LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

The Mandatory Disclosure Rule: Mitigating Risk When the Requirement for Disclosure Is Not Clear

By Jackie Unger

Most federal contractors are aware that the mandatory disclosure rule requires that contractors timely disclose "credible evidence" of certain misconduct taking place in connection with the award, performance, or close out of a contract. Although the rule has been in existence for nearly ten years, contractors still have questions about whether particular conduct must be disclosed and what steps should be taken to minimize the risk of penalties and administrative action resulting from disclosure, or an improper failure to disclose.

Conduct covered by the mandatory disclosure requirements includes violations of certain federal criminal laws involving fraud, bribery, conflicts of interest, and gratuities. Covered conduct also includes violations of the far-reaching False Claims Act (FCA), such as inaccurate billing, false certifications of size status, or misrepresenting compliance with Buy American requirements, to name a few common and growing areas of concern. Significant overpayments by the Government are also considered covered conduct.

Except in the case of blatant intentional misconduct, the answer to whether conduct must be reported is almost always: it depends. This is because the rule does not define key terms, such as what constitutes "credible evidence" of a violation or significant overpayment, leaving a fair amount of ambiguity as to when disclosure is necessary. The FAR Council has explained that "credible evidence" is a higher standard than "reasonable grounds to believe" that a violation has occurred, meaning that mere allegations of misconduct will not trigger disclosure. Importantly, the rule anticipates that contractors will take time to conduct a preliminary internal investigation and determine whether there is sufficient reliable evidence to conclude that a violation or overpayment has occurred. However, contractors may not engage in an open-ended, exhaustive investigation in order to delay disclosure until the investigation is complete. The extent of the preliminary investigation will be dictated by the complexity of the legal issues, the time required to gather and review relevant evidence, and the reliability of the witnesses and evidence. For instance, it may be easier to identify whether a significant overpayment has been received than whether an FCA violation has occurred because an FCA violation requires consideration of whether the contractor acted with some level of intent.

Given the broad range of conduct that could result in a reportable violation, contractors would be wise to implement and follow procedures for handling alleged noncompliance, as such procedures likely would be reviewed by the Government as reflective of the contractor's responsibility. These procedures should

Continued on page 2

Special Issue on Investigations

PILIERO MAZZA

include a uniform definition of credible evidence that will trigger the disclosure requirement, a timeframe for disclosure once credible evidence is obtained, definition of roles and responsibilities for the investigation team, and steps for determining and taking corrective action if noncompliance is identified.

"The investigation, the basis for the determination as to whether credible evidence of misconduct exists, and any corrective action being taken should be well-documented, as this information can be used to demonstrate the contractor's present responsibility in potential suspension and debarment proceedings."

As Ms. Biggs mentions in her article discussing investigations in the context of FCA violations, best practice is to use outside counsel to conduct the investigation in order to ensure impartiality and protection of the attorney-client privilege. Additionally, because the result of the investigation often is not black-and-white as to whether credible evidence of reportable conduct exists and individuals within the company may disagree, it is important to seek advice from outside counsel to validate the decision of whether to disclose and to understand the potential repercussions should the company decide not to disclose.

The investigation, the basis for the determination as to whether credible evidence of misconduct exists, and any corrective action being taken should be well-documented, as this information can be used to demonstrate the contractor's present responsibility in potential suspension and debarment proceedings. Investigation materials and findings, as well as any final disclosure to the Government, should be treated and marked as confidential and proprietary, and access to these materials should be limited to prevent their use by a whistleblower in a *qui tam* action against the company.

If the contractor determines disclosure to the Government is necessary, the contractor should consider skipping the agency's online disclosure form and instead submit a narrative that can more fully describe the company's positive past performance, circumstances leading to the violation, and corrective action taken in order to demonstrate present responsibility. At the same time, contractors should carefully review the language used to protect against the disclosure being treated as an admission of liability.

Finally, because suspension and debarment may occur for a knowing failure to disclose violations or significant overpayments only within three years after contract closeout, contractors should seek prompt closeout and final payment on contracts to limit the period of exposure.

At one point or another, every contractor faces compliance issues. Implementing and following procedures for investigating and, when necessary, disclosing evidence of noncompliance go a long way to mitigating the risk of the most severe penalties and administrative action if and when such issues arise.

ABOUT THE AUTHOR: Jackie Unger is an associate with PilieroMazza who practices in the areas of litigation and government contracts. She may be reached at junger@pilieromazza.com.

Looking Inward: Internal Investigations of Potential False Claims Act Violations

By Ambika Biggs

With the explosion in the number of FCA civil cases filed in recent years, it would behoove government contractors to ensure they are taking all steps necessary to avoid FCA liability. In addition to putting policies and procedures in place to prevent FCA violations from occurring in the first place, contractor's pre-cautionary measures should include conducting thorough internal investigations when a company first learns that it may have an FCA issue.

Under the FCA, anyone who knowingly presents a false or fraudulent claim to the government for payment or approval, or knowingly makes or uses a false record or statement material to a false or fraudulent claim, is civilly liable to the federal government. Anyone found to have

Continued on page 3

violated the FCA must pay a civil penalty of between $10,781 and $21,563 for each violation, in addition to three times the damages the government sustains as a result of the violation. Contractors also may be subject to suspension or debarment, and could be held criminally liable for violating the FCA.

The number of civil FCA claims has risen dramatically in recent years, with the number of FCA claims initiated each year more than doubling from 2002 to 2017. Nearly 800 FCA claims were initiated in 2017, and more than $3.7 billion in settlements and judgments were awarded to the government and *qui tam* relators, who are private citizens who file FCA lawsuits on behalf of the government.

In the context of government contracts, FCA claims can arise in a number of different ways. Government contractors can be held liable under the FCA for submitting claims for payment for services not performed or products or services that they know do not meet the contractual requirements. Another common allegation is that a federal contractor improperly obtained or performed a contract that was set-aside for small businesses. The false claims could include a large business certifying (whether explicitly or implicitly) its small business or socio-economic status on a request for payment to the government, or a small business misrepresenting that it performed the required amount of work under the limitation on subcontracting when it had in fact subcontracted the work to a large business.

In order to reduce their exposure to FCA claims, companies must ensure that they have policies and procedures in place to prevent false claims or certifications from being made to the government. Contractors also should make sure that all employees are aware of and trained on the policies and procedures, and that they know to whom to report potential FCA violations.

Once a contractor has been alerted to a potential FCA violation, it must work quickly to conduct an internal investigation to determine if the FCA has in fact been violated. Such an investigation should consist of interviewing key employees who have knowledge of the potential violation, and collecting and reviewing relevant documents. Contractors can choose to conduct the investigation in-house themselves. However, a better practice is to hire outside attorneys to conduct the investigation for them, as attorneys well-versed in the FCA will be able to analyze the facts and applicable law and make a determination of whether the FCA has in fact been violated. An investigation conducted by outside counsel is protected by attorney-client privilege in most cases, which may not be the case if the investigation is conducted in-house.

After conducting an internal investigation, outside counsel can prepare a report of its findings and recommendations. The report can include advice regarding whether the contractor is required to report the incident to the government since such a determination is not always clear, which Ms. Unger explains in her article on the mandatory disclosure rule.

"The number of civil FCA claims has risen dramatically in recent years, with the number of FCA claims initiated each year more than doubling from 2002 to 2017."

Furthermore, attorneys can advise clients on any employment actions they should take in the wake of such an investigation. While businesses will want to protect themselves by taking disciplinary actions against the perpetrators of FCA violations, they must be careful not to take any adverse actions against employees who report FCA violations, as the FCA has a provision that prohibits employers from taking any adverse employment action against whistleblowers who take actions to stop an FCA violation. Many FCA cases are initiated by disgruntled employees or former employees because *qui tam* relators can receive between 15 to 30 percent of the recovery in an FCA case.

Contractors must be diligent in protecting themselves from FCA liability. We have extensive experience in advising clients on the policies and procedures they should have in place to avoid FCA violations, as well as conducting internal investigations and advising clients on any actions that they should take based on the results.

ABOUT THE AUTHOR: Ambika Biggs is an associate with PilieroMazza who practices in the areas of litigation and government contracts. She may be reached at abiggs@pilieromazza.com.

For any questions or concerns about this issue, or to submit a guest article, please contact our editor, Jon Williams, at jwilliams@pilieromazza.com or 202-857-1000.

When the Law Comes A Callin': A "How To" For Responding to Subpoenas and Document Requests

By Matt Feinberg

Since the last Presidential election campaign began almost three years ago, there has been a significant public focus on sexual harassment, income inequality, crimes against women, public corruption, and the income gap. Sexual harassment claims have skyrocketed in recent months, with some states reporting as much as 400% increases in claim reports. The Department of Labor is enforcing ever-changing compensation rules on service employers. Federal courts are recognizing an expanded reach of workplace non-discrimination laws to the LGBTQ+ community. And, various government watchdogs, including several state attorneys general are opening large-scale policy-based investigations seeking to expose sexual harassment, workplace discrimination, and unequal treatment.

> **"Even if a company has done everything right, it may nevertheless face substantial risk without written proof, and a perceived lack of documentary evidence can lead to service of additional subpoenas, wide-ranging interviews or depositions, or, worse, in-person investigations by governmental authorities."**

Based on these trends, we predict substantial increases in the number of individual employee claims and government-backed investigations over the next several years. And, we expect that these trends will hit every industry, particularly those with large numbers of low-wage earners, service workers, younger employees, or male-dominated workforces. Federal and state government contractors are also prime targets, as they are subject to public whistleblower laws and aggressive competitors eager to obtain an advantage in the race for government contracts. Companies operating within these parameters should expect that it is a question of when—not if—they will become involved in some sort of investigation or receive a subpoena or document request from a state attorney general, an agency or inspector general, or a party in private litigation. So, what can you do to protect your company's bottom line before and after the law comes a callin'?

Create and Maintain a Paper Trail

One might assume that the fewer records a company maintains, the less likely it is for those documents to cause long-term problems. However, in the vast majority of investigations, and in litigation, that is not the case. Incomplete or inaccurate record keeping and insufficient record retention are among the greatest pitfalls a company can face when responding to a subpoena or document request. Even if a company has done everything right, it may nevertheless face substantial risk without written proof, and a perceived lack of documentary evidence can lead to service of additional subpoenas, wide-ranging interviews or depositions, or, worse, in-person investigations by governmental authorities. It is, therefore, critical for companies to create and maintain accurate records of employee complaints, trainings, payroll, and disciplinary actions, among other things. Companies should also implement conservative document destruction policies which preserve documents that are relevant to these common topics of investigation and litigation. Without detailed records, companies could be facing an uphill battle in responding to any subpoena or investigation.

Lawyer Up

Responding to a subpoena can be a complicated endeavor, implicating complex and varied areas of the law and carrying with it damaging ramifications from both public relations and financial perspectives. As soon as a subpoena or document request is received or anticipated, a company should seek out skilled and experience counsel to represent it. Retained counsel should have experience in responding to subpoenas or government investigations as well as in the specific area of law that is the subject of the subpoena or investigation. The company may be able to invoke certain subject matter-specific defenses or privileges, and an attorney with topic-specific experience is in the best position to advance those arguments. In addition, a company should maintain a good relationship with corporate counsel, i.e., an attorney with whom the company can communicate on day-to-day issues and who can identify areas of risk and solve small problems before they become big headaches. When a subpoena is received or an investigation commences, having

Continued on page 5

trusted counsel that knows the ins and outs of the company, understands relevant corporate policies and company atmosphere, and is invested in a long-term relationship can be a major benefit to the company and its bottom line.

Remedy the Problem Areas

Although it is easy to treat subpoenas and investigations as "out of sight, out of mind," once the response to the subpoena has been delivered to the requesting party, the task is not complete. If done properly, the company's compilation and production of documents should, and likely will, identify some of the company's areas of vulnerability: practices and procedures that need to be polished, or behaviors that must be corrected. Counsel should offer practical solutions to cure these problem areas, or the company may request that guidance. And, the company should take action on those recommendations, implementing new or updating old policies and procedures to satisfy the changing political and legal landscape.

Implementing these practical suggestions will help put the company in the best position to respond to a subpoena or government investigation while protecting the company's bottom line.

ABOUT THE AUTHOR: Matt Feinberg is an associate with PilieroMazza who practices in the areas of litigation, labor and employment, and business and corporate law. He may be reached at mfeinberg@pilieromazza.com.

Cybersecurity Update

Defense contractors handling controlled unclassified information (CUI) on non-federal systems had until the end of last year to make sure they were compliant with Department of Defense (DoD) Federal Acquisition Regulation Supplement (DFARS) 252.204-7012 and implemented the 110 security control requirements of National Institute of Standards and Technology (NIST) Special Publication (SP) 800-171. At a minimum, defense contractors with this DFARS clause in their contracts and who handle CUI should make sure they have a system security plan (SSP) in place. A template SSP was recently posted on the Computer Security Resource Center part of the NIST website. Defense contractors to whom DFARS 252.204-7012 applies should also make sure that they have registered on the DoD's DIBNet portal which recently changed its URL to: https://dibnet.dod.mil. That way you will be ready in the unfortunate event that you must "rapidly report" (within 72 hours) a cyber security breach.

Five Tips to Address Employee Complaints and Avoid Liability

By Meghan Leemon

Receiving an employee complaint can be a daunting and overwhelming situation for any employer, whether it be a complaint filed with a supervisor or the company's human resources department, a discrimination complaint filed with the Equal Employment Opportunity Commission (EEOC) or similar state agency, or a wage and hour complaint filed with the Department of Labor's (DOL) Wage and Hour Division. The reality is that many employers will receive an employee complaint at some point. It is important to understand what to do, and what not to do, when you receive the complaint. Generally, while it can be somewhat time consuming, the complaint should be relatively easy to handle if you follow the following five recommendations:

1 Conduct an investigation

First and foremost, you should follow all company policies laid out in the employee handbook or similar document regarding complaint investigation. Even if the complaint has been filed after the employee has left your employ, you should still treat it in a similar manner and conduct an investigation. If there are witnesses or individuals cited in the complaint, talk to them, obtain statements, and keep written records. At the time of the complaint, you may know all the facts, but it is important to keep a record and memorialize these facts in writing as close as possible to any incidents or investigations. If you do not think you can remain unbiased throughout the investigation, you may want to consider bringing in a third-party, such as outside counsel, to help conduct the investigation.

2 Preserve documents

One of the most important things to do is to retain all information related to the employee and the alleged incidents. Failing to properly collect and preserve documents related to the employee and the alleged incidents could result in court sanctions and penalties.

Continued on page 6

Without proper documentation, it could come down to the employee's word against yours. And, while you may not think certain documents, including electronic files, are relevant at the time, they may become relevant later. Keep all documents even after the employee has left your employ, as EEOC and wage and hour complaints may be filed well after the date of the employee's separation.

3 Circle back with the complainant

Do not ignore the complainant. While your initial thought may be that this will go away if you ignore it, that is seldom the case. If the complainant is still an employee, acknowledge their concern and explain that you will conduct an investigation and then respond in writing once the investigation is complete. Be responsive to the complainant and acknowledge his or her concerns, even if you disagree.

4 Assess potential liability

It is possible that your employees may not have acted in the most appropriate manner. If your investigation reveals that there was any wrongdoing, be proactive and do not attempt to cover it up. Liability may be inputted to you, as the employer, especially if you were aware of the situation and did nothing. Similarly, the investigation could reveal that your company policies need updating. You can turn an unfortunate incident into a learning experience.

5 Notify your insurance company

One item employers typically forget is to check their insurance policies. Employment practices liability insurance (EPLI) provides coverage to employers against claims made by employees, including discrimination, harassment, or wrongful termination. Generally, EPLI does not cover wage and hour complaints, but you should double check your policy to confirm. You should also check your policy to determine when you must report a claim; this could determine whether the claim will be covered or denied. If you are unsure, reach out to your insurance carrier.

The above recommendations are not exhaustive. Another item to keep in mind is to always be professional in your responses and throughout the investigation, and even if the complainant is not represented by an attorney, respond as if you are speaking or writing to a plaintiff's lawyer. A plaintiff's lawyer may jump at an employer's failure to properly handle the complaint, which can lead to a greater headache down the road. Also, understand the options available to you. After a charge is filed with the EEOC, you will have the opportunity to mediate with the employee, although this is not required. However, in wage and hour complaints, you would negotiate a resolution directly with DOL (or obtain court approval) as private settlements of FLSA claims are generally not binding or enforceable.

"Another item to keep in mind is to always be professional in your responses and throughout the investigation, and even if the complainant is not represented by an attorney, respond as if you are speaking or writing to a plaintiff's lawyer."

Understanding the do's and don'ts of investigating employee complaints can be critical in avoiding liability. Even if you do not want to have counsel involved immediately, it is good practice to have someone lined up and to provide outside perspective. You do not want to wait until the eleventh hour when the EEOC has issued a right to sue letter or you have been served with an FLSA lawsuit.

ABOUT THE AUTHOR: Meghan Leemon is an associate in our Colorado office who practices in the areas of government contracts and labor and employment. She may be reached at mleemon@pilieromazza.com.