ARNOLD & PORTER LLP

ADVISORY

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DOD FINALIZES AND EXPANDS WHISTLEBLOWER PROTECTIONS FOR EMPLOYEES OF DEFENSE CONTRACTORS

Federal defense contractors should be aware that on November 19, 2009 the US Department of Defense (DOD) issued, and made effective, a final rule that prohibits a federal contractor from taking an adverse employment action against any employee who makes a disclosure alleging certain types of wrongs committed by the contractor relating to a government contract. This rule is titled "Whistleblower Protections for Contractor Employees."

This new rule creates yet another class of whistleblower protections for employees of federal defense contractors. Federal defense contractors, many of whom are already covered by whistleblower statutes such as those contained in the American Recovery and Reinvestment Act of 2009 (ARRA), should be cognizant that this new rule expands the types of disclosures covered by existing law. While ARRA created similar rights and protections for non-government employees working on government contracts, that act related only to protections for employees working on contracts that received stimulus funds under ARRA. The new DOD rule takes those protections and applies them to all DOD contracts, regardless of the source of DOD funding.

Additionally and notably, under the new rule, all contractor employers working on contract with DOD must inform their employees of these new protections *in writing*. Though the rule does not provide a time frame for this written notification, employers would be wise to issue such a notice as soon as practicable as the rule is already in effect.

PROHIBITION ON REPRISAL FOR EMPLOYEE'S DISCLOSURE OF ALLEGED WRONGDOING

An employee who reasonably believes that his or her employer has mishandled DOD funds or caused danger relating to the DOD's contract with the employer may disclose such alleged wrongdoing without fear of reprisal. Employers are barred from firing, demoting, or otherwise discriminating against an employee as a reprisal for disclosing information that the employee in good faith reasonably believes indicates:

(1) gross mismanagement of a DOD contract;

(2) a gross waste of DOD funds;

(3) a substantial and specific danger to public health or safety; or

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(4) a violation of law related to a DOD contract, including the competition for, or negotiation of, a contract.

In order to receive protection under the new rule, the employee's disclosure must be made to a particular type of government official. Such disclosure can be made as a special disclosure or in the ordinary course of an employee's duties to a number of entities or persons including a member of Congress, a representative of a committee of Congress, an inspector general that receives funding from or has oversight over contracts awarded for or on behalf of DOD, the Government Accountability Office, any DOD employee responsible for contract oversight or management, or any authorized office of an agency or the US Department of Justice (DOJ).

INSPECTOR GENERAL INVESTIGATION AND AGENCY HEAD DETERMINATION

If a contractor employee believes that he or she has been discharged, demoted, or otherwise discriminated against based on a report made to a relevant authority, that employee may file a complaint with DOD's Inspector General. Notably, the new rule does not provide a statute of limitations for the filing of such a complaint. This means that DOD contractors now might face whistleblower allegations years after the mismanagement is alleged to have occurred.

If the inspector general finds the complaint merits an investigation, he or she must notify the complaining employee, the contractor employer, and the head of the federal agency. Within 180 days of a complaint being filed, the inspector general must either complete an investigation of the reprisal allegation and submit a report to all notified parties or make a determination that the complaint is frivolous.

Upon receipt of the report, the relevant agency head has 30 days to determine whether there is a sufficient basis to conclude that the contractor has subjected the complaining employee to reprisal. If the agency head finds a violation, he or she has the power to order remedies. Such order would preclude the employee from filing a private cause of action. These remedies include one or more of the following:

(1) order the employer to take affirmative action to abate the reprisal;

(2) order the employer to reinstate the employee to his or her previous position as if the reprisal never occurred including providing the employee with lost compensation from the period of reprisal, including back pay and employment benefits; and/or

(3) order the employer to compensate the complainant in an amount equal to the aggregate costs and expenses incurred in bringing the complaint, including reasonable attorneys' fees.

The contractor employer must comply with the remedies ordered by the agency head or face an enforcement action by the DOJ. If, however, the contractor employer disagrees with the order, the contractor employer may seek an appeal in the United States Court of Appeals in the Circuit where the reprisal was alleged to take place within 60 days of the order's issuance.

EMPLOYEE'S PRIVATE CAUSE OF ACTION

The complaining employee may have a private cause of action under certain circumstances: (1) if the agency head issues an order denying relief to the complainant; (2) the agency head fails to issue an order within 210 days of the submission of the complaint made by the employee; or (3) the agency head decides not to investigate the complaint or discontinues an investigation. If the inspector general has made a determination and the agency head issued an order denying relief, this is admissible in evidence in any subsequent action at law brought by the employee.

The complaining employee may file a private civil lawsuit in federal district court, where the employee has the right to seek compensatory damages and other relief. The case will be a *de novo* action, meaning that the federal court will look at the issue without regard to the prior findings by the inspector general or agency head. Federal district courts will have jurisdiction to hear all cases arising out of this whistleblower provision without regard to the amount in controversy, and the employee or employer may elect to have the case tried before a jury.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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