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Whistle-Blower Protections

Labor and employment litigators did not always have to concern themselves with the reaction of the government customer to their advocacy, statements and positions. That dynamic has changed as the number of whistle-blower reprisal allegations has increased, and the protections have become permanent.

The Art and Nuance of Defending Whistle-Blower Reprisal Allegations



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Government contractors and awardees increasingly find the government customer inquiring about the company's hiring, firing and other human resources practices, and that is driving a change in how contractors and awardees respond to workplace issues. Specifically, newly permanent whistle-blower protections are forcing increased alignment in the work of government contracts and labor and employment counsel.

The rising trend of whistle-blower reprisal actions run by Offices of Inspectors General (OIG) swelled further in December 2016, when a new law caused the convergence of various whistle-blower protection regulatory regimes and made permanent a pilot program for civilian agencies. As a result, government contractors

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and grant recipients are increasingly likely to face employment-related lawsuits in tandem with OIG-driven whistle-blower reprisal proceedings. And the convergence of these actions has potentially challenging implications for contractors and awardees as the relatively slow pace of litigation meets a relatively rapid OIG-driven process, and the well-established discovery rules can be trumped by data requests from the OIG.

Above all, the ultimate customers — agency heads — are informed of whistle-blower reprisal complaints and receive written reports of the investigation, filtered through the OIG without the company controlling the narrative. Stated differently, whistle-blower protections provide the government customer with direct line of sight into the often messy “human resources dirty laundry,” and companies are increasingly calibrating and aligning the positions taken in these proceedings and in the parallel labor and employment matters to avoid loss of credibility with the customer.

Policy and Process

Whistle-blower protections exist, as the regulations indicate, to uphold government policy that contractors and awardees (and subcontractors and sub-awardees) shall not discharge, demote or otherwise discriminate

against an employee as a reprisal for disclosing information to certain government officials about what the individual believes are problems with contracts, sub-contracts, grants and sub-awards. The policies and pro-

cesses for whistle-blower reprisal allegations investigation and remediation for Defense Department (DOD) and civilian agencies are:

	DOD Agency	Civilian Agency
Policy	Prohibited from discharging, demoting or otherwise discriminating against an employee as a reprisal for disclosing to certain entities information that the employee reasonably believes is evidence of gross mismanagement of a DOD contract, a gross waste of DOD funds, an abuse of authority relating to a DOD contract, a violation of law, rule or regulation related to a DOD contract (including the competition for or negotiation of a contract), or a substantial and specific danger to public health or safety. (DFARS 203.903)	Shall not discharge, demote or otherwise discriminate against an employee as a reprisal for disclosing information to a member of Congress, or an authorized official of an agency or of the Department of Justice, relating to a substantial violation of law. (FAR 3.903)
Procedure for Investigation	<ol style="list-style-type: none"> 1) OIG receives complaint, conducts initial inquiry and proceeds if complaint merits further investigation. 2) If investigation proceeds, OIG notifies contractor, complainant and agency head of the investigation; conducts the investigation; and issues written report to the agency head, company and head of contracting. 3) Company is offered opportunity to rebut or respond to allegations 4) If agency head finds merit to the complaint, agency head can order remedies (DFARS 203.905) 	Same procedure (FAR 3.905)
Remedies	<p>If agency head determines “sufficient basis exists to conclude” that the complainant has suffered a prohibited reprisal, the agency head may:</p> <ol style="list-style-type: none"> a) order affirmative action to abate the reprisal b) order the person reinstated and awarded compensatory damages and other benefits withheld but for the reprisal c) order company to pay complainant’s fees, costs and expenses (DFARS2 203.906) 	Same procedure (FAR 3.906)

These now-permanent whistle-blower protections mean that many traditional labor and employment matters may benefit from close coordination with government contracts counsel. In a litigation posture, labor and employment litigators did not always have to concern themselves with the reaction of the government customer to their advocacy, statements and positions. That dynamic has changed as the number of whistle-blower reprisal allegations has increased, and the protections have become permanent. Companies increasingly benefit from counsel adept in considering the government customer’s reaction to the situation and the

positions taken in response to allegations, as well as weighing the risks of and intersections with the various parallel enforcement proceedings that the government may take outside of the labor and employment arena.

Traps for the Unwary

In addition to the challenges of managing potentially parallel labor and employment and whistle-blower reprisal proceedings, companies are challenged to understand the different stakeholders involved in whistle-blower reprisal proceedings and how to build a record necessary to manage this complex dynamic. The stake-

holders and their interests, along with tips for dealing with each, follow.

Office of Inspector General. The gatekeeper and primary investigator in the process is an Office of Inspector General. These offices often have dedicated resources focused on conducting whistle-blower reprisal investigations and draw their ranks from agents and investigators. These OIG-driven inquiries can, and often do, involve robust exchanges of information and requests for interviews of supervisory and management personnel with the might of a law enforcement organization behind the request. These organizations tend to be focused on investigating the elements of a prohibited reprisal and ask detailed questions in a manner that is familiar to companies that have faced federal investigation previously. The specific officials within the OIG who are working a whistle-blower matter will not necessarily have a specific agenda to substantiate an allegation. Instead, their interest is to efficiently move through their docket and produce the necessary reports. Specific information that is easy to access and understand is helpful when dealing with the OIG, and the information should demonstrate either that no prohibited personnel action occurred, or that such action could not have occurred as a response to a protected communication.

Agency Head. The agency head (or designee, where such formal designation has been made) has a different background and process than the OIG. This individual may not be a lawyer or someone trained in investigation, and the elements of whistle-blower protections may not be at the forefront of their focus. The remedies that agency heads controls, however, are significant and can give a complainant substantial, if not total, relief. The agency head will be busy, and interested in a quick and appropriate disposition of the matter. However, unlike the Office of Inspector General, a compelling story and other ancillary facts may matter here. For example, the importance of the company to the govern-

ment or to employment in economically depressed areas may have an impact here, and building that record before the Office of Inspector General that can be drawn on in a response to an agency head is a step companies should consider when undergoing a whistle-blower reprisal investigation.

Suspending and Debarring Officials. Although, as of this writing, the Fair Pay and Safe Workplaces final rule is enjoined from being enforced and appears ready to be undone by the Trump administration, sharing of information about alleged labor and employment violations within the government appears to be continuing. Furthermore, agencies can either delegate agency head review to suspension and debarment offices, or draw legal support for that review from lawyers assigned to those offices. This increases the chances that whistle-blower reprisal information will reach a suspending and debarring official. And suspending and debarring officials are affected most by candor, references to appropriate policies and procedures, and appropriate training. Overly litigious responses will not pass muster. Therefore, when measuring the tone and the substance of any response, companies may wish to consider the impact of their communications on an eventual suspending and debarring official reviewing the file. At a minimum, an appropriate tone and response can keep such officials in “monitoring” mode rather than actively inserting themselves.

Conclusion

Companies receiving government contracts and grants should be aware of the convergence of whistle-blower protection rules and matter that historically may have been seen as more traditionally labor and employment law. Companies may also wish to consider involving government contract lawyers as part of their response to labor and employment allegations that may give rise to whistle-blower reprisal actions.