

December 15, 2020

U.S. CONGRESS PASSES THE CRIMINAL ANTITRUST ANTI-RETALIATION ACT OF 2019

To Our Clients and Friends:

On December 8, 2020, the U.S. House of Representatives passed the Criminal Antitrust Anti-Retaliation Act of 2019.[1] Sponsored by Republican Senator Chuck Grassley and co-sponsored by Democratic Senator Patrick Leahy, the bill prohibits employers from retaliating against certain employees who report criminal antitrust violations internally or to the federal government. Similar legislation has previously been passed unanimously by the Senate in 2013, 2015, and 2017; each time, the legislation stalled in the House.[2] This time, however, the legislation has been adopted with overwhelming support in the Senate and the House.[3] The bipartisan bill now awaits the President's signature.

Overview of the Criminal Antitrust Anti-Retaliation Act

If signed into law, the bill would amend the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 to protect employees who report to the federal government—or an internal supervising authority—criminal antitrust violations, acts “reasonably believed” by the employee to be criminal antitrust violations, and other criminal acts “committed in conjunction with potential antitrust violations,” such as mail or wire fraud.[4] The bill also protects employees who “cause to be filed, testify in, participate in, or otherwise assist” federal investigations or proceedings related to such criminal violations.[5] Notably, the bill's expansive definition of “employee,” which could be read to include contractors, sub-contractors, and agents, may extend these protections to a broader population than a company's own employees.

If an employee faces retaliation, such as discharge, demotion, suspension, threat, or harassment, he or she can file a complaint with the Secretary of Labor. If the Secretary of Labor does not issue a final decision within 180 days of filing, the employee can file a civil action in federal court. If the employee prevails, the employer would have to (1) reinstate the employee with the same seniority status, (2) pay back pay plus interest, and (3) compensate the employee for special damages (including litigation costs and attorney's fees).

The bill would not protect employees who “planned and initiated” the criminal violations, or who “planned and initiated an obstruction or attempted obstruction” of federal investigations of such violations.[6] Further, the bill would not offer protection for reporting civil antitrust violations, unless they are also criminal violations.[7] And unlike Dodd-Frank, the bill would not provide reporting employees with a percentage of any monetary sanctions eventually collected by the Department of Justice (“DOJ”).[8]

Implications of the Criminal Antitrust Anti-Retaliation Act

The most immediate effects of the Criminal Antitrust Anti-Retaliation Act will be experienced by companies involved in criminal antitrust investigations. An employee who has engaged in a criminal antitrust violation may later claim to be a whistleblower after cooperating with an internal or government investigation into their own conduct. The bill does not provide clear guidance for an employer in these circumstances, though it is reasonable to assume alignment with existing whistleblower protections under the Sarbanes-Oxley Act of 2002 and other similar federal whistleblower statutes. Companies will understandably want to consider appropriate remedial personnel actions against the employees engaged in the wrongdoing, but should seek assistance from counsel to minimize the risk that the bill's whistleblower protections are unintentionally triggered.

Additionally, companies may encounter situations in which employees seek to invoke the bill's whistleblower protections by reporting unfounded allegations of criminal antitrust conduct when they anticipate termination for other reasons. Experienced labor and employment counsel will be familiar with this fact pattern from existing whistleblower laws (e.g., False Claims Act, Sarbanes-Oxley Act) and can provide invaluable guidance in helping to navigate a specific scenario. Still, companies will benefit from having robust, documented procedures for responding to whistleblower allegations, and implementing processes for assessing quickly whether reporting parties have good faith, credible bases for their allegations. For further guidance on whistleblower best practices, consult our April 6, 2020 guidance on this topic.^[9]

A question that remains to be answered is whether the law's exceptions ultimately limit its utility. In January 2017, the Antitrust Division injected uncertainty into its Corporate Leniency Policy by reserving the right to exclude certain "highly culpable" individuals from the scope of the immunity afforded to successful applicants.^[10] Unfortunately, the Division did not define "highly culpable," and left individuals uncertain about whether they could be prosecuted despite self-reporting and cooperating with the government. The Criminal Antitrust Anti-Retaliation Act introduces similar unpredictability by excluding from its protections individuals who "planned and initiated" the conduct.^[11] Courts may ultimately be called upon to help clarify this standard, but until that time, employees may be hesitant to entrust themselves to the bill's whistleblower protections.

The new whistleblower protections also subject companies to a heightened risk that employees will report to DOJ *before* reporting internally—potentially exposing employers to criminal liability for activities they may not even know are occurring, and depriving them of the opportunity to self-report. This "agency first" approach aligns with the SEC's amendments to its whistleblower program earlier this year.^[12] The Antitrust Division has an existing leniency policy for individuals that provides incentives for self-reporting, a program that was referenced in the Division's widely read no-poach policy issued in October 2016.^[13] However, the policy has been rarely used—the corporate leniency policy offers a more practical avenue for individuals to cooperate through their employer's application.^[14] The new whistleblower protections would open an additional pathway for DOJ to encourage these types of direct reports from a company's employees. In some instances, the evidence disclosed by a company's employee could be sufficient to preclude the company itself from later applying for protection under the Corporate Leniency Policy. Companies will therefore need to be

vigilant in educating employees about internal conduits for reporting suspected violations and in conducting timely internal investigations to determine whether employee allegations have merit.

[1] H.R. 8226, 116th Cong. (2020).

[2] Julie Arciga, *Congress Approves New Antitrust Whistleblower Protections*, Law360, <https://www.law360.com/articles/1335665/congress-approves-new-antitrust-whistleblower-protections>.

[3] 166 Cong. Rec. S5904-05 (daily ed. Oct. 17, 2019); 166 Cong. Rec H7007-09 (daily ed. Dec. 08, 2020).

[4] H.R. 8226, 116th Cong. (2020).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] Whistleblower Program, U.S. Securities and Exchange Commission, <http://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml>.

[9] *When Whistleblowers Call: Planning Today for Employee Complaints During and After the COVID-19 Crisis*, available at: <https://www.gibsondunn.com/when-whistleblowers-call-planning-today-for-employee-complaints-during-and-after-the-covid-19-crisis/>.

[10] U.S. Department of Justice, Antitrust Division, "Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters" (Jan. 26, 2017), *available at* <https://www.justice.gov/atr/page/file/926521/download>.

[11] H.R. 8226, 116th Cong. (2020).

[12] SEC Amends Whistleblower Rules, available at: <https://www.gibsondunn.com/sec-amends-whistleblower-rules/>.

[13] Antitrust Guidance for Human Resources Professionals, U.S. Department of Justice Antitrust Division, October 2016, available at: <https://www.justice.gov/atr/file/903511/download>. The Division's Guidance is analyzed here: <https://www.gibsondunn.com/antitrust-agencies-issue-guidance-for-human-resource-professionals-on-employee-hiring-and-compensation/>.

[14] Leniency Policies for Individuals, U.S. Department of Justice, <https://www.justice.gov/atr/individual-leniency-policy>.

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