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EVOLUTIONS IN WHISTLEBLOWING: WHAT FEDERAL CONTRACTORS NEED TO KNOW

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ABOUT PILIEROMAZZA

PilieroMazza PLLC is a full-service law firm with offices in Washington, DC and Boulder, CO. We are most well known as a government contracting firm and for 25 years we have helped our clients navigate the complexities of doing business with the federal government. We also provide a full range of legal services including advice on corporate, labor and employment, SBA procurement programs, and litigation matters. Our clients value the diverse array of legal guidance they receive from us and our responsiveness as we guide their growth and secure their success.

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AGENDA

- Review Developments in Whistleblower Protections
 - National Defense Authorization Act
 - Defend Trade Secrets Act
 - False Claims Act
- Learn How These Laws Apply to Federal Contractors
- Discuss Compliance Strategies and Best Practices



NATIONAL DEFENSE AUTHORIZATION ACT



COVERED CONTRACTS

- Contracts or grants funded by the U.S. DOD or NASA (10 U.S.C. § 2409,) and civilian contracts or grants funded by other federal agencies (41 U.S.C. § 4712)
- Includes all individuals performing work on a government contract or grant, including personal services contractors and employees of a contractor, subcontractor, grantee or subgrantee
- Exempt: work performed for intelligence agencies, including the FBI, the CIA, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the NSA, the Office of the Director of National Intelligence, and the National Reconnaissance Office



PROHIBITION OF REPRISAL

- An employee of a contractor or subcontractor may not be:
 - Discharged
 - Demoted
 - Otherwise discriminated against as a reprisal
- “A reprisal . . . is prohibited even if it is undertaken at the request of [an agency] official.”
- Exception: if “the request takes the form of a nondiscretionary directive and is within the authority of the [agency] official making the request.”



TYPES OF PROTECTED DISCLOSURES

The whistleblower must reasonably believe there is evidence of:

- Gross mismanagement of a contract or grant
- Gross waste of funds
- Abuse of authority relating to a contract or grant
- Substantial and specific danger to public health or safety, or
- Violation of law, rule, or regulation related to a contract (including competition for or negotiation of a contract) or grant



TO WHOM MAY A WHISTLEBLOWER DISCLOSE INFORMATION?

- Congress or a representative of a committee of Congress
- An Inspector General
- The Government Accountability Office
- An agency employee responsible for contract oversight or management
- An authorized official of a law enforcement agency or the DoJ
- A court or grand jury
- A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct



PROCESS

- Complainant may submit a complaint to the agency Inspector General (IG)
- The IG investigates allegations and, if they are validated, recommends specific remedial actions to the agency head
- If the agency head denies relief, or a certain length of time passes, the complainant may seek *de novo* review in federal district court



REMEDIES

An agency head may:

- Order the contractor to abate the reprisal;
- Order the contractor to reinstate the person with compensation, including back pay, employment benefits, etc.;
- or
- Order to pay the whistleblower an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fees)



NOTEWORTHY PROVISIONS

- **No Waiver:** “The rights and remedies provided for in this section may not be waived by any agreement, policy, form, or condition of employment.”
- **Notice Requirements:** Ensure that employees are made aware of the rights and remedies “in the predominant native language of the workforce.”
- **Unallowable Costs:** Precludes reimbursement of legal fees incurred by contractors and grantees to defend against whistleblower retaliation claims. (Exception for settlement discussions)



FAR & DFAR CLAUSES

- The whistleblower protections apply to all solicitations and contracts that exceed the simplified acquisition threshold, including contracts for the purchase of commercial items and commercially available off-the-shelf items. See 48 C.F.R. (“FAR”) § 3.908-9.
- The provisions are implemented through new Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement flowdowns that reach to the subcontractor level. See FAR § 52.203-17; DFARS § 252.203-7002.



DEFEND TRADE SECRETS ACT OF 2016



DTSA: WHAT IT DOES

- Provides a federal legal cause of action to private companies for trade secret misappropriation
- Contains whistleblower immunity and anti-retaliation provisions intended to protect individuals who may need to disclose trade secrets
 - Federal, state or local government official
 - Attorney for sole purpose of reporting or investigating a suspected violation of law
 - In a complaint or other document filed in a lawsuit (under seal)
 - In support of wrongful termination, retaliation claims



NOTICE REQUIREMENT

- Requires that employers provide notice of the immunity and retaliation provisions to employees, consultants, and independent contractors
- Employer cannot recover punitive damages or attorney's fees under the DTSA
- However, these damages/ fees may still be available under state law



FALSE CLAIMS ACT



FALSE CLAIMS ACT: A YEAR IN REVIEW

- Of the \$4.7 billion the government recovered in fiscal year 2016, \$2.9 billion related to lawsuits filed under the *qui tam* provisions of the FCA
- 702 *qui tam* suits filed in 2016
- The government paid out \$519 million to the individuals who exposed fraud and false claims by filing a *qui tam* complaint



FCA'S ANTI-RETALIATION PROVISION

- Protects **employees, contractors or other agents...**
- ...from being “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against...”
- ...because the individual **investigated, reported or sought to stop a company** from engaging in practices which defraud the United States government. 31 U.S.C. § 3730(h)(1)



REMEDIES

- Reinstatement or front pay;
- **Double** back pay (double lost wages and benefits) plus interest;
- Special damages, which includes damages for emotional distress and other non-economic harm resulting from the retaliation; and
- Attorneys' fees and costs



OTHER FEDERAL WHISTLEBLOWER STATUTES

- Environmental
- Nuclear Energy
- Commercial Aviation
- Publicly-held Companies
- Finance
- Food and Water Safety
- Workplace/Discrimination
- Mine Safety
- Affordable Care Act
- Migrant and Seasonal Agricultural Workers
- Toxic Substances
- Consumer products
- Motor vehicles
- Work safety
- Tax Fraud



COMPLIANCE STRATEGIES



ENCOURAGE A COMPANY CULTURE OF COMPLIANCE AND NON-RETALIATION

- Provide employees with a secure and reliable way to report violations to the company.
 - Handbooks and company policies
 - Hotlines – independent third party investigating
 - Consider providing anonymous reporting option
- Train supervisors and managers how to respond to complaints and report noncompliance
- Open door policy
- Review and strengthen anti-retaliation policies and distribute to employees periodically



PROPER MANAGEMENT OF EMPLOYEE COMPLAINTS

- Ask for complaints in writing and respond to complaints promptly
- Investigate complaints thoroughly and don't assume employees are just "griping" or "gossiping." A thorough investigation can prevent liability
- Carefully plan investigations and what information will be shared with managers and/or other employees
- Depending on the type of disclosure you may want to include internal/outside counsel from the start
- Be mindful of FCA mandatory disclosure rules



PERSONNEL FILE MANAGEMENT

- Best defense is a clear record demonstrating that discipline is unrelated to whistleblowing activity
- Carry out regular performance reviews
- Keep a written record of poor employee conduct
- Preserve documents



PROTECT YOUR DATA

- Courts are weighing the public interest of whistleblowers against confidentiality policies and finding in favor of the whistleblower
- Enforce electronic monitoring/acceptable use policies
- Written policies should designate a chief information officer and detail security processes utilized to protect data and ensure its integrity
- Ensure your confidentiality clauses don't inhibit employee free speech rights



QUESTIONS?

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