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New Protections for Government Contractor and Subcontractor Whistleblowers

Enhanced rights and protections for whistleblowers under the National Defense Authorization Act take effect on July 1.

Beginning July 1, 2013, government contractor whistleblowers will obtain substantial additional rights and protections based on the provisions enacted on January 2 in the National Defense Authorization Act (NDAA) for Fiscal Year 2013. For the first time, personnel working under government subcontracts will also be protected. In light of these enhancements, government contractors and subcontractors should consider taking proactive measures to address effectively employee concerns and prevent and detect actual and perceived retaliation.

Effective Date

The new NDAA provisions become effective on July 1, 2013 (180 days after enactment) and apply to all contracts awarded on or after such date; all task orders entered on or after such date pursuant to contracts awarded before, on, or after such date; and all contracts awarded before such date that are modified to include a clause rendering such amendments applicable. Employees working under government contracts or subcontracts issued by the intelligence community are excluded from these protections. The protections afforded to employees working under contracts or subcontracts issued by executive agencies other than the U.S. Department of Defense (DOD) or the National Aeronautics and Space Administration (NASA) lapse after four years unless renewed.

Enhanced Whistleblower Protections

The NDAA enhances 10 U.S.C. § 2409, which already prohibits a contractor or subcontractor from taking adverse employment actions against their employees for making disclosures encompassing any of the following areas:

- “Gross mismanagement” of a federal contract or grant
- “Gross waste” of federal funds
- An “abuse of authority” relating to a federal contract or grant
- A “violation of law, rule, or regulation” related to a federal contract or grant
- A “substantial and specific danger to public health or safety”

The NDAA also significantly expands the persons to whom the employee may disclose the alleged misconduct to receive protection. Under the NDAA, employees will receive protection if they disclose to any “management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.” Employees also receive protection by disclosing to the following persons and entities:

- An employee of the agency responsible for the management of the contract or grant
- The Inspector General (IG) of the concerned agency
- The U.S. Government Accountability Office

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- The U.S. Department of Justice or other appropriate law enforcement agency
- A member of Congress or a congressional committee representative
- A court or grand jury

Complaint Procedure

Employees claiming retaliation must submit their complaints within three years of the adverse action to the IG of the executive agency involved. The IG has 180 days to investigate and prepare a report of findings, although additional 180-day extensions are available. The IG must provide the report directly to the complainant, as well as to the concerned contractor and the relevant agency head.

Remedies

After the IG's findings are reported, the agency head must issue an order consistent with the findings within 30 days. The agency head has no discretion in this regard. If the IG finds for the complainant, an agency order will be crafted to make the individual whole. In this situation, the agency will order the contractor or subcontractor to reinstate the individual (if he or she was terminated) and provide back pay and other terms and conditions of employment that would apply to the person in that position if the action had not been taken. The contractor or subcontractor will also be required to compensate the complainant for compensatory damages, attorney fees, and other reasonable costs and expenses incurred in pursuing the complaint. There is no provision for exemplary damages at this stage.

Enforcement of Agency Order

In the event that the contractor or subcontractor fails to comply with the terms of the agency's order, the agency will be required to file an enforcement action in the district court for the district in which the adverse action is alleged to have occurred. Further, the complainant may join in such an action or file his or her own enforcement action. The district court has the authority to grant appropriate relief, including injunctive relief and compensatory and exemplary damages.

De Novo Action in District Court

The complainant also has the right to bring an action against the contractor or subcontractor in district court if the agency denies relief or has not issued an order within 210 days of the complaint. Notably, the case can be heard before a jury at the request of either party. The right to a jury trial will likely favor employees.

Burdens of Proof

The NDAA also revises the existing law by incorporating the burdens of proof identified in 5 U.S.C. § 1221, which protects federal civil servants from reprisal for engaging in conduct protected by that statute. Thus, a violation will be found and relief will be ordered if the agency IG or district court concludes that a protected disclosure was a "contributing factor" in the adverse action. The contributing-factor test is substantially less onerous than proving a "motivating factor" and does not require proof that the decisionmaker acted with a retaliatory motive. Indeed, in such cases, a reasonably close temporal proximity between the adverse personnel action and the protected disclosure is held as a rebuttable presumption that the protected disclosure contributed to the adverse action. Cases decided under whistleblower provisions in other federal laws suggest that a gap of less than a year is sufficient to infer retaliation. In contrast to the lenient standard applied to employees, where a protected disclosure was found to have contributed to an adverse action, the contractor or subcontractor may avoid liability only upon proving, by clear and convincing evidence, that it would have taken the same adverse personnel action in the absence of the disclosure.

Court of Appeals Review

A contractor or subcontractor wishing to challenge an agency's adverse order has 60 days from the date of the order to do so. The review must be filed with the court of appeals for the circuit in which the adverse action is alleged to have occurred. However, the order is not stayed during the appeal.

No Reimbursement of Costs

The NDAA also revises 10 U.S.C. § 2324 (and 41 U.S.C. § 4310 for agencies falling under the pilot program) to prohibit federal government reimbursement of any costs or other expenses, including legal fees incurred by a contractor or subcontractor in connection with successful complaints filed under the NDAA's whistleblower protection provision. However, in the event that the complaint is resolved by an agreement with the agency, contractor and subcontractor costs that are otherwise not allowable as reimbursable costs may be allowed to the extent to which the agreement specifically provides.

Implications

The whistleblower protections discussed above now reach nearly all personnel working under federal contracts and subcontracts. Accordingly, the number of whistleblower complaints is expected to increase, possibly substantially. Indeed, with regard to defense contractors, in the last semiannual report to Congress, the DOD IG reported that, during the six-month period of April 1, 2012, to September 30, 2012, it received 85 complaints from defense employees alleging reprisal for engaging in protected activity. During the prior six-month period, approximately 60 such complaints were filed.

Whistleblower protection provisions have historically been construed broadly in favor of employees. Actions intended to prevent such concerns from arising should become a part of government contractors' and subcontractors' business processes, and federal contractors and subcontractors should assess and improve their capability to address compliance allegations and prevent and detect retaliation. Experience shows that the most effective way to minimize such claims is to create a work environment in which employees are encouraged to raise compliance concerns internally without fear of retribution and to implement mechanisms to resolve such concerns in a timely and effective manner. Other best practices include the following:

- Create and train all employees on the company's policy, setting forth
 - management expectations for employees raising compliance concerns,
 - the methods employees may use to communicate such concerns,
 - management's expectation that concerns will be addressed and resolved in a timely and effective manner, and
 - a strict prohibition on retaliation.
- Provide effective processes for
 - compliance concerns to be reviewed, prioritized, and resolved, with timely feedback to the concerned employee, and
 - employees to submit concerns confidentially or anonymously.
- Prevent retaliatory conduct by
 - creating a process to review proposed adverse employment actions against the legal elements of retaliation and to determine whether the circumstances will lead employees to perceive an otherwise legitimate action as retaliatory,
 - training leaders (supervisors and above) on appropriate leadership behaviors and on methods to prevent and detect retaliation, and
 - immediately addressing the work environment in work groups that exhibit indications of a "chilling effect" or from which retaliation concerns have arisen.
- Understand the current state of the organization's work environment by

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- conducting a baseline assessment of the work environment using surveys, interviews, or other techniques. Such an assessment should determine the willingness of employees to raise concerns internally, the effectiveness of mechanisms to address and resolve such concerns, and management’s ability to prevent and detect possible retaliation.

Contacts

Morgan Lewis counsels clients in heavily regulated industries, such as nuclear energy, transportation, defense, and oil and gas, in connection with whistleblower claims filed internally, with state and federal agencies, and with the courts. We also work with clients to create and maintain a healthy compliance culture and work environment and to prevent and detect actual or perceived workplace retaliation.

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