

What the FY2013 NDAA's New Whistleblower Protections Mean for Government Contractors

Andy Liu

Peter Eyre

Rebecca Springer

Jason Lynch

Crowell & Moring

February 27, 2013

Agenda

- Current Landscape
- Analysis of FY2013 NDAA Provisions
- What is Retaliation?
- Handling a Whistleblower
- Responding to Concerns
- Compliance Program Best Practices
- Questions and Discussion



Current Landscape

Legislative Developments

Senator McCaskill: “I really don’t think there’s anything that is more important than whistleblowers. Because if you look around, it is very clear that whistleblowers have made a difference time and time again in terms of ferreting out serious and significant problems in the federal government . . . Agency after agency we have more contractors working for those agencies than we have federal employees. So if we are not including contractors in the protection of the whistleblower legislation, then we – we’ve got a huge problem here. If the whistleblowers that work for contractors don't have the same protections as federal employees, we are saying to contractors, we don't think wrongdoing by you is that important.”

Legislative Developments

- Sarbanes-Oxley
- Dodd-Frank
- Fraud Enforcement & Recovery Act
- American Recovery & Reinvestment Act

Display of DoD IG Hotline Posters

- DFARS 252.203-7004 issued on September 16, 2011
- Clause requires contractors to prominently display fraud hotline posters prepared by the DoD Office of the Inspector General
- Exception for acquisition of commercial items, contracts that will be performed entirely outside the United States, or contracts that do not exceed \$5 million

Display of DoD IG Hotline Posters



DoD IG Hotline

Submit a Complaint to The Department of Defense Hotline

Select the Type of Complaint You Would Like to Submit:

Hotline Complaint

Report fraud, waste, abuse, and mismanagement regarding programs and personnel under the purview of the U.S. Department of Defense.

Reprisal Complaint

Report adverse personnel actions taken against an individual, because that individual made or was thought to have made a protected communication.

Protection for Employees of Government Contractors

- 10 USC § 2409, FAR 3.9, and DFARS 203.9
 - Employee that initiates or provides evidence of misconduct may not be discharged, demoted, or otherwise suffer retaliation or reprisal
 - Person who believes that they engaged in protected activity and was subjected to retaliation for that activity may submit a complaint to the cognizant IG

Protection for Employees of Government Contractors

- 10 USC § 2409, FAR 3.9, and DFARS 203.9 (cont'd)
 - Unless the complaint is frivolous on its face, the IG must investigate and submit a report to the Agency Head within 180 days
 - Within 30 days of receipt, the Agency Head must determine whether there is “sufficient basis to conclude” that the employee was subjected to a reprisal action
 - Agency Head may do one or more of the following:
 - Order the contractor to “abate” the reprisal
 - Order the contractor to reinstate the employee (together with back-pay, benefits, etc.)
 - Award the complainant the costs of bringing the action

Protection for Employees of Government Contractors

- 10 USC § 2409, FAR 3.9, and DFARS 203.9 (cont'd)
 - If the Agency Head denies relief, or a certain length of time passes, the complainant may seek *de novo* review in federal district court
 - If a contractor refuses to obey an agency order, the Agency Head may enforce it in federal district court



FY2013 NDAA Provisions

Background

- U.S. Commission on Wartime Contracting and Senator Claire McCaskill were key drivers of the legislation
 - “Whistleblowers are the unsung heroes of our fight to root out inappropriate and sometimes illegal behavior in government.”
- Signed by President Obama on January 2, 2013
 - Signing Statement: The whistleblower protection sections “could be interpreted in a manner that would interfere with my authority to manage and direct executive branch officials.”

Effective Date

- Effective Date: July 2, 2013
 - FAR to be revised by that date
 - All contracts awarded and task orders issued after that date
 - For any contract awarded before July 2 but undergoing a “major modification” thereafter, contracting agencies required to “make best efforts” to include a clause providing for the applicability of the new whistleblower protections

Extension to Employees of Civilian Contractors

- Previously, these whistleblower protections only applied to employees of contractors doing business with DoD and NASA
- Sec. 828 of the FY13 NDAA establishes a so-called “pilot program” extending protections to employees of contractors and subcontractors working for civilian agencies
 - Some exceptions for the intelligence community
 - GAO will evaluate and publish a report
 - 41 USC § 4712

Extension to Employees of Subcontractors

- Previously, whistleblower protections only extended to employees of prime contractors
- 10 USC § 2409(a) now prohibits retaliation against employees of subcontractors that engage in protected activity

Internal Disclosures are Covered

- Previously, protection was only available to contractor employees who disclosed to a member of Congress, Inspector General, DoD/NASA oversight official, law enforcement, a court, or a grand jury
- Now, protection is triggered by disclosure to a “management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct”

Expansion of Protected Disclosures

- Previously, included gross mismanagement or waste, violation of a law, rule, regulation, and substantial and specific danger to public health or safety
- FY13 NDAA adds “abuse of authority” in connection with performance or award of a contract or subcontract
 - “Abuse of Authority” defined at 10 U.S.C. § 2409(g)(6): An arbitrary and capricious exercise of authority that is inconsistent with the successful performance of a contract or grant, or the mission of the awarding agency

Reprisals at Agency's Request Not a Safe Harbor

- “A reprisal . . . is prohibited even if it is undertaken at the request of [an agency] official”
- There is an exception if “the request takes the form of a nondiscretionary directive and is within the authority of the [agency] official making the request”

No Waiver of Rights by Agreement

- “The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.”

Notification

- Employees must be informed in writing
- Agencies shall ensure that employees are made aware of the rights and remedies of 10 USC § 2409
- “In the predominant native language of the workforce”

Additional Changes

- Burden of Proof for a “Reprisal”
 - Incorporates 5 USC § 1221(e) (reprisal actions against federal employees)
 - Whether protected disclosure is contributing factor in the reprisal may be established by circumstantial evidence
 - Applies to IG, Agency Head, and Court
- Statute of Limitations for Judicial Claims
 - If agency determines that there is no basis, the employee may bring a *de novo* action at law or equity against the contractor in federal district court
 - New statute of limitations: not more than two years after:
 - Agency head denies relief, or
 - Administrative remedies are deemed “exhausted”

Additional Changes

- Increased Damages
 - If Agency Head orders reinstatement, employee is entitled to “compensatory damages” (instead of “compensation” under prior regime)
- Legal Fees: Costs of defending claims commenced by government and employees are not allowable if:
 - Relates to a violation of a federal or state statute or regulation and results in finding of liability, fine, suspension/debarment, rescission/termination of contract
- Attorney’s Fees for Failing to Abide by Agency Orders
 - When the Agency Head seeks enforcement of his/her order in district court, the court’s remedies include “reasonable attorney fees and costs”



What is Retaliation?

25

Elements of a Retaliation Claim

- Protected activity
- Adverse employment action
- Causal link
- Absence of legitimate, non-retaliatory reason for adverse employment action

Retaliation - Adverse Employment Action

- Certain actions are obviously adverse
 - Discharge
 - Demotion
 - Reduction in pay/benefits
- *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006)
 - Range of employment actions prohibited by Title VII anti-retaliation provisions broader than anti-discrimination provisions
 - Beyond “ultimate employment decisions”
 - All conduct that would “dissuade a reasonable worker” from engaging in protected activity

Adverse Employment Action - Examples

- Transfer to different office
- Reduction in responsibilities
- Denial of leave/vacation requests
- Denial of opportunity for overtime
- Negative, or less positive, performance evaluations
- Failure to select employee for participation in a management training program
- Exclusion from meetings/email lists

Effect of *Burlington Northern*

- Retaliation more likely to be alleged
- Summary judgment less likely
 - Determination of adverse effect - jury issue
 - How would a “reasonable worker” react



Handling a Whistleblower

30

Interviewing the Whistleblower

- Determine who and when
 - HR/Internal investigator/Outside counsel?
 - At outset of investigation/after fact gathering/never?
- What to do if the whistleblower won't participate

Keep it Confidential

- Retaliation depends on cause and effect - whistleblowing caused the adverse job action
- A manager cannot retaliate against a whistleblower if he/she never knew the employee blew the whistle...
- Let managers know only if they need to know

Timing is Critical

- Timing of Appropriate Action is Critical
 - Again, retaliation is about cause and effect
 - Courts differ on how long is “long enough” after whistleblowing to break causation
 - Some courts have held that three months is long enough to break the causal link between whistleblowing and job action; a year is almost always long enough
 - Continuation of discipline that started before whistleblowing is not retaliation

Take Appropriate Action . . . Carefully

- Consider all remedial options
 - Typically a range of potential actions
 - Proactive versus reactive measures
 - Consider which actions a jury would think were appropriate
- Ensure consistency of remedial actions taken in prior similar cases
- Performance management versus avoiding retaliation claims – the rubber meets the road



Responding to Concerns

35

Current Environment

- Increased complexity of investigations for government contractors
 - Mandatory disclosure rules
 - Parallel proceedings for civil or administrative enforcement
 - Government and shareholder pressure on corporations to cooperate and disclose
- Higher Stakes
 - Pressure on agencies to suspend and debar
 - Threat of derivative litigation

Investigations Require a Holistic Approach

- This environment results in tension between guarding against retaliation and effectively responding to concerns
 - Limiting the list of those who are informed versus the need to thoroughly investigate
- There is no “one size fits all” approach

Internal Investigations - Triggers

- Internal formal written or oral complaint
- Regulatory/administrative subpoena
- Filing of a lawsuit
- Filing of a charge of discrimination or other agency filing
- Auditor's or Analyst's question
- Anonymous hotline tip
- Informal comment
- Feedback during performance review

Key: Anything that provides notice of misconduct may trigger the need for an investigation

Devising Investigation Strategies that Meet the Need

- Why?
 - Identify and eliminate misconduct
 - Fulfill disclosure obligations
 - Avoid or resolve enforcement proceedings
- Who?
 - Role of in-house and outside counsel
 - Participation of business people
 - Overseen by:
 - Management
 - Audit Committee
 - Special Committee

Devising Investigation Strategies that Meet the Need

- How?
 - To partition privilege from facts
 - To determine who to interview, what documents to gather, etc.
 - To deal with agencies simultaneously, for both disclosure and settlement
 - To document the process and findings
- When?
 - To issue a document hold order
 - To remediate and revise systems
 - To disclose
 - To push back



Compliance Program Best Practices

41

Compliance Program Best Practices

- Reinforcement of Code of Conduct
- Tone at the Top
- Internal reporting
- Train supervisors and managers on receiving complaints
- Respond promptly
- Obtain confirmation from employees (annually or departing) that they have disclosed illegal activities

Questions and Discussion

Andy Liu

aliu@crowell.com

202.624.2907

Peter Eyre

peyre@crowell.com

202.624.2807

Rebecca Springer

rspringer@crowell.com

202.624.2569

Jason Lynch

jlynch@crowell.com

202.624.2678