



EMPLOYMENT ALERT

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Broad Whistleblower Protections Included Under the American Recovery and Reinvestment Act of 2009 for Employees of Stimulus Fund Recipients

The American Recovery and Reinvestment Act of 2009 includes significant whistleblower protections for employees who report their employer's misuse of stimulus funds. If your company is accepting stimulus funds; you should become familiar with the whistleblower protections under the Act and take proactive measures to avoid exposure.

What the Law Says

Section 1553 of the Act prohibits any private employer, state or local government receiving funds pursuant to the Act from discharging, demoting, or otherwise discriminating against an employee "as a reprisal for" disclosing information that the employee reasonably believes is evidence of:

- (1) gross mismanagement of any 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 that relates to covered funds.

The disclosure must be made to "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)" or to several external entities, including the Recovery Accountability and Transparency Board (the "Board"); an inspector general; the Comptroller General; a member of Congress; a state or Federal regulatory or law enforcement authority; a court or grand jury; or the head of the Federal agency distributing the funds.

Covered Employers

Section 1553 of the Act applies only to a state or local government or a private employer who receives funds under the Act. It does not apply to Federal employers.

Protected Conduct Includes Internal and External Disclosures

An employee who discloses improper uses of stimulus funds to their supervisor "in the ordinary course of [their] duties," and/or to external individuals or entities, is protected

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under Section 1553. This includes disclosures concerning an employer's misuse of stimulus funds during meetings or conferences attended by supervisors or members of management. If an employee's disclosure qualifies as a protected whistleblower activity, that employee could claim that any subsequent adverse employment action taken against them by their employer is retaliation for their disclosure.

Burden of Proof

An employee does not need to prove that the disclosure was the sole cause of the employment action, only that it was a contributing factor. To do so, an employee merely needs to show that the person taking the employment action had knowledge of the employee's disclosure or to show temporal proximity between the action and the disclosure.

To rebut the employee's claims, the employer must have clear and convincing evidence that they would have taken action against the employee regardless of the disclosure.

Procedures for Filing a Whistleblower Claim

Exhaustion of Administrative Remedies

An employee must initially file a complaint with the inspector general for the Federal agency through which the stimulus funds were made available. Section 1553 does not contain an explicit time period within which the complaint must be filed.

Unless the inspector general determines that the action is frivolous, does not relate to stimulus funds, or has been resolved in another Federal or state administrative proceeding, the inspector general must investigate and make a determination on the merits of the claim no later than 180 days after receiving it. An inspector general may also decline to conduct an investigation or continue an investigation and must submit a written explanation to the employee and employer. Within 30 days of receiving an inspector general's investigative findings, the agency head will determine if an employer has committed a violation.

If so, the agency head can award a complainant reinstatement, back pay, compensatory damages, and attorney fees.

Private Right of Action

If an inspector general decides not to investigate a claim or discontinues an investigation; if the head of the agency denies the employee relief; or if the head of the agency does not issue an order within 210 days of the filing of the complaint (absent an extension to which the employee has agreed), the employee may sue in Federal court. In a private right of action, the employee can recover compensatory damages and any other relief authorized under Section 1553. The Act does not specify a time period within which the lawsuit must be filed after the administrative procedures have been exhausted.

Pre-existing mandatory arbitration clauses, except for those negotiated in the context of a collective bargaining agreement, are not binding on whistleblower claims arising under Section 1553 of the Act.



What Do I Have to Do, and How Can I Avoid Liability Under the Act?

If you are an employer who receives funds under the Act, the new legislation requires you to post a notice of rights and remedies provided to employees under Section 1553. Additional steps you can take to protect yourself include:

- Advise management of any complaints regarding improper use of the stimulus funds and document and fully investigate any such complaints.
- Educate and train employees with supervisory authority and management about the broad whistleblower protections under the Act and make certain that no employment action is taken against any employee which could be viewed as a reprisal for engaging in protected whistleblowing under Section 1553 of the Act.
- Consider updating your employee policies and handbooks to reflect an anti-retaliation policy for the specific whistleblowing activity addressed in Section 1553 of the Act.

For more information on this issue or other employment matters, please contact **Mara B. Levin** at mlevin@herrick.com or (212) 592-1458 or **Carol M. Goodman** at cgoodman@herrick.com or (212) 592-1465.

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