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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Not Your Average Whistleblower Statute

Law360, New York (July 31, 2009) -- The American Recovery and Reinvestment Act of 2009 contains an extraordinarily broad whistleblower protection provision.

The law prohibits retaliation against whistleblowing employees of state and local governments and private sector employers, including grantees, contractors and subcontractors of federal, state or local governments that benefit from federal stimulus funds.[1]

This provision is likely to open a new front of whistleblower litigation with significant implications for affected employers. It differs from existing whistleblower laws in a number of ways, all of which make the law friendlier to those who claim to be whistleblowers.

These changes may foreshadow similar expansion of other federal whistleblower protections. The provision generated very little debate in the Congress, but its consequences will surely be seen in the day-to-day employment decisions of employers who benefit from stimulus funds.

Given the almost $800 billion under the ARRA umbrella, the scope of employers covered by the provision and the number of employees who could make claims is staggering.

The ARRA will fund endeavors from road building to school weatherizing and from preventive health care to student aid, and the provision applies to all stimulus-funded contracts, including those below the simplified acquisition threshold, those for commercial items and those for commercially available off-the-shelf items.[2]

The administration estimates that ARRA will “[s]ave and create more than 3.5 million jobs over the next two years.”[3]

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Although this estimate has been criticized, and it is clearly not a direct proxy for the number of employees in a position to raise concerns about covered funds, it does underscore the point that large numbers of employees will be affected.

An informal inquiry of inspectors general unsurprisingly revealed no pending cases at this early stage; it is only a matter of time, however, before employees involved with stimulus projects assert that they were retaliated against for protected whistleblowing under ARRA.

Five key elements of the whistleblower provision are summarized below.

1) The scope of protected activity is quite broad, and includes day-to-day performance of a whistleblower's job.

Protected whistleblowing by ARRA-covered employees includes disclosures to "the Recovery Accountability and Transparency Board, an inspector general, 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 their representatives."[4]

Protected complaints include not only those in which the whistleblower reasonably believes he is reporting evidence of "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," but also those involving "gross mismanagement of an agency contract or grant relating to covered funds," "a gross waste of covered funds," "a substantial and specific danger to public health or safety relating to the implementation or use of covered funds," or "an abuse of authority related to the implementation or use of covered funds."[5]

These categories of protected disclosures were modeled after the Whistleblower Protection Act ("WPA"), which applies to federal government employees, and their application to private sector employment is, in some respects, an attempt to fit a square peg in a round hole.

"Abuse of authority," for example, 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."[6]

Application of these public sector employment concepts to private employers is likely to make performance management very challenging.

The difficulty employers will face in managing the performance of employees whose work relates to stimulus-funded projects will be further exacerbated by the ARRA's

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inclusion of disclosures "made in the ordinary course of an employee's duties" within the scope of protected activity.[7]

The Federal Circuit's examination of the same issue under the WPA is perhaps the leading decision in this area; that court reasoned that extending whistleblower protection to reports made by an employee to his supervisor in the ordinary course of his duties "would be inconsistent with the WPA's recognition of the importance of fostering the performance of normal work obligations and subjecting employees to normal, nonretaliatory discipline."[8]

The Federal Circuit further emphasized that "[t]he WPA was established to protect employees who go above and beyond the call of duty and report infractions of law that are hidden."[9]

The ARRA's express inclusion of ordinary duty disclosures turns these principles on their head, making it very difficult for federal contractors to manage the performance of employees whose duties include contract compliance and oversight.

An internal auditor, for example, could turn virtually any disagreement with his supervisor into a protected act of "whistleblowing."

It remains to be seen whether courts will impose some heightened standard in this area, perhaps requiring that an ordinary duty disclosure specifically include an assertion by the employee that he believes he is blowing the whistle on improper or illegal conduct.[10]

2) Whistleblowers receive the benefit of a heads-you-win, tails-you-get-to-try-again procedure; employers do not.

Unlike many other federal private sector whistleblower statutes, such as the Sarbanes Oxley Act, the Surface Transportation Assistance Act, the Energy Reorganization Act, the Toxic Substances Control Act, the Consumer Product Safety Improvement Act, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"), and the Federal Rail Safety Act, complaints are not processed by the Labor Department's Occupational Safety and Health Administration and there is no provision for an adversarial hearing before an Administrative Law Judge, notwithstanding the whistleblower expertise developed by OSHA and the Labor Department's Administrative Law Judges (and Administrative Review Board) under similar statutes.

Instead, under the ARRA, complaints of prohibited reprisals are filed initially with the inspector general of the federal agency from which the stimulus funds were distributed.[11]

Unless the complaint is deemed to be frivolous, does not relate to stimulus funds, or is the subject of another pre-existing judicial or administrative proceeding, the relevant inspector general is responsible for investigating the complaint and making a report

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within 180 days, subject to the inspector general's ability to grant himself an extension of no more than 180 days, and the complainant's ability to consent to a (presumably longer) extension.[12]

The head of the relevant federal agency is then charged with making a final decision, granting or denying relief to the complainant, within 30 days after receiving the inspector general's report.[13] It is unclear whether any agencies will utilize administrative law judges or adversarial hearings in this process.

The burden of proof is placed on the complainant to show that his protected activity was a "contributing factor" in the challenged employment action, and the employer can defeat such a finding if it shows by clear and convincing evidence that it would have taken the challenged action even in the absence of the protected activity.[14]

This framework is similar to that used under the Sarbanes-Oxley Act and many other federal whistleblower statutes,[15] and much less demanding than the but-for causation standard recently adopted by the Supreme Court for age discrimination claims.[16]

Like many of the other federal private sector whistleblower statutes, the ARRA permits a complainant to opt-out of the administrative process and proceed de novo in federal district court if a final agency decision is not rendered within the specified timeframe (210 days, or longer if an extension is granted).[17]

Unlike the other statutes, however, the ARRA also allows the complainant to proceed de novo in federal district court if he does not like the outcome of the agency proceeding — if the agency head "issues an order denying relief in whole or in part," the complainant may take his case before a judge and jury in U.S. District Court and try again.[18]

Although the statute purports to grant a symmetrical right to trial by jury — "at the request of either party to the action" — this right is illusory for employers because only the complainant can bring the matter in U.S. District Court. The employer is afforded no such right.

Instead, if the employer is dissatisfied with the agency head's determination, its only recourse is to seek review of the final agency action in a court of appeals.[19] This one-sided system, without even the guarantee of an administrative hearing that exists under other federal whistleblower statutes, may be vulnerable to constitutional challenge.

3) Rights under the provision are not waivable and not subject to predispute arbitration agreements. The ARRA whistleblower provision provides that "the rights and remedies provided for in this section may not be waived by any agreement, policy, form or condition of employment, including by any predispute arbitration agreement."[20]

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The provision creates an exception for collective bargaining agreements, providing that "an arbitration provision in a collective bargaining agreement shall be enforceable as to disputes arising under the collective bargaining agreement."[21]

At a minimum, this will prevent employers from making these claims subject to predispute arbitration outside of a collective bargaining agreement.

The effect on CBA provisions is less clear — one reading would preserve the right of employers and unions to commit these claims to arbitration through "clear and unmistakable" contract language under the Supreme Court's decision in 14 Penn Plaza LLC, et al., v. Pyett, et al.,[23] while an alternative, narrower reading of the exception would preserve only the ability of employers and unions to commit disputes arising out of the same facts, but not the same legal theory, to arbitration under the CBA.

Furthermore, the effect of these provisions on releases and settlement agreements is likewise uncertain. They could be read, for example, to prohibit the release of such claims in a standard waiver and release agreement, at least without approval of a court or agency, or they could be read more narrowly to prohibit only prospective waivers of rights.[23]

4) There is no statute of limitations. In addition to the possibility that claims under ARRA may not be waivable, employers may also have to contend with the unsettling prospect of the absence of a statute of limitations.

If a limitations period is not adopted for ARRA (perhaps by regulation), employers may be able to argue that the default four-year statute of limitations[24] or a limitations period for an analogous cause of action should apply, and may also be able to rely on defenses like laches in an effort to prevent stale claims from surfacing.

5) A whistleblower complaint may put the employer at risk for debarment or other criminal or civil enforcement proceedings. A whistleblower claim under the ARRA raises more than just employment law issues — by its nature, it involves an allegation of misuse of, or other inappropriate or illegal activity in connection with, heavily scrutinized stimulus funds.

As a result, a whistleblower's claim, which is filed with the relevant inspector general, may also serve as a catalyst for government investigation and potential civil and criminal liability (including under the False Claims Act), and may trigger required disclosures to the government.

In that regard, to the extent that a whistleblower provides, or a contractor's internal investigation reveals, "credible evidence" of a false claim, overpayment or other violation within the scope of the new Mandatory Disclosure Rule, the contractor must make certain disclosures to the government (generally to the inspector general with a copy to the contracting officer).[25]

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Thus, prudent employers subject to ARRA will do much more than simply post the required employee notice.[26]

As with other sensitive whistleblower issues (such as those raised under the Sarbanes-Oxley Act), government contractors and grant recipients receiving stimulus funds — and those who expect to do so — should proactively implement compliance and whistleblower policies to minimize the risk of violations and to ensure that whistleblowing complaints are addressed promptly and properly (which may include internal investigations and government disclosures).

--Jason C. Schwartz, Gibson Dunn & Crutcher LLP

Jason Schwartz is a partner with Gibson Dunn & Crutcher in the firm's Washington, D.C., office. Associate Michael Hissam and summer associate Heather Hart contributed to this article.

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[1] Pub. L. No. 111-5, § 1553(a), (g)(2), (4). It also covers professional membership organizations, agents or licensees of the federal government, and any person acting directly or indirectly in the interest of an employer receiving stimulus funds. Id. § 1553 (g)(4)(A)(i)(II).

[2] Federal Acquisition Regulation; FAR Case 2009-012, American Recovery and Reinvestment Act of 2009 (the Recovery Act) — Whistleblower Protections, 74 Fed. Reg. 14,633, 14,633-34 (Mar. 31, 2009).

[3] Executive Office of the President, Council of Economic Advisers, “Estimates of Job Creation from the American Recovery and Reinvestment Act of 2009,” May 2009, available at www.whitehouse.gov/administration/eop/cea/Estimate-of-Job-Creation/.

[4] Pub. L. No. 111-5, § 1553(a).

[5] Id.

[6] Id. § 1553(g)(1).

[7] Id.

[8] Huffman v. Office of Personnel Management, 263 F.3d 1341, 1352 (Fed. Cir. 2001).

[9] Id. at 1353.

[10] Cf. Getman v. Administrative Review Board, 265 Fed. Appx. 317, 320 (5th Cir. Feb. 13, 2008) (analyst who refused to recommend a high rating for a stock in the course of

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her ordinary duties but who did not express concern that changing rating would violate securities laws did not engage in protected activity under Sarbanes Oxley Act).

[11] Pub. L. No. 111-5, § 1553(b)(1).

[12] Id. § 1553(b)(2).

[13] Id. § 1553(c)(2).

[14] Id. § 1553(c)(1).

[15] See, e.g., 49 U.S.C. § 42121(b) (AIR 21 burdens of proof); 18 U.S.C. § 1514A(b)(2) (Sarbanes-Oxley Act incorporating AIR 21 burdens of proof); 49 U.S.C. § 31105(b)(1) (Surface Transportation Assistance Act incorporating AIR 21 burdens of proof); 42 U.S.C. § 5851(b)(3)(A) (Energy Reorganization Act burdens of proof).

[16] Compare Allen v. Administrative Review Board, 514 F.3d 468, 476 n.3 (5th Cir. 2008) (defining contributing factor as “any factor, which alone or in connection with other factors, tends to affect in any way the outcome of the decision”) (citations and quotations omitted) with Gross v. FBL Financial Services, Inc., 129 S. Ct. 2343 (2009) (adopting “but for” causation requirement under the Age Discrimination in Employment Act).

[17] Pub. L. No. 111-5, § 1553(c)(3). The complainant may also invoke this right if the inspector general declines to pursue an investigation. Id. § 1553(b)(3)(B).

[18] Id. § 1553(c)(3).

[19] Id. § 1553(c)(5).

[20] Id. § 1553(d)(1). Similar provisions were added to the Federal Rail Safety Act, the Surface Transportation Assistance Act and the National Transit Systems Security Act by the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, §§ 1413, 1521, 1536. 49 U.S.C. § 20109(h); 49 U.S.C. § 31105(g); 6 U.S.C § 1142(g).

[21] Pub. L. No. 111-5, § 1553(d)(3).

[22] 129 S. Ct. 1456 (2009).

[23] A similar issue under the former Family and Medical Leave Act regulations split the courts of appeal before the applicable regulation (29 C.F.R. 825.200(d)) was revised to clarify that it prohibited only prospective waivers of rights, not retrospective waivers of claims. Compare Taylor v. Progress Energy Inc., 493 F.3d 454 (4th Cir. 2007) (holding that rights under the prior version of the Family and Medical Leave Act regulation could not be retrospectively waived) with Faris v. Williams WPC-I Inc., 332 F.3d 316 (5th Cir.

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2003) (prior regulation prohibited prospective but not retrospective waiver of rights under FMLA).

[24] See 28 U.S.C. § 1658(a).

[25] See generally Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008). For a fuller discussion of the new rule, please see my partner Karen Manos's article, "Complying with the New Mandatory Disclosure Rule," Government Contract Costs, Pricing & Accounting Report (Jan. 2009).

[26] The required poster is available at www.recovery.gov/sites/default/files/Whistleblower+Poster.pdf).

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