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Employers beware: Congress gives anti-retaliation protections to antitrust whistle-blowers

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On December 23, 2020, President Trump signed into law the Criminal Antitrust Anti-Retaliation Act (the Act). The Act, which amends the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA),[1] provides whistleblower protections for certain individuals who come forth with information about or assist in the investigation or prosecution of criminal antitrust violations.

Under the Act, an employer is prohibited from retaliating against a "covered individual" based on that individual reporting (or causing to be reported)—either to the federal government or a company supervisor—any criminal antitrust violations, acts the employee reasonably believes to be criminal antitrust violations or other criminal acts "committed in conjunction with potential antitrust violations." The Act also prohibits retaliation against a covered individual for testifying or participating in, or otherwise assisting a federal government criminal antitrust investigation or proceeding. Of note, the Act's definition of "covered individual" is quite broad and may result in the Act's protections being extended not only to a company's employees but also to its contractors, subcontractors, and agents. The Act excludes from its protection, however, any individual who "planned and initiated" an antitrust violation, violation of another criminal law in conjunction with an antitrust violation, or any obstruction of an investigation by the U.S. Department of Justice (DOJ) regarding an antitrust violation.

A covered individual who faces retaliation may file a complaint with the Secretary of Labor. The Secretary of Labor may, after a review, award the covered individual reinstatement, compensatory damages, and attorney's fees and costs. If the Secretary of Labor does not issue a final decision within 180 days of filing, the covered individual may file a civil action in federal court.

The Act is intended to complement the DOJ Antitrust Division's Leniency Program, which enables the first party that reports an antitrust conspiracy to avoid criminal punishment, and ACPERA, which limits a leniency applicant's civil liability in civil suits. DOJ applauded the Act, saying that

[1] See our prior alerts: "The end of ACPERA?," June 25, 2020, and "Evaluating the efficacy and future of ACPERA," April 18, 2019.

"[b]y incentivizing disclosures of anticompetitive conduct, the Act will strengthen the Antitrust Division's criminal enforcement program…."

The Act may be problematic for employers. It increases the risk that employees will report conduct to DOJ that a company, on its own initiative, might not, and without the company having the opportunity to investigate any allegations first internally. And, an employee's disclosure to DOJ might complicate attempts by the company to obtain leniency for criminal antitrust violations.

The new Act is largely consistent with, and in many respects tracks, whistleblower statutes already in place at the federal and state level. The potential legal exposure for companies covered by this new Act means that companies should ensure they have in place internal procedures (for example, robust compliance programs, including reporting hotlines and investigating suspected violations, regular certification requirements stating that employees are not aware of unlawful conduct, and performing exit interviews of all departing employees) to discover and act upon complaints and educate and encourage employees to use such procedures in the event they suspect a violation has occurred. Procedures must be instituted to prevent retaliation against those who do come forward.

In managing HR functions, employers should consider the impact of potential whistleblower actions, especially when evaluating adverse employment actions against employees in a position to blow a whistle. The fulsome penalties provided by the Act and other similar whistleblower statutes make such claims attractive to employees, former employees, and their counsel. A robust compliance program is one of the best ways to avoid whistleblower exposure and the expense and embarrassment that can result from such claims.

Attorneys at Nixon Peabody will continue to monitor developments under the Act. We are available to help employers establish and manage compliance programs, to conduct legally compliant investigations, and to advise about potential legal exposure resulting from whistleblower claims under the Act and similar statutes.

We will continue to monitor and report developments related to the Criminal Antitrust Anti-Retaliation Act. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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