on February 12, 2009, and signed into law by President Obama on February 17, 2009.¹ ARRA, among other things, includes new and expansive whistleblower protections for employees of private contractors and state and local governments who report gross mismanagement, gross waste, public safety concerns, abuse of authority, or a violation of law in the implementation or use of stimulus funds. The whistleblower protections found in Section 1553 of ARRA are often referred to as the “McCaskill Amendment.” This article provides an overview of the whistleblower provisions and identifies best practices that employers should follow to avoid costly whistleblower litigation. The whistleblower law, which Congress and the Obama administration introduced with little public notice, includes protections that are considerably more favorable to employees than found in other anti-retaliation laws.

Covered Employers

The Stimulus Bill’s whistleblower provisions apply to “non-Federal employers” who receive “covered funds.” This means that state and local governments fall within the scope of the statute if they receive stimulus funds for public projects. In addition, contractors and subcontractors that receive stimulus funds directly from the federal government or indirectly from state or local governments, in payment for goods or services, are also covered.² Federal employers are not covered by the whistleblower protection.

Protected Conduct

Protected conduct under the McCaskill Amendment include the disclosure of certain information by an employee to a person with supervisory authority over the employee, a state or federal regulatory or law enforcement agency, a court, a grand jury, a head of a federal agency, a member of Congress, a comptroller or inspector general, or to the Recovery and Accountability and Transparency Board (Board). The Stimulus Bill restricts covered employers from taking adverse employment action against an employee who discloses information that the employee “reasonably believes” is evidence of:

- (1) gross mismanagement of a contract or grant that is related 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;

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- (4) an abuse of authority related to the implementation or use of covered funds; or
- (5) a violation of law, rule, regulation related to an agency contract (including competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.³

Although ARRA does not define “reasonable belief,” other whistleblower protection laws, such as the Sarbanes-Oxley Act,⁴ apply a standard of reasonableness, which evaluates the reasonableness of a belief based on the knowledge available to a reasonable person in the same factual circumstances as the aggrieved employee. The same standard would likely be applied to Section 1553. If so, the employee’s particular experience, background, and access to information will be considered when determining whether the employee had a reasonable belief to report suspected mismanagement, waste, or abuse of stimulus funds.

Administrative Exhaustion Requirement and Private Right of Action

Employees who believe that they have suffered an adverse employment action in response to a protected disclosure must file a complaint with the applicable inspector general. Surprisingly, there is no time limit for an employee to file a complaint. The inspector general must within 180 days of receipt of the complaint either (1) determine that the claim is frivolous; does not relate to stimulus funds; or is already pending with another agency, or (2) investigate and issue a determination on the merits of the whistleblower retaliation claim.⁵ The inspector general will submit a report of the findings of the investigation to the employee, to the employer, to the head of the applicable agency, and to the Board.

Within 30 days of receiving the inspector general’s investigative findings, the agency head shall determine whether a violation exists. If so, the agency head can award re-

instatement, back pay, compensatory damages, and attorneys’ fees and require the employer to engage in “affirmative action to abate the reprisal.”⁶ If the agency head denies relief or fails to issue a decision within 210 days of the employee’s complaint filing date, the employee shall be deemed to have exhausted all administrative remedies, and the employee may bring a de novo action in federal court.⁷ The court appeal includes the right to a trial by jury.

Employee-Friendly Provisions

The ARRA whistleblower protections raise significant concern to employers. Unlike other whistleblower laws that apply to private employers, the new protections expressly cover internal disclosures, including disclosure made in the ordinary course of the employee’s duties. For example, internal disclosures made by an auditor, an investigator, or an attorney, made to his or her supervisor, qualify as protected conduct under Section 1553.

While internal complaints provide an additional source of protected conduct to support a whistleblower retaliation claim, Section 1553 does not require whistleblowers to report complaints internally before disclosing information to an external body. From the employer’s view, whistleblowing has the greatest potential for improved business practices where suspected wrongdoing is reported first within the organization because it provides the employer with an opportunity to correct the problem, if one does exist. The U.S. Supreme Court has even recognized the importance of internal whistleblowing in the context of sexual harassment claims under Title VII of the Civil Rights Act of 1964. For example, in *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*, the court provided employers with an affirmative defense to liability under Title VII where they take reasonable care to prevent and promptly stop harassment from occurring once it is reported.⁸ Likewise, an employer can also be shielded from liability by demonstrating that they have policies that are designed to prevent harassment and that

the complainant failed to take “advantage of any preventative or corrective action provided by the employer or to avoid harm otherwise.”⁹ Unfortunately here, Section 1553 does not encourage internal whistleblowing or expressly provide employers with an affirmative defense.

In addition, Section 1553 does not adequately define what constitutes protected activity. The term “abuse of authority” is defined as “an arbitrary and capricious exercise of authority by a contracting official or employee that adversely affects the rights of any person, or that results in personal gain or advantage to the official or employee or to preferred other persons.”¹⁰ Section 1553, however, does not define what constitutes “gross mismanagement” or “gross waste.” Until courts interpret and apply meaning to these vague and undefined terms, employer uncertainty will exist as to what conduct triggers whistleblower protection.

Section 1553 also does not define what constitutes retaliation for protected conduct. The statute states that an employee may not be “discharged, demoted, or otherwise discriminated against.”¹¹ Unfortunately, for employers, the scope and application of “otherwise discriminated against” is undefined and remains to be seen.¹² For example, if courts apply the “materially adverse action” standard articulated by the U.S. Supreme Court in a recent decision concerning sexual harassment retaliation in *Burlington Northern & Santa Fe Railway Co. v. White*, then the basis for a Section 1553 whistleblower complaint will be significantly expanded.¹³ In that case, the Supreme Court held that the scope of Title VII’s anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm. Retaliation, as defined in the sexual harassment context, constitutes any action that would dissuade a reasonable person from engaging in protected activity.

Section 1553 also provides an unusually employee-friendly burden of proof compared to other laws that prohibit retaliation. To prevail in a whistleblower action, an aggrieved employee must only establish by a

preponderance of evidence that his or her protected conduct constituted a “contributing factor” in the employer’s decision to take an adverse employment action against the employee.¹⁴ This “contributing factor” standard is lower than the “substantial factor” standard found in other employment laws. An employee can establish a prima facie case of retaliation by merely presenting evidence that demonstrates temporal proximity or that demonstrates that the employer possessed knowledge of the disclosure. For example, if an auditor discloses a potential instance of gross mismanagement of funds (although we do not know what that means at this time), and is terminated or disciplined shortly thereafter, the auditor has met his or her burden of proof and has a viable whistleblower claim against the employer.

On the other hand, the employer’s burden is much more difficult. 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.¹⁵ This “clear and convincing” standard is much higher than the employee’s preponderance of the evidence standard. As explained above, if the whistleblower claim is successful, an employee may be granted reinstatement, back pay, compensatory damages, and attorneys’ fees.

Section 1553 places additional obligations on employers. Covered employers are required to post a notice of employees’ rights and responsibilities. Unfortunately, the federal government has not prepared a model notice for employers to follow or issued regulations that clarify an employer’s obligation. Section 1553 states simply that “[a]ny employer receiving covered funds shall post notice of the rights and remedies under this section.”¹⁶ There is no guidance on where the notice should be posted, how many notices are sufficient, or to the form or content of such notice. Furthermore, the rights and remedies under Section 1553 may not be waived through any employment agreement and employers may not enforce predispute arbitration agreements that require employees to arbitrate claims against the employer.¹⁷

Employer Best Practices

In light of the broad reach of the new whis-

tleblower protections, state and local governments that receive stimulus funds, as well as contractors and subcontractors that are involved in public works projects or government contracts, must be cautious in order to avoid costly whistleblower litigation. Covered employers should consider implementing the following measures:

1. Prepare and post a notice that outlines employees’ rights and available remedies under the new whistleblower protections. The notice should outline protected activity, the investigation process, the prohibition against retaliation, and remedies available to employees under Section 1553. In addition, the notice should include hotline or reporting channel for employees to follow. Employers should not wait for the federal government to issue a model notice, as it may not do so.

2. Update employee handbooks, orientation materials, and anti-retaliation policies to include language that covers whistleblower claims specific to stimulus-related disclosures. This inclusion could serve as an affirmative defense, similar to the defenses outlined by the Supreme Court in sexual harassment cases, if an employee files a claim that alleges a violation of Section 1553.¹⁸

3. Inform Human Resources and other employees who are involved in workplace investigations and in the employee discipline process of the whistleblower protections and the retaliation prohibitions that are included in the Stimulus Bill. For example, Human Resources should consider a whistleblower assessment and a careful review to determine whether adequate documentation and reasons exist before implementing an employee’s termination.

4. Consider incorporating whistleblower material in existing training sessions regarding workplace discrimination and/or harassment. Employers must comprehend that whistleblowers are protected without regard to whether their complaint is true. An employee proves his or her complaint simply by showing that a complaint was made and that adverse employment action followed the complaint.

5. Employers should implement and consistently follow procedures and document the legitimate, non-discriminatory, and non-retaliatory reasons for employment actions.

6. Employers engaged in government contracts should also be aware of potential claims under the federal False Claims Act and state whistleblower protection.¹⁹

State and local governments, and their contractors, that accept stimulus funds should take immediate stock of this employee-friendly legislation. In light of the employee favorable burden of proof, employers should proceed cautiously when taking adverse employment action against an employee who complained internally or externally about acts that are protected by Section 1553. **CL**

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Notes

1. American Recovery and Investment Act of 2009, Pub. L. No. 111-5, § 1553.
2. ARRA § 1553(g)(4).
3. ARRA § 1553(a).
4. 18 U.S.C. § 1514A.
5. ARRA § 1553(b).
6. ARRA § 1553(c)(2)(A), (B) and (C).
7. ARRA § 1553(c)(3).
8. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
9. *Faragher*, 524 U.S. at 806.
10. ARRA § 1553(g)(1) and (2).
11. ARRA § 1553(a).
12. This “otherwise discriminated against” language is significantly more open ended than other federal whistleblower laws. For example, the Sarbanes-Oxley Act states employers may not “demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment.” 18 U.S.C. § 1514A. While Sarbanes-Oxley limits retaliation to tangible employment actions, the McCaskill Amendment includes no such restriction.
13. *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).
14. ARRA § 1553(c)(1)(A).
15. ARRA § 1553(c)(1)(B).
16. ARRA § 1553(e).
17. Notwithstanding ARRA § 1553(d)(1) and (2), an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes that arise under the collective bargaining agreement.
18. *Burlington Industries, Inc. v. Ellerth*, *supra*; *Faragher v. City of Boca Raton*, *supra*.
19. 31 U.S.C. § 3730(h); Conn. Gen. Stat. § 4-61dd.