BROAD WHISTLEBLOWER PROTECTIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

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To Our Clients and Friends:

President Obama recently signed into law the American Recovery and Reinvestment Act of 2009 (the "Act"), providing for hundreds of billions of dollars in federal stimulus spending and tax cuts. Among other provisions, this complex law provides broad protections, including a private right of action, for employees who make certain complaints about their employers' use of stimulus funds. Any employer receiving funds under the Act should be aware of these expansive whistleblower protections and should take steps to ensure compliance.

OVERVIEW

The whistleblower provision, Section 1553 of the Act, provides that an employer receiving funds under the Act may not discharge, demote or otherwise discriminate against an employee "as a reprisal for" the employee's disclosure of information that the employee reasonably believes is evidence of: (1) gross mismanagement of an agency contract or grant related to covered funds, (2) 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 or grant, awarded or issued relating to covered funds. Employee disclosures triggering protection under Section 1553 include disclosures to a supervisor or other person working for the employer with authority to investigate misconduct, to a state or federal regulatory or law enforcement agency, to a court or grand jury, or to various representatives of the federal government, such as a member of Congress, the head of the federal agency distributing the funds, the inspector general of the agency, the Comptroller General or the Recovery and Accountability Transparency Board created under the Act (the "Transparency Board").

A violation of Section 1553 has five elements. First, to be covered under the provision, an employer must receive funds under the Act. Second, to be protected, the employee must disclose information that the employee reasonably believes is evidence of one or more of the five enumerated categories of wrongful conduct listed above. Third, the disclosure must be to one of the individuals or entities identified in Section 1553. Fourth, the employer must have discharged, demoted or otherwise discriminated against the employee. Finally, the action taken against the employee must have been taken "as a reprisal for" the employee's disclosure of information. Section 1553 specifies that the disclosure need not be the sole

cause of the challenged employment action, but rather need only be a contributing factor. A disclosure can be shown to be a contributing factor by circumstantial evidence, including that the person undertaking the reprisal knew of the disclosure or that the reprisal occurred within a period of time after the disclosure such that a reasonable person could conclude that the disclosure was a contributing factor in the reprisal. The disclosure will not be found to be a contributing factor if the employer can show by clear and convincing evidence that the challenged employment action would have been taken absent the disclosure.

As compared with other whistleblower laws, such as the whistleblower provisions of the Sarbanes-Oxley Act of 2002 or many state whistleblower statutes, the scope of Section 1553 is quite broad. While many statutes protect employees who disclose information they reasonably believe is evidence of illegal conduct, Section 1553 covers disclosure of information about a broader array of potential wrongdoing, including, for example, gross waste or mismanagement. Section 1553 covers not only disclosure of information to law enforcement agencies, but also to a host of others, including disclosures made to a supervisor in the ordinary course of an employee's duties. Hypothetically, if an employee expresses the view at a meeting attended by his or her supervisor that the employer is grossly mismanaging a project funded in part by stimulus funds, the employee has engaged in protected whistleblowing activity and may claim that any later adverse employment action taken against him or her constitutes an unlawful reprisal for such activity.

ADMINISTRATIVE PROCEDURES

An employee who claims that he or she has been subjected to reprisals prohibited under the Act for engaging in a protected disclosure of information must, in the first instance, file a complaint with the inspector general for the federal agency through which the stimulus funds were made available. The Act does not specify any time period within which the complaint must be filed. The inspector general then has 180 days to either (1) determine that the complaint is frivolous, does not involve funds made available under the Act or is already the subject of another investigation, or (2) investigate the complaint and submit a report of the findings of the investigation to the employee, the employer, the head of the relevant federal agency and the Transparency Board. The inspector general may extend the period for completing the investigation and report by up to 180 days, or any longer period agreed to by the complaining employee. The inspector general also has discretion to decline to conduct or continue an investigation.

Within 30 days after receiving the inspector general's report, the head of the relevant federal agency must determine whether there is a sufficient basis to conclude that the employer has subjected the employee to a prohibited reprisal. The agency may issue an order requiring that the employer cease any reprisal, reinstate the employee to his or her prior position, together with back pay, compensatory damages and any other benefits necessary to make the employee whole, and reimburse the employee's expenses (including attorneys' fees and

costs) reasonably incurred in connection with bringing the complaint. If the employer fails to comply with the agency's order, the agency may file a lawsuit in federal court to enforce the order, and the court may grant appropriate relief, including injunctive relief, compensatory and punitive damages, and attorneys' fees and costs.

PRIVATE RIGHT OF ACTION

After exhausting the administrative procedures, an employee has a right to bring a private lawsuit. Specifically, if the inspector general has either declined to conduct or continue an investigation or has failed to complete a report within the specified timeframes, or if the relevant agency, after receiving the inspector general's report, has denied relief in whole or in part, the employee is authorized to file a lawsuit in federal court. The Act does not specify any time period within which the lawsuit must be filed after the administrative procedures are exhausted.

Section 1553 provides for a right to a jury trial and further provides that no predispute arbitration agreement (other than an agreement contained in a collective bargaining agreement) shall be valid to the extent it purports to require arbitration of an employee's claim under Section 1553. In a private action, the employee may seek compensatory damages and any other relief authorized under Section 1553.

COMPLIANCE AND PREPAREDNESS

Section 1553 requires that any employer receiving funds under the Act must post notice of the rights and remedies provided to employees under Section 1553. In addition, employers receiving funds under the Act should instruct employees with supervisory authority that no action should be taken against employees as a reprisal for engaging in a protected disclosure of information. Employers should also consider revising employee policies, manuals and handbooks to ensure that provisions dealing with whistleblowing activity and anti-retaliation measures reflect, or at least are consistent with, the requirements of Section 1553. Finally, especially given the breadth of the whistleblower protections under Section 1553, any analysis of litigation exposure arising from a planned termination or other adverse employment action should include consideration of any potential claims under Section 1553.

Please feel free to contact us with any questions.

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