Chapter 13

Whistleblower Protections of the American Recovery and Reinvestment Act of 2009

§ 13:1 Introduction

On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Stimulus Act") as the new administration's first major initiative to stimulate the lagging U.S. economy. The legislation contains broad whistleblower protection provisions and provides a private right of action for complaints by employees of any "non-Federal employer" receiving funds under the Stimulus Act, as a means of ensuring that Stimulus Act funds are not mismanaged or misspent.[1]

1. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, § 1553 (2009). The full text of section 1553 can be found at Appendix H, *infra*.

In many respects, the whistleblower protections provided by the Stimulus Act are broader and more "plaintiff-friendly" than comparable whistleblower protections under SOX.

§ 13:2 Statute of Limitations

The Stimulus Act does not contain a statute of limitations. As a result, the applicable limitations period would be determined by looking to analogous federal or state law.

§ 13:3 Who Is Covered?

§ 13:3.1 "Non-Federal Employer"

The Stimulus Act whistleblower protections are focused on non-federal employers, which is broadly defined by the Act as any employer that is a contractor, subcontractor, grantee, or recipient of covered funds, any professional membership organization, agent, or licensee of the federal government or "person acting directly or indirectly in the interest of an employer receiving covered funds," any state or local governments receiving covered funds, or any contractor or subcontractor of such state or local governments.[2] The term "covered funds" means any money received by an employer when any portion of that money was provided or made available by the Stimulus Act.[3] For the protections of this statute to apply, the employer must actually be a recipient of Stimulus Act funds.[4]

This definition would appear to include not only entities, but individuals as well. Thus, as is the case under SOX, there would appear to be individual liability under the Stimulus Act.

§ 13:3.2 Employees Covered by the Stimulus Act

The definition of "employee" under the Stimulus Act is exceedingly broad and includes any "individual performing services on behalf of an employer."[5] It would appear that this definition includes not only employees, but independent contractors as well. Federal employees and members of the uniformed services (that is, armed forces, the commissioned corps of the National Oceanic and Atmospheric Administration, and the commissioned corps of the Public Health Service) are excluded from the definition of "employee."[6]

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2. Pub. L. No. 111-5, 123 Stat. 115, § 1553(g)(4).
3. *Id*. § 1553(g)(2).
4. *Id*.
5. *Id*. § 1553(g)(3)(A).
6. *Id*. § 1553(g)(3)(B).

§ 13:4 What Complaints Are Covered?

Like SOX, the Stimulus Act whistleblower protections cover complaints or disclosures not only to government officials or law enforcement agencies, but also complaints or disclosures made to any "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)."[7] Unlike SOX and other whistleblower laws, however, the Stimulus Act specifies that protected complaints or disclosures include, but are not limited to, those "made in the ordinary course of an employee's duties."[8]

While the protections of the Stimulus Act are not confined to employees working in programs or projects specifically funded by the Stimulus Act, they are focused upon potential misconduct concerning such programs or projects. Hence, employee complaints or disclosures that are protected are limited to those providing information that the employee "reasonably believes" is evidence of:

- 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 related to the implementation or use of covered funds;
- an abuse of authority related to the implementation or use of covered funds; or
- 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.[9]

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7. *Id.* § 1553(a).
8. *Id.*
9. *Id. See, e.g.*, Dent v. Univ. of Md., Coll. Park, Civ.A. No. DKC 16-2446, 2017 WL 2537009, at *9 (D. Md. June 12, 2017) (granting motion to dismiss plaintiff's ARRA claim because she had not alleged the misconduct she disclosed was in any way related to ARRA funds); Hadley v. Duke Energy Progress, Inc., 5:14-CV-229-D, 2016 WL 1071098, at *4–6 (E.D.N.C. Mar. 17, 2016) ("Hadley's opinion of IBM's work as 'a joke,' 'junk,' and 'garbage' does not constitute 'gross mismanagement' under the ARRA," as the "ARRA's whistleblower provision does not convert federal courts into a forum for employees to engage in spending-policy debates with their employer."); Wang v. Wash. Metro. Area Transit Auth., 206 F. Supp. 3d 46, 92–93 (D.D.C. 2016) (gross mismanagement not shown where plaintiff "provides no point of reference for this court to ascertain whether what she is describing as issues are technical glitches in a complicated system or the product of reckless management"); Herrera v.

§ 13:5 Invoking the Protections of the Stimulus Act and Available Relief

Any person who believes that he or she has been subjected to a reprisal prohibited by the Stimulus Act must first submit a complaint to "the appropriate inspector general."[10] This would be the inspector general of the federal agency administering the covered funds at issue.[11]

The appropriate inspector general is required to conduct an investigation and submit, within 180 days after receiving a complaint, a report of his or her findings to the complainant, to the complainant's employer, to the head of the appropriate agency, and to the Board. In limited circumstances, the inspector general is not required to investigate any particular complaint, but must provide a written explanation to the complainant and the employer.[12]

If the inspector general issues a report to his or her agency head, then, within thirty (30) days, the agency head must determine whether there is sufficient basis to conclude that the employee has suffered a prohibited reprisal and issue an order either denying or awarding relief.[13]

Relief ordered by an agency head may include an order to the employer to take affirmative action to abate the reprisal, to provide reinstatement, back pay, compensatory damages, benefits, "and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken," and to compensate the complainant for costs, expenses, and attorneys' fees reasonably incurred.[14]

Review of such agency head orders is available to the aggrieved party in the U.S. Court of Appeals for the circuit where the reprisal is alleged to have taken place.[15] In the meantime, however, the relief ordered by an agency head may be enforced in the U.S. District Court in the

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Trabajamos Cmty. Head Starts, Inc., 15 Civ. 9286 (JSR), 2017 WL 666232, at *4 (S.D.N.Y. Feb. 20, 2017) (clarifying that subjective belief of a statutory violation is not required, only reasonable belief of one of the bases specified in the statute).

10. *Id.* § 1553(b). *See also* Delmore v. McGraw Hill Cos., Inc., No. 12-CV-1306-JPS, 2013 WL 3717741, at *3 (E.D. Wis. July 12, 2013) (dismissing ARRA claim where plaintiff did not first exhaust administrative remedies with the appropriate inspector general).
11. Funds were allocated to a host of federal agencies under the Stimulus Act, including the Departments of Agriculture, Commerce, Treasury, Homeland Security, Transportation, Education, and other agencies.
12. Pub. L. No. 111-5, 123 Stat. 115, § 1553(b)(3)(A).
13. *Id.* § 1553(c)(2).
14. *Id.*
15. *Id.* § 1553(c)(5).

district where the reprisal is alleged to have occurred.[16] The district court is specifically empowered to grant appropriate relief against a non-complying employer, including "injunctive relief, compensatory and exemplary damages, and attorneys' fees and costs."[17]

§ 13:6 Burdens of Proof

The complainant's prima facie burden is only to prove by a preponderance of the evidence[18] that the protected disclosure was a "contributing factor" in the reprisal.[19] "[A] contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[20] This is similar to the burden of proof in SOX cases; however, unlike SOX, the Stimulus Act specifies that to make this showing, it may be sufficient for the complainant to show that "the official 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."[21] Thus, the Stimulus Act makes clear that mere temporal proximity may be sufficient for a complainant to meet his or her burden of proof to establish a prima facie case.[22]

As is the case under SOX, the employer may make out an effective affirmative defense to the complainant's prima facie case by meeting the burden of demonstrating, by "clear and convincing evidence," that the non-federal employer would have taken the action constituting the

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16. *Id*. § 1553(c)(4). The provision for district court enforcement of agency orders would appear to have been included to prevent confusion along the lines encountered under SOX, where there remains a question as to whether district courts have the authority to enforce OSHA's preliminary orders of reinstatement. *See* discussion in section 3:2.4[D], *supra*.
17. *Id*.
18. *See Wang*, 206 F. Supp. 3d at 91 (citations omitted).
19. Pub. L. No. 111-5, 123 Stat. 115, § 1553(c)(1)(A)(i).
20. *See, e.g.*, Conrail v. U.S. DOL, 567 F. App'x 334, 338 (6th Cir. 2014); Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 158 (3d Cir. 2013); Ameristar Airways, Inc. v. Admin. Review Bd., 650 F.3d 562, 567 (5th Cir. 2011).
21. Pub. L. No. 111-5, 123 Stat. 115, § 1553(c)(1)(A)(ii).
22. *But cf.* Gerhard v. D. Constr., Inc., Civil Action No. 11 C 0631, 2012 WL 893673, at *3–4 (N.D. Ill. Mar. 14, 2012) (dismissing ARRA claim on summary judgment where there was "nothing other than a slight temporal connection" tying the plaintiff's termination to his ARRA-related activity); *Hadley*, 2016 WL 1071098, at *6 (holding that ten-month time period between bulk of alleged protected statements and termination did not support causal inference).

reprisal in the absence of the disclosure.[23] In the SOX context, this burden has been recognized as higher than the preponderance of the evidence standard, but less than proof beyond a reasonable doubt.[24]

§ 13:7 Private Right of Action

If the appropriate agency head issues an order denying relief in whole or in part or has not issued an order within 210 days after the submission of a complaint, or decides not to investigate or to discontinue an investigation, and there is no evidence of bad faith on the part of the complainant, the complainant is deemed to have exhausted all administrative remedies as to the complaint and may bring an action de novo against the employer for compensatory damages and the other relief available under the Stimulus Act in the appropriate district court of the United States, which shall have jurisdiction without regard to the amount in controversy.[25] This is longer than the 180-day period provided for under SOX. Similarly, if the inspector general exercises his or her discretion not to conduct an investigation of the complaint, the complainant may immediately bring an action in federal district court.[26] Trial by jury is expressly made available in these federal court actions.[27]

§ 13:8 Other Provisions

The Stimulus Act expressly exempts the rights and remedies provided for reprisals from waiver by any agreement, policy or condition of employment, *including any predispute arbitration agreement*.[28] Thus, court claims cannot be compelled to arbitration under the

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23. Pub. L. No. 111-5, 123 Stat. 115, § 1553(c)(1)(B). *See* O'Hara v. Nika Techs., Inc., 878 F.3d 470, 477–78 (4th Cir. 2017) (granting summary judgment to defendant on plaintiff's ARRA claim as defendant established by clear and convincing evidence that it would have fired plaintiff absent any whistleblowing activity because defendant had been forced to hire another entity to do plaintiff's work because plaintiff could not complete cost estimates on time and because plaintiff defended his work purporting to speak for defendant when he was not so authorized).
24. *See, e.g.*, Collins v. Beazer Homes USA, Inc., 334 F. Supp. 2d 1365, 1380 (N.D. Ga. 2004). *See also Araujo*, 708 F.3d at 158 ("[t]he 'clear and convincing evidence' standard is the intermediate burden of proof, in between 'a preponderance of the evidence' and 'proof beyond a reasonable doubt'") (citing Addington v. Texas, 441 U.S. 418, 425 (1979)).
25. Pub. L. No. 111-5, 123 Stat. 115, § 1553(c)(3).
26. *Id*.
27. *Id*.
28. *Id*. § 1553(d)(2).

Stimulus Act. An exception is made for arbitration provisions contained in collective bargaining agreements.[29]

The Stimulus Act also provides that an employer receiving covered funds is required to post a notice of the rights and remedies provided in the Stimulus Act.[30] No particular form of notice is specified.

§ 13:9 Ramifications for Employers

As the Special Inspector General Neil Barofsky testified before the House Ways and Means Subcommittee on Oversight on March 19, 2009, "[w]e stand at the precipice of the largest infusion of Government funds over the shortest period of time in our Nation's history. If by percentage, some of the estimates of fraud in recent government programs apply to the TARP programs, we are looking at the potential exposure of hundreds of billions of dollars in taxpayer money lost to fraud." A substantial increase in employee whistleblower complaints is virtually assured if employees who "blow the whistle" on this anticipated fraud are ultimately subject to what they perceive to be adverse action.

The Stimulus Act provides broad administrative and judicial remedies, under a relaxed standard of proof, for employees subjected to reprisals by covered employers for complaints made or information disclosed, even internally to supervisors, about covered funds. The Stimulus Act is in many respects more employee-friendly than other whistleblower protections, including SOX, to which employers have become accustomed, and provides far greater penalties for noncompliance. Employers, including private contractors, participating in programs funded by the Stimulus Act, will need to exercise vigilance and provide appropriate training and compliance oversight to minimize the possibility of actionable complaints.

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29. *Id.* § 1553(d)(3).
30. *Id.* § 1553(e).