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THE WHISTLEBLOWER ACT OF 2009,
TIME TO REEVALUATE THAT COMPLIANCE PROGRAM

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On February 17, 2009, the American Recovery and Reinvestment Act of 2009[3] ("ARRA"), commonly known as the "Stimulus Bill", became law and authorized the spending of $787 billion dollars to promote employment, stimulate economic growth, and foster transparency in government spending.[4] To prevent fraud involving the massive outlay of funds the ARRA extended significant whistleblower protections to the employees of non-federal employers that receive stimulus funds.[5] Features of the ARRA whistleblower protections include:

- *Prima facia* case can easily be established by circumstantial evidence, making it difficult for employers to rebut,
- No statute of limitations,
- Employees may bring a *de novo* action in Federal Court,
- Remedies may include compensatory damages, back pay, employment benefits, attorney's fees, and reinstatement.[6]

Companies that receive ARRA funds would be wise to either establish a compliance program or to ensure any existing one is deemed effective. The ARRA will create a new class of whistleblowers putting companies under increased scrutiny.

Employees who alert their employer or authorities to misconduct relating to the stimulus funds and subsequently are terminated or retaliated against are protected by § 1553 of the ARRA.[7] The ARRA offers a modern blueprint for whistleblower protections, designed to overcome interpretations and defects in other whistleblower and civil rights laws that lessened the effectiveness of those provisions.[8] The ARRA is constructed to allow whistleblowers to easily establish a *prima facia* case, in part because a time proximity inference—established by the timing of the protected disclosure and the employer's actions against the employee. This is sufficient to show that the disclosure to authority was a "contributing factor" in the employer's actions against the employee.[9] ARRA § 1553 represents a sweeping blanket of protection, reaching all non-Federal employers to which ARRA stimulus dollars can be traced.

THE ANATOMY OF AN ARRA WHISTLEBLOWER CASE.

The Misconduct.

The ARRA protects employees who disclose misconduct relating to ARRA stimulus funds, such as gross mismanagement, gross waste, substantial and specific danger to public health and safety, abuse of authority, and violations of law, rule, or regulation.[10] Of the protected disclosures that a whistleblower can make under § 1553, only "abuse of authority" is defined in the ARRA, and it is virtually identical to how Whistleblower Protection Act (WPA) jurisprudence would define it:[11] "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."[12] It is likely that the Inspectors General and courts will look to the jurisprudence of the WPA because the language of that act closely mirrors the language of § 1553. [13]

"Gross mismanagement" is a management action or inaction that creates a substantial risk of significant adverse impact on the employer's ability to accomplish its mission, and must be something greater than negligence or petty wrongdoing. [14] "Gross waste" is an expenditure that is significantly out of proportion to its expected benefit; disagreements about alternatives, policy, and speculative arguments will not suffice.[15] *De minimis* amounts and debatable expenditures will not constitute gross waste, and their disclosure is not protected by the ARRA.[16]

Disclosures of dangers to health and safety must be specific and substantial, rather than likely only under speculative conditions in some indefinite future. [17] The danger disclosed should involve a particular person, place, or thing.[18] Three factors help determine whether the danger is too negligible, remote, or ill defined: (1) likelihood of harm resulting from the danger, (2) the immediacy of the harm, (3) the nature of the harm[19].

The Courts will likely be wary of employees trying to use § 1553 as a weapon to shield them from insubordination, mistakes or misconduct. To do so, the courts will use the same exacting standards of what qualifies as a covered disclosure of misconduct to separate whistleblowers deserving of protection from disgruntled employees.[20]

The last kind of disclosure that is protected by the ARRA are disclosures of violations of laws, rule, or regulation.[21] A violation need not have already occurred for the disclosure of a violation to be protected, but the threat of a violation must real and immediate.[22] The course of action to violate the law, rule, or regulation must be decided upon and instructions to that effect given, and not just part of the discussion of possible courses of action.[23] These violations may not be trivial or minor lapses, though many small lapses together may constitute the protected disclosure of excessive violations.[24] Generally, when reasonable people may disagree about the wisdom, policy, or necessity of a decision, courts will likely not protect those who disclose the decision as a whistleblower.[25] Moreover, courts are unlikely to grant protection to employees who would be subject to adverse action based on their poor performance by recognizing minor misconduct of supervisors as protected disclosure of a violation of rule, regulation or law.[26] Whistleblower statutes are supposed to protect employees who make disclosures of actual misconduct, not to encourage the reporting of relatively minor occurrences or judgment lapses of a supervisor made in the course of their normal work.[27]

Misconduct Must Relate To The Stimulus Funds.

There must be a connection between the misconduct and the stimulus funds, the misconduct must "relate to" the covered funds.[28] This provision covers only the stimulus funds authorized or appropriated by the ARRA. These funds were authorized in the form of tax benefits, entitlements, and $278 billion in federal contracts, loans and grants.[29] The end recipients of the contracts, loans and grants are state and local governments, utilities, and businesses. [30] The whistleblower provisions of the ARRA are applicable only to the funds authorized by that bill and do not extend protection to other 'stimulus' monies, such as Troubled Asset Relief Program (TARP) funds.[31] The Inspectors General of the agencies through which the funds are being administered (and ultimately the courts) are left to determine how broadly to construe the *related to* element. The funds are considered covered under this section of the ARRA if the federal government provides any of the money or property, and some of it was appropriated or made available by the ARRA.[32] It is unclear what relationship between the stimulus funds and the misconduct will be considered too tenuous, remote or peripheral to *relate to* the funds, and how strict a tracing requirement will be placed on the employee to show a connection.

Scope of Employee and Employer, Within the Reach of Liability.

The whistleblower protection under the ARRA protects the class of 'employees'. An employee is anyone performing services on behalf of the employer, and is not a federal employee.[33] "Employer" is an expansive term in the ARRA, covering all non-federal recipients of stimulus funding and third parties acting in the interest of a recipient.[34] It includes federal contractors and subcontractors, professional organizations acting in the interest of an employer, agents and licensees of the federal government, State and local governments, and their contractors and subcontractors.[35] The ARRA does not require that the employer receive the funds through contract or directly from the federal government to become liable for reprisals under the ARRA.[36]

Exempting federal employees from protection is the most glaring restraint on the breadth of the protection created by this provision and reduces its effectiveness by not protecting those who may be in the best position to know about and report on fraud, waste, and abuse of stimulus funds.[37]

The Prima Facia Non-Frivolous Case.

To have standing to bring a complaint to the appropriate inspector general under the ARRA the employee must have suffered actual injury.[38] The employee must believe they have been subjected to prohibited reprisal.[39] Reprisals may include discharge, demotion, or any other discriminatory actions (or inactions) taken by the employer towards the employee as a consequence of the disclosure.[40] To be "otherwise discriminated against" likely includes out-of - workplace reprisals, and is broad enough to include any conduct of the employer that a reasonable employee would find materially adverse and would dissuade a reasonable employee from blowing the whistle.[41]

The ARRA's § 1553 protects disclosures of misconduct made to employer-supervisors, State or Federal regulatory or law enforcement agencies, members of Congress, courts, grand juries, federal agencies, or an inspector general.[42] A disclosure to any of these authorities is sufficient as long as the employee reasonably believes they are disclosing information that evidences covered misconduct.[43] It is unclear whether a subjective belief that misconduct related to covered funds has occurred is sufficient or whether that belief will be scrutinized under an objective reasonable person standard. If WPA jurisprudence is followed, the likely objective test would be: "[C]ould a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions..."[44] of the employer evidence fraud, waste or abuse.

Avenues and Remedies.

The inspector general must investigate any complaint that is not frivolous, which relates to the covered funds, and is not the subject of another federal or state judicial or administrative proceeding previously invoked to resolve the dispute.[45] The inspector general has the discretion not to investigate claims, but must inform the employee that the investigation has been abandoned. [46] Should the inspector general investigates, it has 180 days to complete a written report.[47] The head of the concerned agency (through which the stimulus funds in question are administered) must issue an order within 30 days of receipt of the inspector general's report, and may deny relief or impose an administrative remedy. [48]

The administrative remedies authorized by the ARRA include reinstatement, back pay, employment benefits, compensatory damages, and attorney fees.[49] If employer ignores the agency order, the agency may enforce its order in federal court.[50] The employer may appeal the order in the Federal Appeals Court that has jurisdiction where the reprisal occurred.[51]

Under the ARRA, the employee gets two bites at the apple. If the inspector general fails to complete an investigation or the agency denies relief in whole or part or fails to make a decision, then the employee has standing to bring a *de novo* action in Federal District Court, regardless of the amount in controversy.[52] The action is not limited by statute to the same factual or legal arguments presented at administrative level, and it is unclear if the courts will find such a limitation.

The remedies available in Federal District Court are limited to the same compensatory type damages provided for administrative relief, punitive damages are not extended.[53] The purpose is the protection of whistleblowers from reprisals by compensating them for any loses; the punishment of the employer is left to the civil and criminal enforcement agencies.[54] The lack of a significant punishment for reprisals made to whistleblowers lessens the deterrent effect of such a provision, and may render this act as much of a paper tiger as the Sarbanes-Oxley Act.

Burden to the Employer.

The whistleblower must demonstrate that the disclosure was a "contributing factor" in the decision by the employer to take action against the employee.[55] While this essentially the same contributing factor test as used in most whistleblower provisions, including the Sarbanes-Oxley Act,[56] the ARRA allows the whistleblower to affirmatively establish a reprisal using only circumstantial evidence.[57] Under the Sarbanes-Oxley Act and other whistleblower protection statutes, the whistleblower's most difficult task is showing that the disclosure was a "contributing factor" in the employer's decision to take adverse action.[58] The ARRA lessened this burden significantly, which should reduce the numerous evidentiary obstacles that have befuddled whistleblower complainants seeking protection under other provisions.[59]

The ARRA allows circumstantial evidence to affirmatively establish a protected reprisal, "if 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," or that the protected disclosure was known by the decision-maker causing the adverse action.[60] The time proximity and personal knowledge inferences are not expressly provided for in the language of the Sarbanes-Oxley Act, which requires a plaintiff to prove the disclosure was a contributing factor to the decision to take adverse action by a preponderance of the evidence,[61] and may be the difference that makes the ARRA whistleblower provision effective.

Rebutting the Prima Facia Case.

Once the employee-whistleblower establishes a *prima facia* case, the burden shifts to the employer to rebut. However, the evidentiary standards are significantly higher than in other contexts where courts have a "burden-shifting' approach. The McDonnell Douglas burden shifting of Title VII discrimination precedent[62] does not apply, as the ARRA provides its own evidentiary framework.[63] The employer has the considerably larger burden to show—by clear and convincing evidence—that the same actions would have been taken against the employee had the protected disclosure not occurred.[64] The "clear and convincing evidence" standard requires the employer show that it was highly probable that the employer would have taken the same action absent the disclosure.[65] Congress' use of the contributing factor test and the rejection of Title VII burden shifting removes any "but-for" causation requirement. Therefore, the ARRA allows for a successful "mixed motives" case, where the employer may have a legitimate motive other than a prohibited reprisal in addition to reprisal, yet fails to show that the legitimate motive absent the prohibited motive would have lead to the same adverse action. [66]

No Statute of Limitations.

The ARRA contains no statute of limitations.[67] Liability may extend indefinitely, as long as there is a correlation to related funds appropriated or made available by the Stimulus Bill.[68] Of major concern to the employer is the ability of an employer to establish a *prima facia* case in virtue of the circumstantial time inference long after ability of the employer to meet the ARRA's high threshold for rebuttal has diminished with time, as memories deteriorate and paperwork (and electronic data) is routinely destroyed or lost.

No Waivers, No Arbitration, But Through Collective Bargaining.

Congress, likely in recognition that the Sarbanes-Oxley Act whistleblower protection was significantly undermined by waivers and arbitration agreements between employers and employees, has included a provision for their non-enforceability. The ARRA rights and remedies are not subject to waiver.[69] Pre-dispute arbitration agreements are ineffective in preventing enforcement of the ARRA whistleblower disputes.[70] Only collective bargaining agreements can create effective waivers of rights to seek ARRA's protection and may enforce arbitration of a dispute, which would otherwise constitute a claim under the ARRA.[71] Additionally, employers must post a notice of the rights and remedies afforded under the whistleblower provision. [72]

Financial Fraud Enforcement Task Force.

Attorney General Eric Holder has stated that "One of the greatest and most glaring threats facing our economy is the presence of financial fraud... "[73] Whistleblowers are the principal means by which law enforcement gather evidence of fraud, waste and abuse of government funds.[74] Given massive federal spending authorized by the ARRA[75] and TARP, potential exists for fraud, waste and abuse on a grand scale. In order to coordinate the investigation and prosecution of financial crimes the Financial Fraud Enforcement Task Force was created by Executive Order,[76] replacing the Corporate Fraud Task Force that was created in the wake of the Enron debacle.[77] This interagency task force will target fraud, waste and abuse related to stimulus spending.[78] It is intended to be the cornerstone of the Department of Justice's (DOJ) efforts to aggressively target the theft of federal stimulus funds and the illegal use of taxpayer dollars.[79] The DOJ has secured its largest single year budget increase in 2009 to combat financial fraud, increasing the number of Federal Bureau of Investigations Agents, prosecutors, and support staff dedicated to investigating and convicting those committing financial crimes.[80] Attorney General Holder has made the DOJ commitment to the criminal enforcement of financial crimes unequivocal to those involved in fraud, "you are writing your ticket to jail."[81]

Whistleblowers will likely play a role in the significant number of investigations and cases related to the massive stimulus spending.[82] Currently, there are more than 5,000 pending financial fraud investigations underway by the DOJ.[83] ARRA § 1553 could be a powerful tool to encourage whistle blowing, protect those with the courage to report misconduct, and aid in the criminal investigations and prosecutions of the new Financial Fraud Enforcement Task Force.

Stimulus and Recovery.

The ARRA's whistleblower provision represents the next step in the evolution of the species, constructed to avoid some of the evidentiary hurtles that have reduced the effectiveness of past whistleblower provisions.[84] The effectiveness of this provision will ultimately be decided by how broadly or narrowly the "related to" language is construed, and whether the employee's evidentiary advantage presented in the ARRA burden framework is preserved. Though the effects and usefulness of this provision are limited to the life of the funds appropriated by the ARRA, how disputes are resolved under its framework will provide insight to the future of whistleblower protection.

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[3] American Recovery and Reinvestment Act of 2009 (Stimulus Bill), Pub.L. No. 111-5, 123 Stat. 115 (2009).

[4] *See*, http://www.recovery.gov

[5] American Recovery and Reinvestment Act of 2009 (Stimulus Bill), Pub.L. No. 111-5, § 1553, 123 Stat. 115 (2009).

[6] § 1553 (c) (2) (B)

[7] *Id.*, § 1553 (a) (1)—(5).

[8] Press Release, Government Accountability Project, Stimulus Agreement Gives Whistleblower Rights to Contractor Employees; Fails to Protect Federal Workers (Feb. 13, 2009) (http://www.whistleblower.org/content/ press _detail.cfm?press _id=1 589&keyword=); *See* Philip H. Hilder & Scott L. Mullins, *What, Retaliation? U.S. Supreme Court Expands Anti-Retaliation Rules,* A.B.A. NAT'L INST. ON INTERNAL CORP. INVESTIGATIONS AND IN-HOUSE COUNSEL (2009).

[9] § 1553 (c) (1) (A) (ii)

[10] § 1553 (a) (1)—(5).

[11] *See*, *Downing v. Dept. of Labor*, 98 M.S.P.R. 64, 70 (2004) ("'Abuse of authority' is an arbitrary or capricious exercise of power by a federal official or employee that adversely affected the rights of any person or that resulted in personal gain or advantage to him or to preferred other persons"); § 1533 (g) (1).

[12] § 1553 (g) (1)

[13] *See*, Whistleblower Protection Act, 5 U.S.C.A. § 2302 (b) (8) (1994); §1553 (a).

[14] *Downing*, 98 M.S.R.P. at 69.

[15] *Id.*, at 69—70.

[16] *See*, § 1553 (a) (2); *See*, *Crews v. Dept. of the Army*, 217 F.3d 854, (Fed. Cir. 1999).

[17] *Cambers v. Dept. of Interior*, 515 F.3d 1362,1369 (Fed. Cir. 2008).

[18] *Id.*

[19] *Id.*

[20] *See*, *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

[21] § 1553 (a) (5).

[22] *Reid v. Merit Sys. Prot. Bd.*, 508 F.3d 674, 677—678 (Fed. Cir. 2007) ("...requiring a violation of law, rule, or regulation to occur before the employee could make a protected disclosure would force the employee either to act without protection or risk being partly responsible for the violation...it was Congress's intent to discourage disclosures in order to protect taxpayers from illegality, waste, and abuse... The government is far better served by having the opportunity to prevent illegal, wasteful, and abusive conduct than by notice that it may act to reduce the adverse consequences from such conduct that has already occurred.").

[23] *Id.*, at 678.

[24] *Herman v. Dept. of Justice*, 193 F.3d 1375, 1381 (1999).

[25] *See*, § 1553 (a) (5); *Lachance*, 174 F3d at 1381.

[26] *See*, *Herman*, 193 F.3d at 1381.

[27] *See*, *Id.*

[28] § 1553 (a) (1)—(5).

[29] *See*. http://www.recovery.gov.

[30] *See*, *Id.* (follow "Where is the Money Going?" hyperlink).

[31] *See*, § 1553 (g) (2) ("COVERED FUNDS.--The term "covered funds" means any contract, grant, or other payment received by any non-Federal employer if—(A) the Federal Government provides any portion of the money or property that is provided, requested, or demanded; and (B) at least some of the funds are appropriated or otherwise made available by this Act."); *See*, § 1553 (a) (1)—(5) (prohibiting reprisals for reporting fraud, waste, and abuse relating to "covered funds"); *See*, http://www.sigtarp.gov/ (Special Inspector General for the Troubled Asset Relief Program's web site, "SIGTARP's third primary role is to prevent, detect and investigate cases of fraud,

waste and abuse of TARP funds and programs. SIGTARP, through its own investigative resources and through partnership with other relevant law enforcement agencies, is committed to robust criminal and civil enforcement against those, whether inside or outside of Government, who waste, steal or abuse TARP funds."); *See* Letter from Niel Barofsky, Special Inspector General, Office of the Special Inspector General Troubled Asset Relief Program, to Tom Devine, Government Accountability Project (Feb. 2, 2009) (http://www.openthegovernment.org/otg/SIGTARP_to_GAP 2 2 09.pdf) ("SIGTARP is committed – even beyond obligations under the relevant provisions of law – to build a robust whistleblower system that both encourage individuals to come forward and protect those individuals once they have done so." Letter sent in response to worries about poor whistleblower protection by SIGTARP because there are no whistleblower provisions in the Act that created and funded TARP, acknowledging the ARRA's provision was limited to ARRA contract, grant, and loan funds).

32 § 1553 (g) (2).

33 § 1553 (g) (3) (A)—(B).

34 § 1553 (g) (4).

35 *Id.*

36 *Id.*

37 Government Accountability Project, *supra* note 8.

38 § 1553 (b) (1).

39 *Id.*

40 § 1553 (a) (1).

41 *See, Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

42 § 1553 (a).

43 *Id.*

44 *White*, 174 F.3d at 1381.

45 § 1553 (b) (1).

46 § 1553 (b) (3) (A).

47 § 1553 (b) (2) (A).

48 § 1553 (c) (2).

49 § 1553 (c) (2).

50 § 1553 (c) (4).

51 § 1553 (c) (5).

52 § 1553 (c) (3).

53 *Id.*

54 *See, State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

55 §1553 (c) (1) (A) (i) (a).

56 *See* Philip H. Hilder & Scott L. Mullins, *What, Retaliation? U.S. Supreme Court Expands Anti-Retaliation Rules*, A.B.A. NAT'L INST. ON INTERNAL CORP. INVESTIGATIONS AND IN-HOUSE COUNSEL (2009); *See*, Sarbanes-Oxley Act of 2002 (Public Company Accounting Reform and Investor Protection Act), Pub.L. 107-204, 116 Stat. 745 (2002).

57 §1553 (c) (1) (A).

58 Valerie Watnick, *Whistleblower Protections Under The Sarbanes-Oxley Act: A Primer and a Critique*, 12 Fordhan J. Corp. & Fin. L. 831, 866 (2007).

59 *See*, Watnick, *supra* note 49 at 867.

60 *Id.*

61 Watnick, *supra* note 49 at 866.

62 *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-805 (1973)

63 §1553 (c) (1)

64 § 1553 (c) (1) (B).

65 *Id.; Price v. Symsek*, 988 F.2d 1187,1191 (Fed. Cir. 1993).

66 *See, Gross v. FBL Fin. Serv., Inc.*, 129 S.Ct. 2343, 2345 (2009).

67 *See*, §1553

68 *See*, § 1553 (a).

69 § 1553 (d) (1)

70 § 1553 (d) (2)

71 § 1553 (d) (3)

72 § 1553 (e); *But See*, § 1603 ("All funds appropriated in this Act shall remain available for obligation until September 30, 2010, unless expressly provided otherwise in this Act.").

[73] Eric Holder, U.S. Att'y Gen., Speech at the Forum Club of the Palm Beaches (Jan. 8, 2010)(transcript available at http://www.justice.gov/ag/speeches/2010/ag-speech-100108.html)

[74] *See,* Barofsky, *supra* note 6.

[75] *See*, http://www.recovery.gov

[76] Exec. Order No. 13,519, 74 Fed. Reg. 222 (Nov. 19, 2009).

[77] Zachary A. Goldfarb, *Task Force To Take Up Financial Fraud Cases,* WASH. POST, Nov. 1 8, 2009, at A1 5.

[78] *Id.*

[79] Holder, *supra* note 69.

[80] *Id.*

[81] *Id.*

[82] *See*, Zachary, *supra* note 73.

[83] Holder, *supra* note 69.

[84] *See*, Watnick, *supra* note 49 at 866; Hilder, *supra* note 54.