

New Whistleblower Obligations on Healthcare Providers Under the American Recovery and Reinvestment Act of 2009

Legal Alert

April 27, 2010

The American Recovery and Reinvestment Act of 2009 (ARRA) is set to provide \$19 billion in order to encourage physicians to convert to the use of Electronic Health Record (EHR) systems by 2015. This incentive reimbursement program offers medical practices an attractive funding mechanism to convert their present record systems into more modern and potentially more cost-effective systems. It is no surprise that along with the funding, certain additional responsibilities and obligations will be imposed on medical practices and other healthcare providers who are recipients of these incentive funds. Practices contemplating the use of these incentive funds should be alert to these obligations.

Whistleblower Protection

Section 1553 of the ARRA protects employees of the recipient of these incentive funds from being disciplined, discharged or demoted for reporting the misuse, abuse or waste of ARRA funds. The protection extends to the reporting of (1) the gross mismanagement of an agency contract or grant relating to ARRA funds; (2) a gross waste of ARRA covered funds; (3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds; (4) an abuse of authority related to the implementation or use of covered funds; and (5) a violation of law, rule or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued related to covered funds.

Significantly, the burden on an employee seeking to establish such a claim is minimal. To demonstrate an unlawful reprisal for reporting the misuse of ARRA funds, the employee needs only to demonstrate that the employer imposing the discipline knew of the protected disclosure and the disclosure was a "**contributing factor**" to the discipline or reprisal. Employees who prevail on such a claim may be entitled to reinstatement, back pay, compensatory damages and attorney's fees.

Notice Posting

Healthcare providers that receive ARRA funds must post a notice informing their employees about their ARRA whistleblower remedies and rights. Although no specific notice has yet been recommended by the government, prudent healthcare providers will not wait for the government to act and will publish their own notice pending further government recommendations.

Action Steps

Continued

Employers may take the following proactive steps to help protect themselves from whistleblower claims by employees under the ARRA:

1. Post a notice informing employees about ARRA whistleblower rights and remedies.
2. Develop communication channels, including anonymous channels, to ensure employees feel their complaints and concerns are being properly addressed.
3. Prepare and disseminate a company code of conduct that requires reporting fraud and abuse, and educate employees about their responsibilities.
4. Train and educate supervisors to recognize potential whistleblowers and take complaints seriously.

For more information about the incentive programs under the ARRA, please contact any member of the Health Care or Labor and Employment Practice Groups at Flaster Greenberg PC.

ATTORNEYS MENTIONED

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