

# American Recovery and Reinvestment Act



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P.L. 111-5, enacted 2/17/09

- **The recent stimulus act provides protection for state and local government employees and contractor employees who disclose information that the employee reasonably believes is evidence of ...**
  - **A gross mismanagement of an agency contract or grant relating to covered funds,**
  - **A gross waste of covered funds,**
  - **A substantial and specific danger to public health or safety related to the implementation or use of covered funds,**
  - **An abuse of authority related to the implementation or use of covered funds, or**
  - **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 relating to covered funds**

# Time Limitations for Investigating Whistleblower Reprisal Complaints

- The OIG has 180 days after receiving a complaint to take one of the following actions...
  - Make a determination that the complaint is frivolous, does not relate to covered funds, or another Federal or State judicial or administrative proceeding has previously been invoked to resolve the complaint, or
  - Submit a report as required



# Discretion not to Investigate

- If the IG exercises his discretion not to conduct or continue an investigation, then the OIG must provide the person submitting the complaint and the non-Federal employer a written explanation. (i.e. frivolous complaint, not related to covered funds, or other administrative proceeding has begun)
- *The OIG must report in the semi-annual report to Congress a list of those investigations the IG decided not to conduct or continue.*



## Extensions of Time

- **Voluntary Extensions** – If the OIG cannot complete the investigation within 180 days and the person submitting the complaint agrees, the OIG can submit the report in the amount of time agreed upon between the two parties.
- **Unilateral Extensions** – If the investigation is not completed within 180 days, the IG can extend the period for not more than another 180 days without agreement from the person submitting the complaint.
- *The OIG must report in the semi-annual report to Congress a list of those investigations for which an OIG received an extension.*



## Access to OIG Investigative File

- **The person alleging a reprisal is permitted access to the OIG investigative records** once the investigation is closed in accordance with the Privacy Act.
- If the person alleging a reprisal brings a civil action, then the person alleging the reprisal **and the non-Federal employer** are permitted access to the OIG investigative records in accordance with the Privacy Act.



## Burden of Proof for the Person alleging Reprisal

- Person alleging the reprisal affirmatively establishes the occurrence of the reprisal if the person demonstrates that the **disclosure was a contributing factor in the reprisal**. Circumstantial evidence may be used to demonstrate it was a contributing factor:
  - The official undertaking the reprisal knew of the disclosure, or
  - 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.



## Burden of Proof for the non-Federal Employer

- The non-Federal employer may rebut the presumption that the person alleging the reprisal has established under the contributing factor test by demonstrating by **clear and convincing evidence** that the non-Federal employer would have taken the action constituting the reprisal in the absence of the disclosure.





# Agency Response

- Not later than 30 days after receiving the IG report, the head of the agency shall conclude whether the non-Federal employer subjected the complainant to a prohibited reprisal or not and shall issue an order denying relief in whole or in part or shall take one of the listed remedial actions.



# Possible Agency Ordered Remedial Actions

- Order the employer to take affirmative action to abate the reprisal.
- Order the employer to reinstate the person to the position that the person held before the reprisal, together with the compensation (including back pay), compensatory damages, employment benefits, and other terms and conditions of employment that would apply to the person if the reprisal had not been taken.
- Order the employer to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees) that were reasonably incurred by the complainant for, or in connection with bringing the complaint regarding the reprisal.



## Civil Actions

- **The complainant may bring a de novo action at law or equity against the employer to seek compensatory damages and other relief available under this section in the appropriate United States district court when all administrative remedies are exhausted.**

