

ALERT

Congress Further Empowers Whistleblowers in the Defense Industry—And Beyond

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Buried in this year's defense appropriations are greater rights and protections for employees of government contractors who blow the whistle on problems with federal contracts. The new rules, however, are not just for Department of Defense (DOD) contractors. They include a new statute that broadly applies whistleblower rights and remedies to all companies doing business with the Government. With these expanded protections, employees of federal contractors will have more opportunities and protection for disclosures that can form the basis of *qui tam* suits under the False Claims Act (FCA).

For those doing business with the DOD, the National Defense Authorization Act for Fiscal Year 2013 (NDAA) means an expansion of existing rights and protections for their employees. For contractors with the National Aeronautics and Space Administration (NASA), the NDAA implements permanent new protections equal to those afforded to employees of defense contractors. And for those doing business with other federal agencies, the NDAA creates a four-year pilot program that matches the new regime for whistleblowers at defense contractors. The only exception will be contractors in the intelligence community.

Whistleblowers have long had protected status under federal law, but the NDAA continues a recent Congressional trend of expanding the opportunities and protections for those whistleblowers. In 2009, Congress imposed special whistleblower protections for stimulus projects funded under the American Recovery and Reinvestment Act. In 2010, Congress watered down the public disclosure bar of the FCA, giving *qui tam* relators more opportunities to bring actions based on secondhand information. Later that year, the Dodd-Frank Act instituted a new reward system for individuals who blow the whistle on

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securities violations. Most recently, in November 2012, Congress expanded protections for federal government employees who disclose evidence of fraud, waste or abuse.

The NDAA adds to 10 U.S.C. § 2409, which historically has prohibited contractors with the DOD from taking adverse employment action (such as termination, demotion or other discrimination) against employees who disclose gross mismanagement, gross waste, dangers to public health or safety or violations of law in connection with a DOD contract. This prohibition—which applies to a broader array of statements than the FCA—covers disclosures to Congress, an Inspector General (IG), the Government Accountability Office (GAO), the Department of Justice (DOJ) or a DOD employee responsible for contract oversight or management. Employee complaints about such reprisals are investigated by the IG, and agency heads have the authority to order the contractor to reinstate the employee, compensate him, and pay reasonable attorneys' fees and costs.

With the amendments, whistleblowers will have broader protection and government contractors will have fewer defenses to liability and more obligations to notify employees. Specifically, the NDAA:

- Clarifies that the prohibition on reprisals extends to subcontractors, too;
- Adds protection for statements about an "abuse of authority," which the new law defines as an arbitrary and capricious exercise of authority that is inconsistent with the mission of the contracting agency or the successful performance of the contract or grant;
- Adds protection for internal disclosures to a manager or other employee who has the responsibility to investigate, discover or address misconduct;
- Adds protection for employees who initiate—or merely provide evidence of contractor or subcontractor misconduct in—any judicial or administrative proceeding relating to fraud, waste or abuse on a federal contract or grant;
- Prevents contractors from using employment agreements or policies to get employees to waive the whistleblower rights and remedies;
- Makes clear that reprisals against whistleblowers are prohibited even when undertaken by the contractor at the request of a government official, unless the request is a nondiscretionary directive within the authority of the official;
- Requires contractors to notify employees of the amended rights and remedies for whistleblowers in writing in the predominant native language of the workforce; and
- Broadens the reach of these protections to contractors with any federal agency (other than the intelligence community), under a four-year pilot program in a newly created section 41 U.S.C. § 4712.

For employees outside the defense industry, the new law institutes protections for disclosing gross mismanagement or waste in federal contracts, violations of federal law or regulations, or substantial or specific dangers to public safety, among other things. This could include, for example, allegations that drug and device companies are marketing products for off-label use in connection with federal programs. It could also include employee allegations of mismanagement or waste in connection with federal research grants and other federal programs, even if the allegations do not rise to the level of fraud protected by the FCA.

The NDAA does limit the timing for employees to complain about reprisals. Complaints may not be brought more than three years after the date on which the alleged reprisal occurred—the same statute of limitations under the current version of the FCA for suing an employer for retaliation.

The new provisions, which are effective July 1, 2013, must be implemented in any new contract or any new task order under a contract already in existence. For pre-existing contracts, the expanded rights and protections are not automatic, though. If a pre-existing contract undergoes a major modification, contracting agencies must make "best efforts" to include a new clause in the contract implementing the amended procedures.

The net effect of these new rules will be to encourage employees of contractors to blow whistles more often and more freely. Although these amendments do not directly affect the FCA, the number of *qui tam* lawsuits under the FCA has increased sharply as Congress has created more opportunities and greater protections for whistleblowers in recent years. Last year, whistleblowers filed a record number of such suits. As a result, those doing business with the Government will need to make sure their compliance programs are effective and that they are prepared to investigate and respond appropriately to employee complaints about fraud, waste or abuse.