Attention, employers: The economic stimulus plan that President Obama signed into law on February 17, 2009 takes effect March 19, 2009, and contains significant new whistleblower protections that will catch the unwary by surprise.

If you receive funds under the plan, formally called the American Recovery and Reinvestment Act of 2009 (“ARRA” or “the Act”), chances are good that many people will be watching how you use the money. And if you take action against an employee who reports suspected wrongdoing, chances are even better that you will be accused of violating the ARRA, even if you used the money properly. The Act contains several protections for “whistleblowers,” or people who report suspected wrongdoing, and makes it unlawful for employers to retaliate against them.

Although whistleblower protections are not a new concept — laws such as the Sarbanes-Oxley Act and the False Claims Act contain them — the ARRA offers more protection than most. Rather than focusing on protecting people who report suspected fraud, the ARRA extends protection to those who report suspected gross mismanagement or waste, which are fairly subjective concepts and likely will lead to a deluge of claims.

The protections are contained in Section 1553 of the ARRA, which is known as the McCaskill Amendment. Section 1553(a) forbids “any non-federal employer receiving covered funds” from firing, demoting, or otherwise discriminating against any employee “as a reprisal for disclosing . . . information that the employee reasonably believes to be evidence of” the following:

1. gross mismanagement of an agency contract or grant relating to covered funds;
2. a gross waste of 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; or
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 relating to covered funds.

These protections extend not only to employees who report their suspicions to someone outside the organization, but also cover employees who report their suspicions internally. Internal reporting includes disclosures made “in the ordinary course of an employee’s duties” and disclosures made to supervisors and other individuals within the company with “the authority to investigate, discover, or terminate misconduct.” Further, the reprisal need not be motivated solely by the protected disclosure. Rather, the complainant must merely demonstrate that the disclosure “was a contributing factor in the reprisal.” However, § 1553(c)(1)(B) protects the employer from liability if it demonstrates that it would have taken the action in question even in the absence of the employee’s protected disclosure.

If an employee believes he or she has been retaliated against in violation of the Act, he or she may submit a complaint to the inspector general of the administrative agency tasked with overseeing use of the funds in question. The inspector general then will conduct an investigation and make a determination within 180 days of the complaint, unless he or she receives an extension of time under § 1553(b)(2)(B)(i) or opts not to investigate pursuant to § 1553(b)(3). At the conclusion of the investigation, the inspector general will submit a report to the complainant, the employer, the head of the agency, and the Recovery Act Accountability and Transparency Board. Within 30 days of receiving this report, “the head of the agency concerned shall determine whether there is a sufficient basis to conclude” that the employer has unlawfully retaliated against the employee. Upon making this determination, the head of the agency shall either “issue an order denying relief
in whole or in part,” or shall order the employer to do one or more of the following:

(1) take affirmative action to abate the reprisal;
(2) 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 in that position had the reprisal not been taken; or
(3) pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorney’s fees and expert witnesses’ fees) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the agency or a court of competent jurisdiction.

If this complaint process does not result in relief to the complainant, he or she can file a civil action under § 1553(c)(3). Upon request, this section grants complainants the right to a trial by jury. Conversely, if the employer refuses to comply with an order entered pursuant to § 1553(c)(2), the head of the agency shall file an action for enforcement in a United States district court.

HOW TO PROTECT YOURSELF: Employers who receive funds under the ARRA should ensure that all supervisory personnel are familiar with the anti-retaliation provisions contained in § 1553 of the Act, and should update their personnel policies accordingly. If an employee makes a protected disclosure, do not take any adverse action against him or her that you would not have taken had the disclosure not been made. In the event that an independent grounds for adverse action arises, carefully document those grounds and contact your employment attorney before taking any action against the employee.