

Broad Contractor Whistleblower Protections Are Here To Stay

Law360, New York (March 29, 2017, 1:17 PM EDT) -- On March 2, 2017, the U.S. Government Accountability Office published a report that identified necessary improvements to implement the Whistleblower Protections Pilot Program (“WPPP”). Notably, the report was issued two months after the program officially lost its “pilot” status with the passage of Public Law 114-261 which made permanent the protections granted by WPPP as codified at 41 USC § 4712. While the GAO report is mostly focused on improvements for agency implementation, it also highlights the rights of contractor employees under § 4712, which contractors must understand now more than ever that the enhanced whistleblower protections are here to stay.

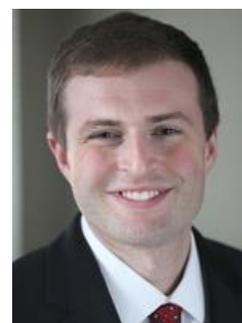
Background

The origins of the enhanced whistleblower protections for contractor employees can be traced back to the beginning of the Obama administration with the passage of Section 1553 of the American Recovery and Reinvestment Act of 2009, which established whistleblower protections for all recipients of stimulus funds. Similar language was then included in the National Defense Authorization for Fiscal Year 2013.

Within the NDAA were two separate sections designed to increase the whistleblower protections of contractors: Section 827, codified at 10 U.S.C. § 2409, covered NASA, U.S. Department of Defense, and Coast Guard contractors while Section 828, codified at 41 U.S.C. § 4712, established a four-year pilot program to extend whistleblower protections to contractors and grantees at most other federal agencies with the exception of the intelligence community. The provisions of § 4712 are implemented through Federal Acquisition Regulation Clause 52.203-17 (“Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights”). Although the pilot program was set to expire in January 2017, the enhanced whistleblower protections were made permanent by Public Law 114-261, which was signed into law in the final weeks of the Obama presidency.



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Whistleblower Protections

Although federal employee whistleblowers have long enjoyed protection against reprisal, protections for contractor whistleblowers have historically been less consistent across agencies. § 4712 enhanced legal protections for contractor employees who reasonably believe they have experienced reprisal as a result of disclosing certain wrongdoing as defined in the statute to specified bodies and individuals. Namely, § 4712 establishes that contractors and grantees cannot discharge, demote, or otherwise discriminate against a whistleblower as a reprisal for disclosing information that the employee reasonably believed is evidence of any of the following:

- a gross mismanagement of a federal contract;
- a gross waste of federal funds;
- an abuse of authority relating to a federal contract;
- a substantial and specific danger to public health or safety; or
- a violation of a law, rule, or regulation related to a federal contract (including competition for or negotiation of a contract).

§ 4712 also expanded the number of bodies and persons to whom an employee of a contractor, subcontractor, or grantee could disclose evidence of wrongdoing and be protected. Previously, an employee seeking protection could disclose the information only to an authorized official of the executive agency, the U.S. Department of Justice, or a member of Congress. Under § 4712(a)(2), an employee is also entitled to protection for making a disclosure to a court or grand jury, a federal employee responsible for contract or grant oversight or management at the relevant agency, the GAO, an inspector general, or a management official or other employee of the contractor, subcontractor, or grantee who has the responsibility to investigate, discover, or address misconduct.

One objective of § 4712 was to increase employees' awareness of their rights to report waste, fraud, and abuse in connection with federal dollars, and the statute requires that contractors, subcontractors, and grantees of the agency inform their employees in writing (in the predominant native language of the workforce) of their whistleblower rights and remedies under § 4712.

Investigations and Remedies

§ 4712(c) establishes a process and remedies for whistleblowers who believe they have been discriminated against due to their whistleblowing activity. Whistleblowers who believe they were discharged, demoted, or otherwise discriminated against in violation of § 4712 may file a complaint with the Office of the Inspector General of the relevant agency no more than three years after the date of the alleged reprisal. The complaint must then be investigated by the Inspector General who upon completion of the investigation submits a report of the findings of the investigation to the person, the contractor or grantee concerned, and the head of the agency.

Not later than 30 days after receiving an inspector general report, the head of the executive agency must determine whether there is sufficient basis to conclude that the contractor or grantee concerned has subjected the complainant to a prohibited reprisal. The agency head is required then to either issue an order denying relief or take one or more of the following actions:

- Order the contractor or grantee to take affirmative action to abate the reprisal.
- Order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including back pay), employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
- Order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' 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 executive agency.

Contractors and grantees have 60 days from the issuance of an order to appeal to an appropriate U.S. circuit court. Conversely, § 4712 requires the complainant to exhaust administrative remedies before bringing a de novo action at law — i.e., the complainant cannot file an action in court until the agency head issues an order denying relief or if the time for the agency head to issue an order has expired.

Findings of the GAO Report

In preparing its report, the GAO surveyed 14 executive departments and conducted an in-depth review of four of those departments (Commerce, Homeland Security, Interior and State). The 14 executive departments received approximately 1,560 reprisal complaints during the time period surveyed (July 1, 2013, to Dec. 31, 2015). The OIGs determined that 127 of the reprisal complaints were submitted under the WPPP and investigated 44 of those complaints, concluding that the remainder of the complaints did not require investigation. The OIGs completed 17 investigations during the time period and none of the investigations resulted in findings that substantiated reprisal.

At the four departments selected by the GAO for an in-depth review, department officials reported taking no additional action — beyond inserting the FAR clause in contracts — to inform contractors about their responsibilities to communicate to their employees about their whistleblower rights. Accordingly, the GAO noted that there were opportunities to improve communications between the government and contractors because some of the contractors that the GAO surveyed were unaware of their obligations under § 4712.

Conclusion

If GAO's survey sample is at all representative of the broader contracting community, then it appears that many contractors may not fully understand their obligations to communicate whistleblower rights to their employees. It may also indicate that some employers may not fully understand the whistleblower rights of their employees under § 4712. Now that the enhanced whistleblower protections are permanent, contractors need to understand § 4712, and would be well-advised to re-examine their internal training and anti-retaliation policies to mitigate the risk that a mishandling of a putative whistleblower could invite an inspector general investigation and a possible finding of reprisal.

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