ARNOLD & PORTER LLP

CLIENT ADVISORY

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# NEW WHISTLEBLOWER PROTECTIONS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

Non-Federal employers who receive Federal stimulus funds pursuant to the recently enacted stimulus package, the American Recovery and Reinvestment Act of 2009 (ARRA or Act), should be aware that the Act contains new whistleblower provisions which protect employees from reprisal for reporting alleged misconduct by their employers with respect to the use of stimulus funds.

The whistleblower provisions of the Act, entitled "Protecting State and Local Government and Contractor Whistleblowers," apply to "non-Federal employers" who receive "covered funds" under the Act. Non-Federal employers include private employers and state and local governments. "Covered funds" means any contract, grant, or other payment received by any non-Federal employer where the Federal Government provided some portion of the funding and at least some of the funds were appropriated or otherwise made available under ARRA.

## PROHIBITION ON REPRISAL FOR DISCLOSING MISUSE OF COVERED FUNDS

An employee who reasonably believes that his or her employer has mishandled stimulus funds may disclose such alleged wrongdoing without fear of reprisal. Such disclosure can be made as a special disclosure or in the ordinary course of an employee's duties to a number of entities or persons including a supervisor, a court or grand jury, the Accountability and Transparency Board (created in the Act to oversee spending), the head of a Federal agency, an inspector general, a Member of Congress, the Comptroller General, a state or Federal regulatory or law enforcement agency, or to one of several external authorities in any of the Federal branches of government.

Employers are barred from firing, demoting, or otherwise discriminating against an employee as a reprisal for disclosing information that the employee in good faith reasonably believes indicates:

(1) gross mismanagement of an 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 use or implementation of covered funds; or

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(4) a violation of law, rule, or regulation related to an agency contract or grant awarded or issued related to covered funds.

## INVESTIGATION BY THE INSPECTOR GENERAL AND AGENCY HEAD DETERMINATION

An employee who believes that he or she has been subjected to reprisal may submit a complaint to the appropriate inspector general of the executive agency related to the covered funds at issue.

Notably, the Act does not provide a statute of limitations for the filing of such a complaint. In practical terms, this means that non-Federal employers who receive covered funds under the Act might face whistleblower allegations years after such funds have been used.

Within 180 days of a complaint being filed, the inspector general must complete an investigation of the reprisal allegation and submit a report, or make a determination that the complaint is frivolous or unrelated to covered funds. If the inspector general finds the complaint merits an investigation, he or she must report the findings to the employee, employer, the head of the grant-issuing Federal agency, and the Accountability and Transparency Board.

Upon receipt of the report, the relevant agency head has 30 days to determine whether there is a sufficient basis to conclude that the non-Federal employer has subjected the complainant to reprisal. If the agency head finds such a violation, the agency head has the power to order remedies. Such an order would preclude the employee from filing a private cause of action. These remedies include one or more of the following:

(1) order the employer to take affirmative action to abate the reprisal;
(2) order the employer to reinstate the employee to his or her previous position as if the reprisal never occurred (which might mean providing the employee with lost compensation from the period of reprisal, including back pay and employment benefits); and/or
(3) order the employer to compensate the complainant in an amount equal to the aggregate costs and expenses incurred in bringing the complaint, including reasonable attorneys' fees.

## PRIVATE CAUSE OF ACTION

The complaining employee may have a private cause of action under certain circumstances: (1) if the agency head issues an order denying relief to the complainant; (2) the agency head fails to issue an order within 210 days of the submission of the complaint made by the employee; or (3) the agency head decides not to investigate the complaint or discontinues an investigation. The complaining employee may file a private civil lawsuit in Federal court, where the employee has the right to seek compensatory damages and other relief. The case will be a *de novo* action, meaning that the Federal court will look at the issue without regard to the prior findings by the inspector general or agency head. Federal district courts will have jurisdiction to hear all cases arising out of this whistleblower provision without regard to the amount in controversy, and the employee may elect to have his or her case tried to a jury.

## EFFECT ON EMPLOYERS

The ARRA creates yet another layer of whistleblower protections for employees of "non-Federal employers" who receive stimulus funds. Private corporations, many of whom are already covered by whistleblower statutes, such as Sarbanes-Oxley, and the whistleblower and *qui tam* provisions of the False Claims Act (FCA), should be cognizant that the ARRA whistleblower protections are broader than existing law. Most significantly, there is no statute of limitations and an employer may be exposed to liability many years after receiving stimulus funds. This is far different from laws like Sarbanes-Oxley, which require employees to report a claim within 90 days of an adverse employment action, and the whistleblower provisions of the FCA which are governed by reference to analogous state statute of limitations. The *qui tam* provisions of the FCA have a six-year statute of limitations. No statute of limitations, coupled with a private right of action in the event that an

agency head rejects or fails to rule on a complaint, will likely raise compliance risks for private companies awarded contracts utilizing Federal stimulus funds.

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*We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

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