

**Who needs caffeine when you have the stimulus bill?**

**WHISTLEBLOWER IMPLICATIONS**

Frank E. Sheeder, Esq.  
fesheeder@jonesday.com  
(214) 969-2900

---

---

---

---

---

---

---

---

**Overview**

- Generally, what is the American Recovery and Reinvestment Act of 2009 ("ARRA") and how does it impact healthcare?
- New whistleblower provisions
- Incentives for employees of entities receiving stimulus funds to report fraud or misuse of funds
- How can you prepare your organization?



---

---

---

---

---

---

---

---

**What is ARRA?**

- American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, signed Feb. 17, 2009
- "To provide investments needed to increase economic efficiency by spurring technological advances in science and health."
- \$787 billion
- New and sweeping whistleblower protections
- Incentives for reporting fraud

---

---

---

---

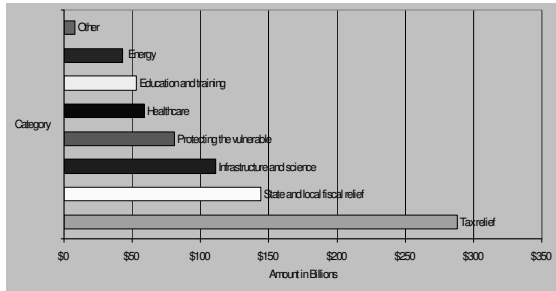
---

---

---

---

## Where is the Stimulus Money Going?



<http://www.recovery.gov/?q=content/where-the-money-is-going-to-bulk-view>

---

---

---

---

---

---

---

---

---

---

## General Impact on the Healthcare Industry

- Opportunities for the healthcare industry
  - Grants
  - Health information technology
- Whistleblower provisions




---

---

---

---

---

---

---

---

---

---

## A Sample of Opportunities for Healthcare Providers and Approximate Funding Amounts

- Rural utilities service; distance learning, telemedicine, and Broadband Program — \$2.5 billion
- Economic Development Assistance Programs — \$150 million
- Broadband Technology Opportunities Act — \$4.35 billion
- Health Resources and Services
  - Community Health Center — \$500 million
  - Construction, renovation, equipment — \$1.5 billion
  - Health professions workforce shortages — \$500 million

---

---

---

---

---

---

---

---

---

---

**A Sample of Opportunities for Healthcare Providers and Approximate Funding Amounts (cont'd)**

- National Center for Research Resources — \$1 billion
- Healthcare Research and Quality — \$1.1 billion
- Office of the National Coordinator for Health Information Technology — \$2 billion
- Prevention and Wellness Fund — \$650 million
- Scientific and Technical Research Services — \$220 million
- Training and Employment Services — \$250 million

---

---

---

---

---

---

---

---

**“HITECH” Act**

- Electronic Health Records (“EHR”) funding provision
- Incentives to physicians and hospitals to be “meaningful EHR users”
- Voluntary, but penalties if do not adopt use of EHR by 2015

---

---

---

---

---

---

---

---

**Employers Covered by the Act**

- **Broad** definition of employer
- Employers that receive funds as:
  - “the contractor, subcontractor, grantee or recipient”
  - “any professional membership organization, certification or other professional body, any agent or licensee of the Federal government, or any person acting directly or indirectly in the interest of an employer receiving covered funds”
- Some news reports: Language regarding recipients of grants and other federal payments added to encompass hospitals
- Remember the Slide “A Sample of Opportunities”...
- Non-federal employers only

---

---

---

---

---

---

---

---

### Whistleblower Provisions

- Mandatory Notice
- Protected Disclosures
- Investigation
- Enforcement
- Private Right of Action
- Protection from Reprisal
- Burden of Proof
- No Preemption

---

---

---

---

---

---

---

---

### Mandatory Notice

- “Requirement to Post Notice of Rights and Remedies - Any employer receiving covered funds shall post notice of the [whistleblower] rights and remedies provided under this section. . . .”
- Sound familiar?

---

---

---

---

---

---

---

---

### Protected Disclosures

- **Broad** categories
- Incentive for an employee to report any information he or she “reasonably believes” is evidence of:
  - Gross mismanagement of an agency contract or grant relating to stimulus funds
  - Gross waste of stimulus funds
  - Substantial and specific danger to public health related to the implementation or use of the stimulus funds
  - An abuse of authority related to the implementation or use of stimulus funds
  - A violation of law, rule, or regulation related to an agency contract or grant, awarded or issued relating to stimulus funds

---

---

---

---

---

---

---

---

### Details? Regarding Disclosures

- Internal and External Covered
- No time limit for disclosures
- “Reasonable belief” is not defined
  - Common definition: “Reasonable if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions evidence wrongdoing.”



---

---

---

---

---

---

---

---

### What Counts as “Reporting”

- A person with supervisory authority over the employee
- The Recovery Accountability and Transparency Board established under ARRA
- A state or federal regulatory or law enforcement agency
- Court, grand jury
- Member of Congress
- Head of a federal agency or their representative
- The Comptroller General
- An Inspector General

---

---

---

---

---

---

---

---

### Investigations

- Inspector generals to investigate all complaints of reprisal (few exceptions)
  - Submit written report within 180 days to employee, employer, head of the appropriate agency, and the Recovery Accountability and Transparency Board

---

---

---

---

---

---

---

---

### **Enforcement**

- Within 30 days, determination of whether employer engaged in reprisal
- No administrative review/appeal mechanism
- Actions by relevant agency:
  - Order employer to take action
  - Order employer to reinstate complainant, compensatory payment, back pay, benefits, terms and conditions of employment
  - Order employer to pay complainant all costs, expenses (including attorney and expert fees) incurred in bringing the reprisal complaint
- Judicial enforcement of order
  - If fail to comply with order, agency shall file an action in United States district court for a district in which the reprisal was found to have occurred
  - Injunctive relief, compensatory and exemplary damages, attorneys fees and costs

---

---

---

---

---

---

---

---

### **Private Rights of Action**

- Civil action for reprisal in Federal Court
- Compensatory damages
- Even if IG does not conduct or continue investigation, or declines
- Action when IG gives notice of adverse decision, or no action within 210 days of submission
- Jury trial
- Arbitration agreements do not apply

---

---

---

---

---

---

---

---

### **Protection from Reprisal**

- Discharge, demotion, discrimination
- Demonstrate by a preponderance of evidence that a disclosure of information he “reasonably believed” was evidence of mismanagement, waste, fraud, or abuse of stimulus funds was a “contributing factor” in the reprisal.
- Direct evidence not needed

---

---

---

---

---

---

---

---

### **Burden of Proof**

- Employer's burden is higher than employee's
  - "Clear and convincing" evidence, not easier "preponderance of evidence," "substantial factor" standard
- Must show it would have taken the same action in the absence of employee engaging in the protected conduct

---

---

---

---

---

---

---

---

### **No Preemption**

- Whistleblower protections are in addition to state laws
- False Claims Act provisions not supplanted

---

---

---

---

---

---

---

---

### **Impressions**

- Broad provisions
- Employee-friendly burden of proof
  - Contributing factor
- Will need to identify and respond to any issues that are raised



---

---

---

---

---

---

---

---

**How Can You Prepare Your Organization?**

- Is your organization covered by the Act?
- Identify and follow up on issues raised
- Be proactive
- Audit use of funds
- Modify current compliance program
  - Policies and procedures
  - HR education

---

---

---

---

---

---

---

---

**Thank you.  
Questions?**

Frank E. Sheeder, Esq.  
fesheeder@jonesday.com  
(214) 969-2900

---

---

---

---

---

---

---

---