

Recovery Act New Whistleblower Protections

The FAR interim rule implementing Section 1553 of the Recovery Act significantly enhances whistleblower protections when accepting monies appropriated or otherwise made available under the Recovery Act (“Stimulus funds”). The interim rule creates a new FAR Subpart 3.900 and, as discussed below, goes well beyond any traditional notion of acquisition issues and implements Section 1553’s provisions regarding burden of proof, recovery of damages, venue for civil actions, rights to jury trials, and appellate rights. In short, the FAR – an acquisition regulation – now includes substantive provisions, favorable to trial lawyers and their clients, addressing civil employment litigation against companies accepting Stimulus funds. The whistleblower protection provisions in the Recovery Act were added by an amendment introduced by Senator Claire McCaskill (D-MO). The interim rule applies to all federal procurement contracts funded in whole or in part with Stimulus funds, including contracts for commercial items, commercial-off-the-shelf (“COTS”) items, and those below the simplified acquisition threshold.

Disclosure of Covered Information

An employee may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing “covered information” (as defined below) to the following (long) list of entities or their representatives: the newly created Recovery Accountability and Transparency Board, an agency’s Inspector General (“IG”), the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee, a court or grand jury, or the head of a Federal agency. FAR 3.907-2. The term “covered information” means information that the employee *reasonably believes* is evidence of:

- 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 law, rule, or regulation related to an agency contract (including competition for or negotiation of a contract) awarded or issued relating to Stimulus funds.

FAR 3.907-1. The interim rule does not define what is considered “gross” mismanagement or waste, as opposed to mere misfeasance.

Investigation of Complaints and Burden of Proof

An employee may submit a complaint alleging reprisal to the IG of the agency awarding a contract paid with Stimulus funds. FAR 3.907-3(a). Any contracting officer receiving an employee's complaint must forward it to the agency IG, agency legal counsel, or to the appropriate office in accordance with agency procedures. FAR 3.907-3(c).

An employee can affirmatively establish that a reprisal occurred by demonstrating that the disclosure was a "contributing factor" in the reprisal. FAR 3.907-6(a)(1). This can be demonstrated through "circumstantial evidence" including a showing that the "official undertaking the reprisal knew of the disclosure" or by evidence 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." *Id.* This low burden of proof effectively creates a rebuttable presumption that a prohibited reprisal occurred. While the employee has a low burden of proof, the opposite is true for employers. The employer must demonstrate by "clear and convincing evidence" that the employer "would have taken the action constituting the reprisal in the absence of the disclosure." FAR 3.907-6(a)(2).

Because of the disparate burdens of proof, employers may conclude that the risks are simply too high to take any action against an employee making a covered disclosure. Alternatively, employers may decide to outsource termination, discipline, or demotion decisions or use "walled off" company officials to ensure that in either case the decision-maker does not have knowledge of disclosure. Merely having such knowledge will affirmatively establish an effective presumption of a prohibited reprisal.

In addition, an employee alleging a reprisal is granted access to the IG's investigation file. FAR 3.907-5(a). In contrast, the employer only has access to the investigation file if the employee subsequently brings a civil action against the employer, and then only in accordance with the restrictions in the Privacy Act, which will likely result in obtaining redacted documents. FAR 3.907-5(b). In either case, the IG may exclude from disclosure any information protected from disclosure by a law or that would otherwise impede a continuing investigation. FAR 3.907-5(c).

The IG investigating an employee's complaint must then send a report to the head of the agency, who must determine within 30 days after receiving the report whether there is sufficient basis to conclude that the employer engaged in a prohibited reprisal. FAR 3.907-6(b). Before the head of the agency can make a determination against an employer, the employer must be provided an opportunity

to rebut any “affirmatively established” reprisal, but that may be difficult under “clear and convincing” burden of proof on the employer.

Remedial Actions

The head of the agency has broad remedial authority. The head of the agency can issue an order requiring, among other things, that the employer take affirmative action to abate the reprisal, reinstate the employee, pay compensation damages (including back pay and employment benefits), and pay the employee’s costs and expenses (including attorneys’ fees and expert witness fees) that were reasonably incurred by, for, or in connection with bringing the complaint. FAR 3.907-6(a)(2)-(3).

The interim rule, which implements consistent provisions in the Recovery Act, addresses additional non-procurement issues such as venue and jurisdiction of federal courts for the civil action brought by an employee that does not obtain remedial action by an agency head. If the head of the agency issues an order denying relief to the employee in whole or in part, does not issue an order within 120 days after the submission of the complaint (or within 30 days after the expiration of an extension of time authorized under Section 1552 of the Recovery Act), decides not to investigate or discontinues an investigation, then the disappointed employee can then bring a *de novo* civil action against the employer seeking compensatory damages or other available relief (including injunctive, compensatory and exemplary damages, and attorneys fees and costs), as well as the right to request a jury trial. FAR 3.907-6(c)-(d).

Such civil action against employers can be filed in any district court of the United States for the district in which the reprisal was found to have occurred, without regard to the amount in controversy (*i.e.*, trumping the \$75,000 jurisdictional amount for diversity jurisdiction in 28 U.S.C. § 1332). Again, in contrast to rights granted to employees, the employer’s appeal rights from an agency head’s adverse order is limited to an appeal in the United States Court of Appeals for the circuit in which the reprisal is alleged to have occurred. FAR 3.907-6(e). Even then, the review is not *de novo*, but only a review “of the order’s conformance with the law” and with FAR Subpart 3.907.

Similarly, if the employer fails to comply with a remedial order from the head of an agency, the agency head must request that the Department of Justice file an action for enforcement of the order in the United States district court for the district where the reprisal was found to have occurred. FAR 3.907-6(d).

Stimulating Litigation and Coercive Settlements

As stated above, the interim rule applies only to contracts involving Stimulus funds. The signal it sends, however, is clear. When accepting Stimulus funds, employers must only turn square corners, but the traffic laws will be materially different and employers may feel like they have been caught in a speed trap. Employers will be faced with a choice of taking no action against an employee that may well deserve to be terminated and risking expensive litigation under burdens of proof and standards of review stacked in favor of the employee. The interim rule does not mention the possibility or effect of a settlement, but given the uneven playing field, there is ample incentive to file a complaint and attempt to extract a financial settlement, including the payment of attorneys' fees and cost. This part of the Recovery Act will clearly stimulate trial lawyers.

Not unexpectedly, the interim rule requires employers to post notices in the workplace of the rights and remedies for whistleblower protections, and to flow-down that requirement in all subcontracts. FAR 52.203-15(b). Finally, the rule only affects "non-Federal employers" – federal employers are not covered by Section 1553 of the Recovery Act or the interim rule. In an period of change, its nice to see that some things do not.

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