

Boosting Contractor Employee Whistleblower Protections

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On Dec. 5, 2016, Congress enacted S. 795, which permanently extends robust legal protections to employees of federal contractors, subcontractors and grantees who report waste, fraud or abuse. It also extends these protections to personal services contractors working on defense or civilian contracts or grants.

In moving to pass the bill, Rep. Jason Chaffetz, R-Utah, chairman of the House Committee on Oversight and Government Reform, stated:

[W]histleblowers are invaluable to the oversight work of Congress. We rely on people who are on the front lines seeing things as they truly are to provide information and blow the whistle when they see something going awry. They are one of our best sources of information about waste, fraud and abuse within the federal government.

As an institution, we should try to do everything we can to encourage them to come and speak with us, and when they do, to make sure that they have the proper and adequate protections.

The anti-retaliation provisions of the National Defense Authorization Act for Fiscal Year 2013 (NDAA) will be a powerful tool to combat waste, fraud and abuse in government contracts and grants, which total about half a trillion dollars annually.

NDAA Whistleblower Protections

Two provisions of the NDAA protect whistleblowers: Section 827, codified at 10 U.S.C. § 2409, covers individuals working on contracts with the U.S. Department of Defense or NASA; and Section 828, codified at 41 U.S.C. § 4712, covers individuals working on contracts or grants funded by other federal agencies. Section 827 amended an existing law that protects employees of DOD contractors, but Section 828 was enacted as a new pilot program and would have expired in 2017 absent the enactment of S. 795.

The scope of coverage is broad and includes all individuals performing work on a government contract or grant, including personal services contractors and employees of a contractor, subcontractor, grantee or subgrantee. The NDAA whistleblower provisions do not apply, however, to work performed for intelligence agencies, including the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office.

Broad Scope of NDAA Protected Whistleblowing

Both NDAA anti-retaliation provisions protect disclosures about:

- Gross mismanagement of a federal contract or grant, which is “a management action or inaction which creates a substantial risk of significant adverse impact upon the agency’s ability to accomplish its mission.” *Kavanagh v. Merit Systems Protection Board*, 176 F. App’x 133, 135 (Fed. Cir. April 10, 2006) (citing *White v. Department of the Air Force*, 63 M.S.P.R. 90, 95 (1994));
- A gross waste of federal funds, which is “more than [a] debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.” *Chambers v. Department of the Interior*, 515 F.3d 1362, 1366 (Fed. Cir. 2008) (quoting *Van Ee v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994));
- An abuse of authority relating to a federal contract or grant, which is “an arbitrary or capricious exercise of power ... that adversely affects the rights of any person or that results in personal gain or advantage to ... preferred other persons.” *Doyle v. Department of Veterans Affairs*, 273 F. App’x 961, 964 (Fed. Cir. April 11, 2008) (quoting *Embree v. Department of the Treasury*, 70 M.S.P.R. 79, 85 (1996)); or
- A “substantial and specific danger to public health or safety” (alleging the nature and likelihood of the harm, as well as when the harm may occur), or a “violation of law, rule or regulation” related to a federal contract. See *Chambers*, 515 F.3d at 1367, 1369.

To be protected, a disclosure must be made to a member of Congress or a congressional committee; an inspector general; the Government Accountability Office; a federal employee responsible for contract or grant oversight or management at the relevant agency; an authorized official of the U.S. Department of Justice or other law enforcement agency; a court or grand jury; or a management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover or address misconduct.

Broad Scope of Adverse Personnel Actions

Similar to the text of Section 806 of the Sarbanes-Oxley Act, the NDAA whistleblower-protection provisions bar a broad range of retaliatory acts, including discharging, demoting or “otherwise discriminat[ing] against a whistleblower.” The latter, catchall category of retaliatory adverse employment actions will likely be construed to encompass the Burlington Northern material-adversity standard — i.e., prohibited retaliation likely includes actions that well might have dissuaded a reasonable worker from engaging in protected conduct. See *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 67–68 (2006).

Favorable Causation Standard for Whistleblowers

The NDAA applies the burden-shifting framework and causation standard set forth in the Whistleblower Protection Act (WPA). Under that standard, a complainant prevails merely by demonstrating that the protected disclosure was a contributing factor in a personnel action, which can be accomplished by using the knowledge-timing test (i.e., by showing that the person taking

the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person may conclude that the disclosure was a contributing factor in the personnel action). A whistleblower need not demonstrate the existence of a retaliatory motive to establish that protected conduct was a contributing factor in a personnel action. *Marano v. Department of Justice*, 2 F.3d 1137, 1141 (Fed. Cir. 1993).

Once a whistleblower has proved contributing-factor causation by a preponderance of the evidence, his or her employer can defeat the NDAA claim only by showing by clear and convincing evidence that it would have taken the same challenged action in the absence of the protected disclosure. Under the WPA, the law upon which the NDAA anti-retaliation provision is modeled, courts consider three factors in determining whether an agency meets this onerous burden:

1. “The strength of the agency’s evidence in support of its personnel action”;
2. “The existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision”; and
3. “Any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.”

Carr v. Social Security Administration, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

Remedies for Prevailing NDAA Whistleblowers

Remedies include reinstatement, backpay, uncapped compensatory damages (emotional distress damages) and attorney’s fees and costs.

Procedures Governing NDAA Whistleblower-Retaliation Claims

An NDAA reprisal claim must be filed initially with the Office of Inspector General of the agency that awarded the contract or grant about which the employee disclosed wrongdoing. The statute of limitations is three years after the date of the reprisal. Unless the OIG determines that the complaint is frivolous, fails to allege a violation of the NDAA, or has previously been addressed in another federal or state judicial or administrative proceeding, the OIG shall investigate the complaint and, upon completion of such investigation, submit a report to the head of the agency.

The agency head can issue an order denying relief or require the contractor to take affirmative action to abate the reprisal and provide make-whole relief to the whistleblower. If the whistleblower has not obtained relief within 210 days of the filing of the complaint, then he or she may bring an action de novo in federal district court and try the case before a jury.

Where an NDAA complaint is removed to federal court, the whistleblower can add a claim under the anti-retaliation provision of the False Claims Act, which affords the whistleblower an

opportunity to recover double backpay. The False Claims Act protects “lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under [the FCA],” as well as “other efforts to stop one or more [FCA] violations.” 31 U.S.C. § 3730(h)(1). FCA-protected conduct includes internal reporting of fraudulent activity to a supervisor and steps taken to investigate a potential FCA action.

As the new administration focuses on “draining the swamp,” the NDAA’s whistleblower-protection provisions will be a critical tool to encourage whistleblowers to root out waste, fraud and abuse.

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