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Stimulus Fund Safeguards For Whistleblowers

Law360, New York (February 18, 2009) -- The economic stimulus bill passed by Congress on Feb. 12, 2009, includes robust whistleblower protections to ensure that employees of private contractors and state and local governments can disclose waste, fraud, gross mismanagement or a violation of law related to stimulus funds.

This article summarizes the key provisions of Senator McCaskill's, D-Mo., whistleblower protection amendment to the stimulus bill ("McCaskill Amendment").

Covered Employers

The McCaskill Amendment applies to private contractors, state and local governments, and other nonfederal employers that receive a contract, grant or other payment appropriated or made available by the stimulus bill.

Broad Scope of Protected Conduct

Protected conduct includes a disclosure to a person with supervisory authority over the employee, a state or federal regulatory or law enforcement agency, a member of Congress, a court or grand jury, the head of a federal agency, or an inspector general information that the employee reasonably believes evidences:

- Gross mismanagement of an agency contract or grant relating to stimulus funds;
- A gross waste of stimulus funds;
- A substantial and specific danger to public health or safety related to the implementation or use of stimulus funds;
- An abuse of authority related to the implementation or use of stimulus funds; or

- A violation of a law, rule, or regulation that governs an agency contract or grant related to stimulus funds.

Significantly, internal disclosures are protected, which is a substantial expansion of two current analogous whistleblower protection laws protecting contractors, both of which do not expressly cover internal disclosures. See 10 U.S.C. § 2409; 41 U.S.C. § 265.

The McCaskill Amendment specifically protects so-called “duty speech” whistleblowing, i.e., disclosures made by employees in the ordinary course of performing their job duties.

Courts will likely apply a standard of objective reasonableness from analogous whistleblower protection laws, such as Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A, which evaluates the reasonableness of a belief based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the aggrieved employee.

Prohibited Acts of Retaliation

The McCaskill Amendment prohibits a broad range of retaliatory employment actions, including termination, demotion, or any other discriminatory act, which includes any act that would dissuade a reasonable person from engaging in protected conduct. See *Burlington N. & Santa Fe R.R. Co. v. White*, 548 U.S. 53 (2006).

Employee-Favorable Burden of Proof

To prevail in a whistleblower action under the McCaskill Amendment, an employee need not show that the protected conduct was a significant or motivating factor in the reprisal, but instead must merely prove that the protected conduct was a “contributing factor” to the reprisal.

The amendment specifically clarifies that an employee can meet the “contributing factor” standard through temporal proximity or by demonstrating that the decision-maker knew of the protected disclosure.

An employer can avoid liability by demonstrating by “clear and convincing evidence,” a high evidentiary burden, that it would have taken the same action in the absence of the employee engaging in protected conduct.

Remedies

A prevailing employee is entitled to “make whole” relief, which includes: (1) reinstatement; (2) back pay; (3) compensatory damages; and (4) attorneys’ fees and litigation costs.

Where an agency files an action in federal court to enforce an order of relief for a prevailing employee, the court may also award exemplary damages.

Administrative Exhaustion Requirement and Right to a Jury Trial

Actions brought under the whistleblower provisions of the McCaskill Amendment must be filed with the appropriate inspector general.

Unless the inspector general determines that the action is frivolous, does not relate to covered funds, or has been resolved in another federal or state administrative proceeding, the inspector general must conduct an investigation and make a determination on the merits of the whistleblower retaliation claim no later than 180 days after receipt of the complaint.

Within 30 days of receiving an inspector general's investigative findings, the head of the agency shall determine whether there has been a violation, in which event the agency head can award a complainant reinstatement, back pay, compensatory damages and attorneys' fees.

If an agency head has denied relief in whole or in part or has failed to issue a decision within 210 days of the filing of a complaint, the complainant can bring a de novo action in federal court, which shall be tried by a jury at the request of either party.

The McCaskill Amendment expressly clarifies that predispute arbitration agreements do not apply to claims brought under the amendment.

Alternative Remedies

In addition to the relief available under the McCaskill Amendment, employees of government contractors have other options to remedy whistleblower retaliation.

The retaliation provision of the False Claims Act, 31 U.S.C. § 3730 (h), prohibits retaliation against an employee who has taken actions "in furtherance of" an FCA enforcement action, including initiating an FCA action, investigating a potential FCA action and testifying in an FCA action.

At least 24 states have adopted laws similar to the FCA, nearly all of which include an analogous retaliation provision.

Unlike the McCaskill Amendment, the retaliation provision of the FCA does not require administrative exhaustion.

Employees of contractors and of state governments may also have claims under state whistleblower protection statutes, but some of those statutes do not protect internal whistleblowing.

In addition, employees of private contractors may have a claim of common law wrongful discharge in violation of public policy, a tort remedy that provides access to a jury trial and punitive damages.

When evaluating a whistleblower retaliation claim arising from an employee's disclosure about fraud on the government, it is critical to consider whether the employee also has a qui tam action and to preserve the employee's ability to pursue a qui tam, which may entail avoiding public disclosure of the fraud.

In sum, the McCaskill Amendment provides a critical safeguard against fraudulent spending of stimulus funds.

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