

## **Beware the Federal Government Bearing Gifts: How the American Recovery and Reinvestment Act of 2009 Could Become a Whistleblowing Trojan Horse**

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According to legend, it was Odysseus of Ithaca who devised the plan to end the ten-year Trojan War by presenting to the Trojans a gift in the form of a giant wooden horse. The Greeks left the horse at the gates of Troy and apparently sailed away in an act of surrender. The Trojans accepted the gift and brought the horse through the gates and into the city. Unbeknownst to the Trojans, a Greek strike force was hidden in the horse. Late that evening, as the Trojans slept, the concealed Greeks slipped out of the horse and opened the gates to the returning Greek army, who torched Troy and ended the devastating war. The lesson, of course, is to be wary of seemingly generous gifts left at your doorstep because, like the Trojan Horse, those gifts may contain the seeds of the recipient's destruction.

The lesson of the Trojan Horse is nowhere more apparent than in the American Recovery and Reinvestment Act of 2009 (the ARRA or the Act), the federal government's \$789 billion economic stimulus plan;<sup>1</sup> an apparent "gift" that could have Trojan Horse-like ramifications for its recipients. The reason for this is the ARRA's whistle-blower protection provision. The provision is designed to prevent state and local governments, as well as their contractors (collectively referred to as "covered employers"), from retaliating against employees who disclose gross mismanagement related to stimulus funds;<sup>2</sup> misuse of stimulus funds;<sup>3</sup> substantial and specific dangers to the public related to the implementation of stimulus funds;<sup>4</sup> abuse of authority related to the implementation of stimulus funds;<sup>5</sup> or use of stimulus funds to violate a law, rule or regulation.<sup>6</sup> The ARRA's whistle-blower protection places a very low

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1. David M. Herszenhorn & Carl Hulse, *Deal Reached in Congress on \$789 Billion Stimulus Plan*, N.Y. TIMES, Feb. 12, 2009, at A1.

2. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a)(1), 123 Stat. 115, 297.

3. *Id.* § 1553(a)(2).

4. *Id.* § 1553(a)(3).

5. *Id.* § 1553(a)(4).

6. American Recovery and Reinvestment Act § 1553(a)(5).

burden of proof on the employee-plaintiff,<sup>7</sup> a high burden of rebuttal on the employer-defendant,<sup>8</sup> and does not impose a statute of limitations on the claims of employees. Perhaps most critically, the provision does not require that an employee internally report any perceived wrongdoing.<sup>9</sup> Simply put, given the already alarming trends concerning retaliation claims,<sup>10</sup> the ARRA threatens state and local governments with a flood of bad press and potential litigation relating to the use of ARRA funds. ARRA litigation also creates a paradox because state and local governments will be forced to use already scarce resources to defend litigation engendered by an act designed to assist those governments in the height of financial distress.

At first glance, the ARRA offers a windfall for plaintiffs and their attorneys. Because the underlying cause of any lawsuit under the ARRA—disclosure of prohibited conduct—is so broad, nearly anything a government employee discloses could be categorized as prohibited conduct. “Gross mismanagement” could presumably encompass any number of ordinarily innocuous actions, especially considering that an employee need only have a reasonable belief that gross mismanagement has occurred.<sup>11</sup> What constitutes a “substantial and specific danger to public health or safety” is unclear. Furthermore, it is left to speculation whether an employee must have an objective reasonable belief or a subjective reasonable belief that an employer has engaged in wrongdoing.

Such issues are just a few of those employers will face as they try to deal with potential ARRA disclosures, whether those disclosures are made internally or externally. Fortunately, the ARRA’s whistle-blower provision is written almost identically to the Federal Whistleblower Protection Act (WPA), which protects federal employees who disclose the prohibited practices of “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>12</sup> It is a well-settled maxim of statutory interpretation that courts “interpret similar language in different statutes in a like manner when the two statutes address a similar subject

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7. *See id.* § 1553(c)(1)(A)(i).

8. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(c)(1)(B), 123 Stat. 115, 299 (setting forth clear and convincing standard on rebuttal).

9. *See id.* § 1553(a).

10. *See generally* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, CHARGE STATISTICS, FY 1997 THROUGH FY 2009 (2010), <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (noting total number of filed charges by individuals for multiple types of discrimination). In 1997, retaliation charges accounted for 22.6% of all charges filed with the Equal Employment Opportunity Commission. *Id.* That amount was far less than the corresponding number for racial discrimination charges (36.2%) and sex discrimination charges (30.7%). *Id.* Moreover, the amount of retaliation charges was only slightly more prolific than the corresponding number of disability discrimination charges (22.4%) and age discrimination charges (19.6%). *Id.* Fast forwarding to 2008, there is a much different composition of charges filed with the EEOC. While race discrimination still accounts for the highest percentage of charges, at 36.0%, retaliation charges have increased their share to 34.3%, with sex discrimination, age discrimination, and disability discrimination following at 30.0%, 24.4%, and 23.0%, respectively. *Id.*

11. American Recovery and Reinvestment Act § 1553(a).

12. 5 U.S.C. § 2302 (b)(8)(A)(ii) (2006).

matter.”<sup>13</sup> Therefore, case law interpreting WPA provides a potential blueprint for interpreting the ARRA that may give employers a roadmap in defending potential ARRA lawsuits.

Of course, successfully defending an ARRA lawsuit is a far cry from a triumph for an employer. Rather, success is avoiding litigation altogether, as well as the bad press that comes with allegations of wrongdoing in relation to gross mismanagement of ARRA funds. Therefore, employers that receive stimulus funds should take all necessary precautions to proactively prevent ARRA suits from emerging in the first place. Employers can do so by approaching the problem before it escalates to a situation where retaliation is an issue; namely, by creating an internal system for addressing concerns of prohibited conduct, whether those concerns are valid or not, so that employees are encouraged to choose the internal disclosure option over the external one.

This Article seeks to provide covered employers with guidance in interpreting the ARRA by analyzing case decisions under the WPA and to suggest methods for covered employers to best deal with those disclosures in order to prevent ARRA funds from turning into a Trojan Horse-like gift. Part I details the whistle-blower protection provision contained in the ARRA and lists the prohibited practices which trigger whistle-blower protection when an employee discloses them. Parts II, III, and IV focus on a three-part analysis of “protected disclosures” that trigger whistle-blower protection under the ARRA. Part II addresses what qualifies as a “disclosure.” Part III answers the question of whether the employee’s belief that he is disclosing a prohibited practice must be subjective or objective. Part IV addresses what actions actually constitute a prohibited practice so as to make the “disclosure” one that is “protected.” Finally, Part V concludes by offering insight on future problems the ARRA poses and provides suggestions as to what steps state and local governments, as well as their contractors, can take to limit exposure to ARRA lawsuits.

## I. AN OVERVIEW OF THE ARRA’S WHISTLE-BLOWER PROTECTION PROVISION

### A. *Acquiring Whistle-Blower Status*

Included in the ARRA are momentous whistle-blower protections. Section 1553(a) of the ARRA prohibits any non-federal employer receiving federal stimulus funds from firing, demoting, or otherwise discriminating against an employee who undertakes protected action under the ARRA.<sup>14</sup> Protected actions under the ARRA include disclosure by an aggrieved employee of certain information in the ordinary course of an employee’s duties to a person with supervisory authority over the employee, to a state or federal regulatory or law enforcement agency, to the Recovery Accountability and Transparency

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13. *United States v. Novak*, 476 F.3d 1041, 1051 (9th Cir. 2007).

14. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a), 123 Stat. 115, 297.

Board (the Board), to a member of Congress, to a court or grand jury, to the head of a federal agency, or to an inspector general.<sup>15</sup>

To receive protection under the Act, the employee must reasonably believe that the disclosed information is evidence of one or more of the following: gross mismanagement of an agency contract or grant relating to stimulus funds,<sup>16</sup> a gross waste of stimulus funds,<sup>17</sup> a substantial and specific danger to public health or safety related to the implementation or use of stimulus funds,<sup>18</sup> an abuse of authority related to the implementation or use of stimulus funds,<sup>19</sup> or a violation of a rule or regulation that governs an agency contract or grant related to stimulus funds.<sup>20</sup> Of these five, Congress only defined “abuse of authority,” as “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.”<sup>21</sup>

#### *B. Remedies for Whistle-Blowers Subjected to Adverse Action*

An individual who believes that he has suffered a reprisal for undertaking a protected action has a right to bring a lawsuit in federal court only after exhausting the administrative remedies provided in the ARRA.<sup>22</sup> Specifically, those administrative remedies require that an action must be filed with the appropriate inspector general’s (IG) office.<sup>23</sup> So long as the IG determines that the action is not frivolous, does not relate to covered funds, or has not been resolved in another proceeding, the IG then has 180 days, absent an extension, to conduct an investigation into the claim, determine whether there is a violation, and submit a report of that investigation to the employee, the employer, the head of the appropriate agency, and the Recovery Accountability and Transparency Board.<sup>24</sup> The absence of any time limitations on filing a complaint with the IG is noteworthy.

Within thirty days of receiving the IG’s report, the head of the applicable agency must determine whether the employer has subjected the employee to unlawful retaliation. Once the agency makes that determination, its head can order the employer to reinstate the employee, as well as award back pay,

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15. *See id.*

16. *Id.* § 1553(a)(1).

17. *Id.* § 1553(a)(2).

18. American Recovery and Reinvestment Act § 1553(a)(3).

19. *Id.* § 1553(a)(4).

20. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a)(5), 123 Stat. 115, 297.

21. *Id.* § 1553(g)(1).

22. *Id.* § 1553 (c)(3).

23. *See id.* § 1553(b)(1).

24. American Recovery and Reinvestment Act § 1553(b)(1)-(2).

compensatory damages, and attorney fees.<sup>25</sup> The complainant-employee also has the right to de novo review of his complaint in federal court if any of the following occurs: the IG elects not to investigate the complaint,<sup>26</sup> the IG elects to discontinue investigation of the complaint,<sup>27</sup> the agency head issues an order denying relief,<sup>28</sup> the agency head fails to issue an order within 210 days of submission of the complaint to the IG,<sup>29</sup> or the agency head fails to issue an order within thirty days of the expiration of an extension between the complainant and the IG.<sup>30</sup> Once again, there is no time limit with respect to a complainant's ability to initiate suit in federal court.

### C. Burdens of Proof for Employee and Employer

To succeed in a Section 1553 claim, an employee need not show that the protected conduct was a significant factor in the retaliation, but rather was a "contributing factor."<sup>31</sup> An employee may prove this either by establishing temporal proximity between the protected disclosure and the retaliation or by demonstrating that the decision-maker responsible for the reprisal knew of the protected disclosure.<sup>32</sup> As a defense, the employer can only avoid liability by proving through "clear and convincing evidence" that the protected disclosure was not a factor contributing to the employer's decision to take an adverse action against the employee.<sup>33</sup>

## II. THE MECHANICS OF A PROPER ARRA "DISCLOSURE"

An employee receives whistle-blower protection under the ARRA when he discloses what he reasonably believes to be a prohibited practice.<sup>34</sup> Thus, to acquire protection, the first question is whether the employee has made a "disclosure" as contemplated by the ARRA.

As the next two subsections explain, the ARRA addresses to whom an employee may make a disclosure, as well as how an employee's disclosure may be made. What the ARRA does not elucidate, however, is whether a disclosure can include disclosures of public information, a distinction that will be very important given the ARRA's mandate for transparency of stimulus money.<sup>35</sup>

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25. *Id.* § 1553(c)(2).

26. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(c)(3), 123 Stat. 115, 300.

27. *Id.*

28. *Id.*

29. *Id.*

30. American Recovery and Reinvestment Act § 1553(c)(3).

31. *Id.* § 1553(c)(1)(A)(i).

32. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(c)(1)(A)(ii), 123 Stat. 115, 299.

33. *Id.* § 1553(c)(1)(B).

34. See *id.* § 1553(a).

35. The recipients and uses of all recovery funds should be transparent to the public, and the public

Because that question is not directly addressed by the statutory language, subsection (C) looks to the WPA for guidance.

*A. Disclosure Need Not Be Internal To Be Protected*

Under the ARRA, a disclosure does not need to be made internally in order to be protected.<sup>36</sup> Rather, the ARRA protects disclosures made to a supervisor, a state or federal regulatory or law enforcement agency, the Recovery Accountability and Transparency Board, a member of Congress, a court or grand jury, the head of a federal agency, or an inspector general.<sup>37</sup>

*B. Disclosure Can Be Made During the Course of Employment*

The ARRA also protects disclosures that an employee makes during the ordinary course of employment.<sup>38</sup> This is a unique feature of the ARRA that does not mirror the interpretations of the WPA that have held that disclosures that are part of an employee's job performance cannot constitute a protected disclosure.<sup>39</sup> This distinction is particularly significant. Consider the following example:

A city employee is a fire alarm inspector and part of his job function is to submit a "punch list" of items that must be completed prior to the city signing off on a new fire alarm system for one of its schools or government buildings. Those "punch lists" will typically point out whether a contractor deviated from specifications of a design and whether certain technical requirements have been met in order to successfully complete the project. On one such project, the employee submitted a "punch list" indicating that the alarm system had deviated from the design plans that the contractor submitted to the city. When that employee is later terminated for assaulting a co-worker, he claims that he was actually discharged for being a whistle-blower. To support his allegation, he points to his "punch list," which he claims "disclosed" a possible danger to public health and safety.

If the employee in this hypothetical were working for the federal government and brought this case pursuant to the WPA, he could not prove he was a whistle-blower because making a "punch list" was part of his job performance and thus statements contained therein could not serve as the basis for a protected disclosure. If the employee were to bring a lawsuit under the ARRA, however, the information in the "punch list" could form the basis of a

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benefits of these funds should be reported clearly, accurately, and in a timely manner. Memorandum from Peter R. Orszag, Dir., Office of Mgmt. & Budget, Executive Office of the President to the Heads of Dep'ts & Agencies (Feb. 18, 2009) [hereinafter Orszag Memo] (addressing initial implementing guidelines for ARRA).

36. See American Recovery and Reinvestment Act § 1553(a).

37. *Id.*

38. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a), 123 Stat. 115, 297.

39. See *Darby v. Dep't of Energy*, 83 F. App'x 329 (Fed. Cir. 2003); *Langer v. Dep't of the Treasury*, 265 F.3d 1259 (Fed. Cir. 2001).

protected disclosure, despite the fact that the list was made in the ordinary course of employment. Consequently, the ARRA opens a significantly larger pool of communications to become the basis for lawsuits.

### C. Disclosure Must Be About Something Not Publicly Known

As demonstrated above, the ARRA clearly indicates that an employee can make a disclosure to any number of individuals and entities and that the disclosure can be made during the course of an employee's ordinary job duties. What the ARRA does not address, however, is whether a disclosure must be information that is not publicly available. This is extremely important in the context of the ARRA, as the federal government mandates strict disclosure guidelines on the use of stimulus funds.<sup>40</sup> In accordance with those guidelines, information regarding the use of stimulus funds will be available to the public. Consequently, significant public awareness of the stream of ARRA funds may limit the opportunity for employees to "disclose" prohibited practices if a "disclosure" concerns information that is not publicly known or available.

As is the case with much of the gray areas of the ARRA, looking to cases interpreting the WPA is beneficial in filling in the blanks and determining whether a disclosure must be of something not publicly known. According to the Court of Appeals for the Federal Circuit, "[r]eporting information that is already publicly known is not a protected disclosure [under the WPA]."<sup>41</sup> The Federal Circuit based its reasoning, in part, on prior precedent that construed the term "disclosure" as "requir[ing] a revelation of 'something that was hidden and not known.'"<sup>42</sup> Thus, without a more specific definition in the ARRA indicating a contrary interpretation of "disclosure," it is reasonable to assume that the ARRA requires a disclosure to concern something not already known to the public. Given the ARRA's mandate of full disclosure for stimulus fund recipients, it would appear that potential topics for disclosure would be quite limited in scope.

## III. WHAT CONSTITUTES REASONABLE BELIEF

As is the case with most of Section 1553, the ARRA does not define "reasonable belief." Is it an objective standard or is it a subjective standard? To find out, it is essential to look to interpretations of other federal retaliation statutes, such as the WPA and the Sarbanes-Oxley Act (SOX).

Interpreting the "reasonable belief" standard in the WPA, the Federal Circuit held that the test was an objective one, stating as follows:

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40. See Orszag Memo, *supra* note 35.

41. *Ferdik v. Dep't of Def.*, 158 F. App'x 286, 289 (Fed. Cir. 2005).

42. *Id.* (citing *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, 1349-50 (Fed. Cir. 2001)).

[C]ould a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence gross mismanagement? A purely subjective perspective of an employee is not sufficient even if shared by other employees. The WPA is not a weapon in arguments over policy or a shield for insubordinate conduct. Policymakers and administrators have every right to expect loyal, professional service from subordinates who do not bear the burden of responsibility. If personnel management is to be undone by the board, which of course has no responsibility for the results of its orders, the bases for its action must be thoroughly established.<sup>43</sup>

Likewise, federal courts interpreting Section 806 of the SOX have held that “reasonable belief” is “determined on the basis of the knowledge available to a reasonable person in the circumstances with the employee’s training and experience.”<sup>44</sup> Using the “reasonable belief” interpretation of the SOX will be greatly beneficial to employers attempting to navigate the tricky waters of ARRA whistle-blower protection.

Thus, it seems highly likely that courts will interpret the “reasonable belief” language in the ARRA as they have interpreted the same language in the WPA and the SOX; as requiring an objectively reasonable belief of wrongdoing.

#### IV. DEFINING THE FIVE CATEGORIES OF PROHIBITED CONDUCT

If an employee makes a disclosure contemplated by the ARRA and he subjectively believes that the disclosure involves a prohibited practice, the final step in determining whether the employee has whistle-blower status is to determine whether that belief is objectively reasonable; a question that can only be answered by understanding the definitions of the five “prohibited practices” contained in the ARRA. Of those prohibited practices, only one, “abuse of authority,” is defined, albeit in a relatively vague manner.<sup>45</sup> The remaining four prohibited practices, gross mismanagement, gross waste, violations of law, and dangers to public health or safety, are not defined in the ARRA. On their face, these prohibited practices are broad enough to open a Pandora’s Box of possibilities as to what may or may not be prohibited conduct and to provide whistle-blower protection when disclosed. Without any guidance aiding employers in interpreting the prohibited practices delineated in the ARRA, employers are left speculating as to what kind of employee complaints, even if

43. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

44. *Mahoney v. KeySpan Corp.*, No. 04 CV 554 SJ, 2007 WL 805813, at \*5 (E.D.N.Y. Mar. 12, 2007) (quoting *Lehrs v. Buca Di Beppo, Inc.*, No. 2004-SOX-8, 2004 DOLSOX LEXIS 65, at \*31 (Dep’t of Labor, June 15, 2004); see also *Fraser v. Fiduciary Trust Co. Int’l*, 417 F. Supp. 2d 310, 322 (S.D.N.Y. 2006).

45. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(g), 123 Stat. 115, 301-02. The ARRA defines abuse of authority as “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.” *Id.*

seemingly frivolous, may provide whistle-blower protection. Thus, it is again necessary to look to the WPA, which also protects federal employees who disclose the prohibited practices of “gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,” to determine what kinds of acts would fall within the ARRA’s categories of prohibited conduct.

#### A. Gross Mismanagement

Gross mismanagement, with respect to the WPA, is any management action or inaction that creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.<sup>46</sup> It does not include management and policy decisions that are merely debatable, nor does it involve actions or inactions that only rise to the level of simple negligence.<sup>47</sup> Rather, for an action or inaction to rise to the level of gross mismanagement, that action or inaction must involve a blatant and serious error of management that is not debatable by reasonable persons.<sup>48</sup> Furthermore, the actual “mismanagement” must involve an actual member of management.<sup>49</sup> The following cases have involved instances where an employee has disclosed “gross mismanagement”:

In *Shriver v. Department of Veterans Affairs*,<sup>50</sup> an employee in the Department of Veterans Affairs disclosed to management that the department was not processing a significantly large quantity of mail. The disclosure resulted in a long investigation, as well as pressure from the Office of the Inspector General and Congress. When the employee was passed over for a promotion, he sued under the WPA. The Merit Systems Protection Board (MSPB) determined that the employee’s disclosure concerning the unprocessed mail evidenced inaction by management of such a severe nature so as to create a substantial risk of significant adverse impact on the agency’s ability to accomplish its mission.<sup>51</sup>

In *Embree v. Department of the Treasury*,<sup>52</sup> an employee was an import specialist of the United States Customs Service who disclosed that her supervisor was failing to collect a significant amount of delinquent payments owed to the government. The MSPB held that the employee had disclosed gross mismanagement because the supervisor’s failure to collect the large number of accounts would adversely affect the ability of the agency to complete its mission of collecting payments.

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46. See *Harvey v. Dep’t of the Navy*, 92 M.S.P.R. 51, 56 (2002); *White v. Dep’t of the Air Force*, 63 M.S.P.R. 90, 95 (1994).

47. See *Nafus v. Dep’t of the Army*, 57 M.S.P.R. 386, 395 (1993).

48. See *White*, 63 M.S.P.R. at 95.

49. See *Ward v. Merit Sys. Prot. Bd.*, 981 F.2d 521, 525 (Fed. Cir. 1992).

50. 89 M.S.P.R. 239 (2001)

51. See *id.* at 245.

52. 70 M.S.P.R. 79 (1996).

Conversely, the disclosures in the following situations did not rise to the level of “gross mismanagement”:

In *White v. Department of the Air Force*,<sup>53</sup> an educational services specialist employee with the Air Force made disclosures criticizing the allegedly autocratic methods and standards used by the Air Force in implementing the Bright Flag Quality Education System. The employee was reassigned to an administrative position and brought a lawsuit against the Air Force, alleging that the reassignment was in response to a protected disclosure alleging gross mismanagement. The Federal Circuit held that the employee’s disclosure was not protected because the allegations did not rise to the level of gross mismanagement, but merely involved a difference of opinion between the employee and the agency on what the appropriate course of action was to address a particular problem.<sup>54</sup>

In *Ward v. Merit Systems Protection Board*,<sup>55</sup> an employee scientist disclosed to the Army that a fellow scientist was providing misinformation that could result in the termination of a pilot program that the employee was working on. The Federal Circuit determined that this was not a protected disclosure of gross mismanagement under the WPA because it did not involve disclosure of actions taken by anyone in a management position.<sup>56</sup>

In *Smith v. Department of the Army*,<sup>57</sup> a supply technician employee claimed that the Army’s purchase of a \$15,000 fuel management system was gross mismanagement because it replaced a seven-year old system that provided all the same information as the new system would. The MSPB held that this was not a protected disclosure of gross mismanagement because purchasing the new system would not significantly and adversely affect the Army’s ability to perform its mission.<sup>58</sup>

In *Berkley v. Department of the Army*,<sup>59</sup> a painter employed by the Army was disciplined for writing a letter to the President of the United States in which he claimed that the Army had wasted \$92 million. The MSPB held that the employee had shown no basis for his belief that the Army had wasted \$92 million, and thus his disclosure of “gross mismanagement” was not protected.<sup>60</sup>

In *Nafus v. Department of the Army*,<sup>61</sup> a computer programmer analyst for the Army wrote a memorandum protesting an urgent proposal requesting seven personal computers and software. The employee claimed that the information provided by management to justify the request was misleading and

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53. 95 M.S.P.R. 1 (2003).

54. *See id.* at 15.

55. 981 F.2d 521 (Fed. Cir. 1992).

56. *See id.* at 525.

57. 80 M.S.P.R. 311 (1998).

58. *See id.* at 316.

59. 71 M.S.P.R. 341 (1996).

60. *Id.* at 347-48 (noting appellant made only vague allegation of waste).

61. 57 M.S.P.R. 386 (1993).

unsupportable. The MSPB held that the employee had not disclosed gross mismanagement because management's actions could not be construed as having an adverse impact on the agency's mission to any significant degree.<sup>62</sup>

### *1. Application of the Gross Mismanagement Standard*

The difficulty in meeting the legal standard for gross mismanagement is evident from the cases cited above. Consider then the following situation: a state government employee actually believes that her co-worker's assignment to a project financed by stimulus funds constitutes gross mismanagement. The employee complains to her manager that this is a mismanagement of stimulus money because the co-worker has less seniority with the state than the complainant. When the employee does not receive a promotion the next month, she threatens to bring an ARRA whistle-blower action.

Without any guidance as to the sorts of actions that would constitute gross mismanagement under ARRA, it could appear that this employee acquired whistle-blower status. However, once an employer applies WPA analysis of gross mismanagement, as set forth in the above-referenced MSPB and Federal Circuit decisions, the state's choice of utilizing the co-worker would not be categorized as gross mismanagement. While the complaining employee subjectively believes that her co-worker is not as qualified for the project, the complaining employee has not shown how the state has made a non-debatable error of management that would create a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission.<sup>63</sup>

### *B. Gross Waste of Funds*

The second category of prohibited action referenced in both the ARRA and the WPA is disclosures involving a gross waste of funds. Again, using interpretations of the WPA as a guidepost, a gross waste of funds must be more than a trivial expenditure. The expenditure must significantly outweigh the reasonable expectation of the benefit to the government.<sup>64</sup> In other words, the protection against "gross waste" is not designed to protect people who are reporting inconsequential or de minimis matters.<sup>65</sup> Rather, it is to protect, for example, the Pentagon employee who discloses billions of dollars in cost overruns.<sup>66</sup> Consider the following, which involves findings that the employee

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62. *See id.* at 390, 395 (noting no gross mismanagement if management decision not debatable).

63. On the other hand, if the employee could show, for instance, that the co-worker is in charge of a multi-million dollar construction project, that the co-worker has no construction background, has never managed a project, and is not considered a responsible employee, there would certainly be a better case that the state's decision to put the co-worker in charge of the project was a non-debatable error of management that damaged the ability of the state to accomplish its mission and complete the project.

64. *See Embree v. Dep't of the Treasury*, 70 M.S.P.R. 79, 85 (1996).

65. *See Nafus*, 57 M.S.P.R. at 393.

66. *See id.*

disclosed a “gross waste of funds”:

In *Sood v. Department of Veterans Affairs*,<sup>67</sup> a medical technologist employed with the Department of Veterans Affairs claimed that she was denied certain benefits because she disclosed to her supervisors that another employee had illegally purchased a hematology analyzer and was receiving kickbacks from the purchase. The MSPB determined that the employee had disclosed information that she reasonably believed to be a gross waste of funds.<sup>68</sup>

In *Special Counsel v. Spears*,<sup>69</sup> an employee with the Office of Special Counsel was disciplined for writing a letter complaining that a supervisor traveled to a non-local training seminar at a cost of \$2,000 when he could have attended the same seminar locally without expending \$2,000. The MSPB held that the employee had reason to believe that this was a gross waste of funds and had therefore made a protected disclosure under the WPA.<sup>70</sup>

Contrast those findings with the examples below, in which the employee disclosures did not constitute a “gross waste of funds”:

In *Nafus v. Department of the Army*, a computer programmer analyst for the Army wrote a memorandum protesting an urgent proposal requesting seven personal computers and software. The employee claimed that the information provided by management to justify the request was misleading and unsupportable. The MSPB held that the employee had not disclosed gross waste of funds because all the computers would be put to use for the benefit of the government and would not cause any harm to the taxpayers.<sup>71</sup>

In *Embree v. Department of the Treasury*,<sup>72</sup> an employee was an import specialist of the United States Customs Service who disclosed that her supervisor was failing to collect a significant amount of delinquent payments owed to the government. The MSPB held that, while the employee had disclosed gross mismanagement, the case did not involve any expenditure of funds and thus there was no proof that gross waste had occurred.<sup>73</sup>

In *McCorcle v. Department of Agriculture*,<sup>74</sup> an employee was a veterinarian with the Department of Agriculture who complained to his superiors that the department had wasted three years of taxpayer funds by assigning him to clerical duties during that time. The MSPB held that this was not a disclosure of “gross waste,” but was rather nothing more than an employee’s personal disagreement with the agency’s assignment of duties and his opinion that he was being underutilized. Further, the MSPB determined that the employee failed to explain how he reasonably believed that his salary was significantly

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67. 88 M.S.P.R. 214 (2001).

68. *See id.*

69. 75 M.S.P.R. 639 (1997).

70. *See id.*

71. *See Nafus v. Dep’t of the Army*, 57 M.S.P.R. 386 (1993).

72. 70 M.S.P.R. 79 (1996).

73. *See id.* at 83.

74. 98 M.S.P.R. 363 (2005).

out of proportion to the benefit that the agency received from the duties he performed.<sup>75</sup>

### *1. Application of the Gross Waste of Funds Standard*

As demonstrated by the cases listed above, for an employee to be protected under the “gross waste of funds” clause, the expenditure of funds must be clearly wasteful in relation to the corresponding benefits. The following hypothetical is illustrative of a situation in which the expenditure of funds does not rise to the level of “gross waste”: an employee who believes global warming is a myth and complains to her supervisor that the state government’s use of funds to put solar panels on state owned buildings is grossly wasteful. When the employee is terminated two months later, she makes a complaint to the relevant inspector general, claiming that her termination was in violation of ARRA’s whistle-blower provision.

Applying “gross waste” interpretations from the WPA, it appears unlikely that the employee will receive whistle-blower protection under the ARRA. Using stimulus money to add solar panels arguably provides a cleaner, long-term, and more affordable source of energy to the state. Whatever the employee’s subjective beliefs may be, there is no evidence that the money will not result in a benefit to the state that is proportionate to the expenditure.

### *C. Substantial and Specific Danger to Public Health or Safety*

The third category of protected disclosures that is contained in both the ARRA and the WPA is disclosures involving a substantial and specific danger to public health or safety. Revelation of a negligible, remote, or ill-defined peril, which does not involve any particular person, place or thing, is not protected.<sup>76</sup> For example, general criticism that the EPA is not doing enough to save the environment would not qualify as a disclosure of a substantial and specific danger to public health or safety, whereas an allegation by a Nuclear Regulatory Engineer employee that a cooling system at a nuclear plant is insufficient would be a protected disclosure.<sup>77</sup>

The Federal Circuit has stated as follows regarding the considerations for determining when a disclosed danger is sufficiently substantial and specific to warrant protection under the WPA:

One such factor is the likelihood of harm resulting from the danger. If the disclosed danger could only result in harm under speculative or improbable conditions, the disclosure should not enjoy protection. Another important factor

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75. *See id.*

76. *See Sazinski v. Dep’t of Hous. & Urban Dev.*, 73 M.S.P.R. 682, 686 (1997).

77. *See Prescott v. Dep’t of Health & Human Servs.*, 6 M.S.P.R. 252, 257-58 (1981) (quoting S. REP. NO. 95-969 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743).

is when the alleged harm may occur. A harm likely to occur in the immediate or near future should identify a protected disclosure much more than a harm likely to manifest only in the distant future. Both of these factors affect the specificity of the alleged danger, while the nature of the harm—the potential consequences—affects the substantiality of the danger.<sup>78</sup>

In the following circumstances, the employee has disclosed a substantial and specific danger to public health or safety:

In *Gady v. Department of the Navy*,<sup>79</sup> the MSPB protected a Navy librarian's complaints about the department's policy of allowing smoking in the library because she reasonably believed that it posed a safety risk to the staff.<sup>80</sup>

In *Connelly v. Nuclear Regulatory Commission*,<sup>81</sup> a Nuclear Regulatory Commission employee disclosed information that one of her co-workers was passing confidential information to an outsider, who was an anti-nuclear activist. The MSPB determined that this was a protected disclosure because it concerned a serious abuse of the co-worker's authority.<sup>82</sup>

On the other hand, the employees in the cases below have failed to meet the threshold for disclosing a substantial and specific danger to public health or safety:

In *Fiorillo v. United States Department of Justice, Bureau of Prisons*,<sup>83</sup> a prison guard made statements to newspapers questioning the integrity of the prison where he worked. Specifically, he alleged that a female inmate and employee had been sexually assaulted five years earlier, that breaches of national security occurred in the prison, and that the prison was saturated with corruption. The Federal Circuit held that, although the allegations related to matters of public concern in the past, they were not new or revealing and were essentially airings of the guard's personal complaints.<sup>84</sup>

In *Sazinski v. Department of Housing & Urban Development*,<sup>85</sup> a structural engineer employed by the Department of Housing and Urban Development wrote a letter expressing his concerns that the elimination of his position might create a scarcity of resources in the future when supporting a department program. The MSPB held that this did not disclose any substantial and specific danger to public health or safety and that the letter was nothing more than a disagreement with the department's decision to eliminate his position.<sup>86</sup>

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78. *Chambers v. Dep't of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008).

79. 38 M.S.P.R. 118 (1988).

80. *See id.* at 121.

81. 64 M.S.P.R. 28 (1994).

82. *See id.* at 31.

83. 795 F.2d 1544 (Fed. Cir. 1986).

84. *See id.* 1549.

85. 73 M.S.P.R. 682 (1997).

86. *See id.* at 685-86.

### 1. Application of the Substantial and Specific Danger Standard

Clearly, the WPA, and potentially the ARRA, require employees' disclosures of health and safety concerns to be of substantial and specific dangers. In the following situation, however, the employee may acquire such protection: an employee for a city's highway department writes an e-mail to her boss complaining that the city's decision to eliminate a bicycle lane on a heavily traveled road will endanger cyclists who traditionally ride to work on that road. She cites statistics that show a greater incidence of cycling accidents on roads without designated bike lanes.

It seems likely that the employee's e-mail to her boss is a protected disclosure. There is no indication that the employee has a personal interest in maintaining a bike lane. Rather, it appears that she has done this solely out of concern for public safety. Moreover, she indicates in her complaint a substantial and specific danger that would probably occur—a greater amount of injuries to bikers—if the city removes the bike lane.

### D. Abuse of Authority

Abuse of authority is defined rather vaguely as “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.”<sup>87</sup> In a definition that foreshadowed the ARRA's statutory definition of abuse of authority, the MSPB defined the WPA's version of abuse of authority as “an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or results in personal gain or advantage to himself or preferred other persons.”<sup>88</sup> The MSPB further clarified the definition by specifying that abuse of authority would include harassing or intimidating other employees, using one's influence to denigrate other staff members in an abusive manner, or threatening the careers of employees.<sup>89</sup> The following are examples of such abuse of authority:

In *D'Elia v. Department of the Treasury*,<sup>90</sup> an employee at the Department of the Treasury reported that his supervisor used a government owned computer for personal purposes at home, had approved falsified time sheets, and had improperly approved of a change in duty station. The MSPB held that the employee's report was protected because the employee reasonably believed it disclosed an abuse of authority by his supervisor.<sup>91</sup>

In *Embree v. Department of the Treasury*, an Import Specialist of the United

87. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(g), 123 Stat. 115, 301.

88. *Pasley v. Dep't of the Treasury*, 109 M.S.P.R. 105, 114 (2008).

89. *See* *Murphy v. Dep't of the Treasury*, 86 M.S.P.R. 131, 136 (2000).

90. 60 M.S.P.R. 226 (1993), *overruled by* *Thomas v. Dep't of the Treasury*, 77 M.S.P.R. 224 (1998).

91. *See id.* at 229.

States Customs Service disclosed that her supervisor was failing to collect a significant amount of delinquent payments owed to the government. The MSPB held that the employee had disclosed abuse of discretion because the employee's supervisor had used his authority to provide an advantage to outside debtors to the disadvantage of the department creditor.<sup>92</sup>

In *Wheeler v. Department of Veterans Affairs*,<sup>93</sup> an employee with the Department of Veterans Affairs alleged that the agency abused its authority when it found he was not qualified for a position on the grounds that he failed to submit his college transcript, even though the application materials did not require the submission of transcripts. The MSPB determined that because the vacancy announcement did not call for the submission of transcripts, a disinterested observer could reasonably conclude that the agency's decision to disqualify based on the failure to submit transcripts was an arbitrary and capricious exercise of power that adversely affected the rights of applicants, and constituted an abuse of authority.<sup>94</sup>

The following examples do not represent protected disclosures of abuse of authority:

In *Carolyn v. Department of the Interior*,<sup>95</sup> a financial economist with the Bureau of Indian Affairs was terminated during his probationary period when he disclosed to an agency official that his supervisor's investment strategies and decisions were in violation of his legal and fiduciary responsibilities. The MSPB found that the employee had failed to specify how the supervisor had abused his authority and had failed to show how the supervisor's decisions had adversely affected the rights of the tribes whose investments he was responsible for. Consequently, the MSPB determined that the employee had not disclosed an abuse of authority.<sup>96</sup>

In *Doyle v. Department of Veterans Affairs*,<sup>97</sup> the employee was the Chief Physician of the Rehabilitation Department at the Veterans Administration Medical Center for the Department of Veterans Affairs in West Palm Beach, Florida. One of his duties was to write proficiency reports for subordinates. After writing one such proficiency report, the Chief of Staff asked the employee to change the report to include the use of a model narrative, as it may prove helpful. The employee filed a complaint with the Office of Special Counsel, claiming that the Chief of Staff had abused his authority by requiring that he add a model narrative to the proficiency report. Both the MSPB and the Federal Circuit determined that the Chief Physician had not stated a case under

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92. See *Embree v. Dep't of the Treasury*, 70 M.S.P.R. 79, 83 (1996).

93. 88 M.S.P.R. 236 (2001).

94. See *id.* at 241.

95. 63 M.S.P.R. 684 (1994), *overruled by* *Thomas v. Dep't of the Treasury*, 77 M.S.P.R. 224 (1998).

96. See *id.* at 690.

97. 273 F. App'x 961 (Fed. Cir. 2008).

the WPA because, among other things,<sup>98</sup> he had not disclosed an abuse of authority as “[d]iscussion and even disagreement with supervisors over job-related activities is a normal part of most occupations” and does not constitute an abuse of authority.<sup>99</sup>

### *1. Application of the Abuse of Authority Standard*

Similar to the other provisions contained in both the ARRA and the WPA, a court will determine whether the disclosure is protected only after looking to the objective reasonableness of the employee’s belief. In the following theoretical situation, the employee would be unlikely to acquire protection under the ARRA: an employee works for a small government contractor that is receiving stimulus funds pursuant to a contract with the local city government. The employee put in a request for overtime hours on a project that was part of the government contract, but the owner of the company informed her that he had decided not to allow employees to work overtime on the project, as it would cut into the company’s profit margin from the contract. Provided that the company owner’s decision is within the bounds of labor law, his explanation for the reasons not to allow overtime on this project should be sufficient so that no reasonable employee would think that the decision was “arbitrary and capricious,” but was rather a conscious decision to conserve limited funds.

### *E. Violation of Law, Rule, or Regulation*

Looking to disclosures that uncover a violation of law, rule, or regulation, courts interpreting the WPA have held that protection under the WPA does not necessitate the identification of a statutory or regulatory provision by title or number.<sup>100</sup> Rather, an employee will gain whistle-blower protection when the employee’s statements and the circumstances surrounding the making of those statements clearly implicate an identifiable violation of law, rule, or regulation.<sup>101</sup> Additionally, “WPA was enacted to protect employees who report genuine violations of law, not to encourage employees to report minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee’s assigned duties.”<sup>102</sup>

The courts in the situations below held that the employee was protected under the WPA because of a reasonable belief that the employer had violated a law, rule, or regulation:

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98. The MSPB and the Federal Circuit held that, because the employee had resigned, he could not demonstrate an adverse personnel action and thus had no cause of action under the WPA.

99. *Doyle*, 273 F. App’x at 964 (quoting *Willis v. Dep’t of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998)).

100. *Langer v. Dep’t of the Treasury*, 265 F.3d 1259, 1266 (Fed. Cir. 2001).

101. *Id.*

102. *Id.* at 1267 (quoting *Herman v. Dep’t of Justice*, 193 F.3d 1375, 1381 (Fed. Cir. 1999)).

In *Van Ee v. Environmental Protection Agency*,<sup>103</sup> an Environmental Protection Agency employee made disclosures objecting to the Department of the Interior's (DOI) plan to use \$400,000 to fund a research study of desert tortoises. The employee pointed out that the DOI was not evaluating alternate habitats for the tortoises as required by law, and suggested that the Endangered Species Act and the Apex legislation should be followed to provide safe habitats, rather than doing a research study. The court held that the employee disclosed what he reasonably believed were specific violations of law inherent in the DOI's course of action. Furthermore, based on his expertise, the employee disclosed that the proposed expenditures for research were unnecessary, not in accordance with law, and a misallocation of resources.<sup>104</sup>

In *Kraushaar v. Department of Agriculture*,<sup>105</sup> a Department of Agriculture employee alleged that he engaged in whistle-blowing when he disclosed to supervisors that his direct supervisor failed to follow agency regulations regarding the training required for a probationary law enforcement officer, and when the supervisor threatened disciplinary action if the employee did not use annual leave in the specific way he wanted. The court held that both of these disclosures were protected because the employee reasonably believed that his supervisor's actions were violations of the agency's specific and set-out regulations.<sup>106</sup>

Conversely, the employee was not protected in the situations below:

In *Langer v. Department of the Treasury*,<sup>107</sup> an employee who worked as assistant district counsel with the Internal Revenue Service (IRS) disclosed information relating to the handling of secure "pink envelopes" within the IRS, the imbalance in the number of Caucasians and African Americans being investigated using grand jury procedures, and improper performance appraisal procedures for a secretary. The court held that her disclosures were not protected because the agency's alleged violations were minor and inadvertent, and some concerned not a rule adopted by the IRS, but rather a procedure personally established by the employee as an exception to general agency procedures regarding the handling of pink envelopes.<sup>108</sup>

In *Frederick v. Department of Justice*,<sup>109</sup> a patrol agent in the Department of Justice Border Patrol Division alleged that he had disclosed a violation of law when he reported to his supervisors that another agent violated international law by crossing the border into Mexico without Mexican permission. In evaluating the reasonableness of the whistle-blower's purported belief, the

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103. 64 M.S.P.R. 693 (1994).

104. *Id.* at 698.

105. 87 M.S.P.R. 378 (2000).

106. *Id.* at 383.

107. 265 F.3d 1259 (Fed. Cir. 2001).

108. *Id.* at 1266.

109. 73 F.3d 349 (Fed. Cir. 1996).

Federal Circuit court stated that the alleged action of the Border Patrol agent was of such a trivial nature that the “whistle-blower” could not have had a reasonable belief that the Border Patrol agent was violating a law, rule, or regulation within the meaning of the WPA. Indeed, the Border Patrol agent testified that in fact the exact location of the border was unclear and that he believed he never crossed into Mexico but always remained on United States soil.<sup>110</sup>

*1. Application of the Violation of Law, Rule, or Regulation Standard*

The gist of the violation of a law, rule, or regulation standard is that the violation must be imminent, non-trivial, and involve more than internal rules or procedures. Thus, based on WPA interpretations, it is unlikely that an employee would gain whistle-blower protection for disclosing a fellow employee’s violation of an informal policy requiring employees to sign out of the office when they will be gone for longer than an hour. Because this policy does not rise to the level of a law, rule, or regulation, and because it is extremely trivial in nature, an employee would be hard-pressed to acquire whistle-blower status based on that disclosure.

V. ANTICIPATING AND ADDRESSING THE PROBLEMS CAUSED BY THE ARRA’S WHISTLE-BLOWER PROVISION

At first blush, the ARRA’s whistle-blower provision creates an enormous risk of liability for covered employers. Interpretations of the analogous WPA and SOX show, however, that it will indeed be more difficult than meets the eye for an employee to acquire whistle-blower status. The employee must make a disclosure of non-public information, which is a considerable task given the federal government’s requirements for transparency with respect to the use of stimulus funds. Further, the employee must reasonably believe that he is disclosing one of the five prohibited practices. As set forth by the MSPB and the Federal Circuit, when interpreting the WPA, to acquire whistle-blower protection an employee must do more than make bald assertions or conclusions that a prohibited practice has occurred. Rather, the employee must allege specific facts that give rise to a reasonable belief that a prohibited practice has occurred, and those allegations, if proved, must be able to meet the high thresholds of proof required by the definitions of those prohibited practices.

Despite the apparent hurdles employees face in order to successfully achieve whistle-blower status, there are remaining problems posed by the ARRA’s whistle blowing provision that could prove counterproductive to the stimulus plan’s purpose of providing state and local government with more resources to stimulate the economy. Specifically, the following three factors will prove

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110. *Id.*

problematic: first, the lack of a statute of limitations for ARRA whistle-blower suits; second, the fact that employees only need to show that the protected disclosure was a “contributing factor” to the adverse action; and third, the requirement that the employer must demonstrate through clear and convincing evidence that the disclosure did not contribute to the adverse action. These three factors virtually assure that most complaints will not be disposed of by a motion to dismiss and likely not by a motion for summary judgment. Thus, even if many of these lawsuits are ultimately unsuccessful or frivolous, defending them will require the expenditure of significant taxpayer resources, a result that seemingly threatens the entire purpose of the ARRA.

Moreover, as discussed previously, the ARRA protects disclosures made to numerous external sources without the employee ever having to make an internal complaint first. This is extremely disadvantageous for the covered employer because it does not provide the employer an opportunity to examine the allegation and remedy it prior to outside entities becoming involved. This could result in the use of unnecessary time and resources, for both the disclosing employee and the employer receiving the disclosure, for investigating a possibly meritless complaint that could have been resolved to the employee’s satisfaction in-house. Furthermore, the fact that an employee can go outside of the covered entity to report a potential prohibited practice creates the possibility that the press will report on the alleged prohibited practice before the covered employer learns of the allegation or is provided with an opportunity to resolve the issue that could reasonably have no merit or be a misunderstanding on the part of the disclosing employee.

Therefore, it is necessary for employers to formulate a workable compliance program that will limit its exposure to external ARRA whistle-blower disclosures and, ultimately, litigation. In essence, what the covered entity must do is engage in what Richard Thaler and Cass Sunstein call “choice architecture.”<sup>111</sup> Choice architecture is the process of “organizing the context in which people make decisions.”<sup>112</sup> Thaler and Sunstein, in their book, *Nudge*, illustrate the idea of choice architecture by presenting a situation in which a door that is push-only from the inside nevertheless has a pull-handle on it.<sup>113</sup> That handle influences people to pull the door, even though they must push it to get out of the room.<sup>114</sup> This, according to the authors, is bad choice architecture, as it fails to recognize the nature of individuals to pull when they see a handle.<sup>115</sup> A good choice architect, therefore, will recognize human impulse and design systems that anticipate those impulses, incorporate them

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111. See generally RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 3 (Updated 1st Ed., Penguin Books 2009).

112. *Id.*

113. *Id.* at 83.

114. *Id.*

115. THALER & SUNSTEIN, *supra* note 111, at 83.

into the design of the system, thereby maximizimizing the effectiveness of that system.<sup>116</sup> In more colloquial terms, the choice architect designs a system that “nudges” people towards the architect’s desired outcome.<sup>117</sup>

Given the potential problems created by external disclosure, covered employers would be well-advised to heed the concept of choice architecture and “nudge” employees to disclose internally in an effort to resolve the problem as opposed to the employee disclosing externally with the ultimate goal of a lawsuit. To successfully do so, those employers must inform employees of the ARRA’s whistle-blower protections; educate all employees, including supervisors, about the protection offered by the ARRA’s whistle-blower provision; and create an internal forum for disclosing prohibited practices and for handling complaints based on personnel actions resulting from those disclosures. Note that none of these practices in any way attempts to interfere with an employee’s ARRA rights. Rather, it just offers employees the option to address problems in a way that is more beneficial to the employer and may result in a greater benefit to the employee.

#### *A. Nudge 1: Disclosure by Poster*

The first nudge that may limit potential ARRA liability is actually a by-product of the ARRA’s mandate to post employees’ rights under the Act.<sup>118</sup> By requiring covered entities to post a notice that discloses employees’ ARRA rights, the federal government may essentially “nudge” or encourage employees to internally disclose possible prohibited practices prior to resorting to external sources. Why? Because informing employees of their rights under ARRA not only fulfills a statutory requirement, but it may also increase the comfort level of employees. If the employer explicitly informs its employees of their federally protected rights, they may be less fearful of potential consequences associated with internally disclosing prohibited practices prior to going to outside sources.

#### *B. Nudge 2: Educating Employees on the ARRA’s Whistle-Blower Protections*

Covered entities can also encourage employees to forgo non-protected, external disclosures by educating them on their federal ARRA rights and how those rights should be exercised. As discussed, on their face, the prohibited practices which are subject to disclosure under the ARRA are extremely vague. Thus, employees who may have briefly glanced at an ARRA workplace poster would not have an automatic understanding of the narrow definition of “gross mismanagement” and how difficult it is to prove. This could result in an

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116. *Id.*

117. *Id.* at 4.

118. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(e), 123 Stat. 115, 301.

employee making a disclosure of something that is not a prohibited practice.

Educating employees on the nuances of the ARRA's whistle-blower provision, especially the "prohibited practices," can help reduce the likelihood of such problems in the following ways: first, as is the case with the covered entity's disclosure, providing employees with education about their rights may increase the employee's comfort in making an internal, as opposed to external, disclosure. Second, by providing employees with sufficient information as to what does or does not constitute a prohibited practice, the covered entity may provide a significant enough nudge that some employees may choose not to make an external disclosure because of their informed decision that the issue does not involve a prohibited practice. Finally, informing them as to what constitutes a prohibited practice also provides the employer with a watermark of what a "reasonable employee" would believe. This, in turn, provides employers with a potential defense that a disclosing employee's belief that a prohibited practice had occurred was not objectively reasonable.

### *C. Nudge 3: Create an Internal Forum to Address ARRA Disclosures*

In addition to disclosure and education, employers should create an optional internal avenue for employees to formally make disclosures of what they believe to be prohibited conduct. In a small covered entity such as a town or small company, this could be as simple as designating a specific person to handle and process employee disclosures in as confidential a manner as is allowed by the circumstances surrounding the disclosure. The designated person should be well equipped to conduct an investigation into the allegations, including speaking with the individual that is the subject of the complaint and any potential witnesses. It would further involve speaking with in-house counsel and ultimately deciding on a resolution to the matter, which should be presented to the employee in writing. For larger covered entities, such as cities, states, and large companies, it may be necessary to designate a specific office (e.g., human resources) in each department that will be responsible for processing ARRA disclosures of employees that work in that specific department.

This third nudge can also be augmented by combining it with the first two, disclosure and education. Presumably, a covered entity can reference in its mandated ARRA poster the presence of an internal avenue for ARRA specific disclosures, provided that this avenue is clearly listed as optional and not a prerequisite for an employee exercising the specific rights contained in the Act. Further, when educating employees about their ARRA whistle-blower rights, the covered entity should also inform them about the optional internal procedure that the employer has developed to supplement the rights that the ARRA provides. These strategies will only further increase the possibility that an employee proceeds in-house with any possible ARRA disclosures, while

neither preventing external disclosure nor giving any indication that external disclosure would be disadvantageous to the employee. In sum, the covered employer is merely taking advantage of one of the ARRA's options for disclosure, internal disclosure, the most mutually convenient and cost-effective choice.

## VI. CONCLUSION

Despite the initial shock factor amongst government lawyers around the United States, the ARRA may not provide the expansive whistle-blower protections as would appear from the face of the statute. Looking to how courts have interpreted similar portions of the WPA, and to a lesser extent the SOX, the ARRA's whistle-blower protections will likely be severely curtailed by the requirement of an objectively reasonable belief, along with strict definitions of what constitutes prohibited conduct for the purpose of a protected disclosure.

However, the difficulty for an employee to succeed in an ARRA whistle-blower case does not necessarily mean that the employee cannot use the ARRA to make things difficult for the employer, especially with the politically charged issues related to the use of billions of dollars of taxpayer money. Therefore, covered employers should utilize internal nudges in an attempt to steer any potential ARRA whistle-blower issues away from external disclosure as a first option. If an employer does so, it will help to reduce or nullify the possibility that the ARRA becomes a whistle-blowing Trojan Horse.