

HB | Legal Report Series

# THE DOD WHISTLEBLOWER

8 STEP GUIDE *to*  

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REPORTING FRAUD  

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*and* CLAIMING  

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REWARDS  

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# THE FCA DEFENSE CONTRACT WHISTLEBLOWER

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## 8 STEP GUIDE *to* REPORTING *and* REWARDS

Under the federal False Claims Act (FCA)<sup>1</sup>, engineers, mechanics, IT professionals, and other defense contractor, subcontractor, or government grant recipient employees are urged to report knowledge of fraud, waste, and abuse of government funds.

When a defense contract whistleblower's information on False Claims Act violations leads to the recovery of government funds, the *qui tam* whistleblower is eligible to collect between 15% and 30% of the total recovery amount. Whistleblowers who properly report FCA violations are also granted legal protections from employer retaliation, including demotion, termination, harassment and otherwise discriminating activity.

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<sup>1</sup> 31 U.S.C. §§ 3729 - 3733

Common defense contractor FCA violations include:

- Failing to meet design specifications
- Failing to meet best price requirements
- Failing to report product defects upon discovery
- Cross charging contracts (fixed price to cost plus)
- Violating Buy American laws
- Violating Truth in Negotiations Act (TINA) responsibilities
- Submitting fraudulent invoices for services, goods, or labor
- Failing to adhere to environmental / worker safety standards
- Failing to pay prevailing wages / David Bacon Act requirements
- Using substandard, refurbished, defective parts and materials
- Making fraudulent misrepresentations in DoD contract bidding
- Violating worker safety requirements or environmental safety obligations

To be eligible for the monetary whistleblower award and legal protections, defense contract whistleblowers must navigate and adhere to proper reporting procedures. We have published this report outlining the steps required to file a DoD whistleblower claim to help defense contractor employees report knowledge of False Claims Act violations and collect the maximum available *qui tam* award.



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## **Step 1. Select a Defense Contract Whistleblower Attorney**

Once a defense contractor employee comes across information suggesting potential fraud against the U.S. government, that individual's rights as an employee and a whistleblower are in jeopardy. The job of the defense contract whistleblower attorney is to protect those rights and ensure that your case is successful.

Whistleblowers should consult with an experienced defense contract whistleblower lawyer as early as possible, preferably from the instant you become suspicious of misconduct. There are several reasons for this. Early contact with an FCA defense contract attorney is vital to (1) establishing the whistleblower as the original source of the information, (2) ensuring the whistleblower meets first-to-file requirements<sup>2</sup>, (3) preserving evidence of FCA violations, and (4) protecting the whistleblower from employee retaliation.

Potential whistleblowers may be concerned about how they will pay for attorney services. However, reputable defense contractor whistleblower attorneys handle FCA cases on a contingency basis. This means the attorney will not ask for fees or payment unless and until the whistleblower collects the *qui tam* award amount from the government.

Established False Claims Act attorneys specializing in defense contract cases understand and help their clients with:

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<sup>2</sup> The government offers cash whistleblower awards only to the first individual to file a claim. In addition, the information reported must be "original source," meaning the information is not available to the general public via the media, internet, or other outside sources.

- Protecting rights of employment, income, identity, and career
- Following proper procedures and deadlines involved in reporting FCA violations
- Handling special challenges involving highly confidential information
- Gathering persuasive evidence in a safe and legal manner
- Preparing a credible, compelling *qui tam* claim
- Recovering compensation for employer retaliation in necessary
- Securing the maximum possible whistleblower cash award amount

In selecting an FCA defense contract whistleblower attorney, feel free to inquire about their prior experience with defense contract whistleblower claims.

A qualified defense contract whistleblower lawyer will be well-versed in False Claims Act law, have access to skilled investigative experts who will help gather evidence for your case, and have experience with cases against high-profile defense contractors.

High-profile defense contractors may include:

|                       |   |
|-----------------------|---|
| LOCKHEED MARTIN CORP  | AECOM                                   |
| THE BOEING COMPANY    | SCIENCE APPLICATIONS INTERNATIONAL CORP |
| GENERAL DYNAMICS CORP | GENERAL ELECTRIC COMPANY                |
| RAYTHEON COMPANY      | GENERAL ATOMIC TECHNOLOGIES CORP        |
| NORTHROP GRUMMAN CORP | TRIAD NATIONAL SECURITY LLC             |
| MCKESSON CORP         | ANALYTIC SERVICES INC                   |

|                                   |                                    |
|-----------------------------------|------------------------------------|
| UNITED TECHNOLOGIES CORP          | JACOBS ENGINEERING GROUP INC       |
| HUNTINGTON INGALLS INDUSTRIES INC | CENTENE CORP                       |
| LEIDOS HOLDINGS INC               | ATLANTIC DIVING SUPPLY INC         |
| L3HARRIS TECHNOLOGIES INC         | CALIFORNIA INSTITUTE OF TECHNOLOGY |
| HUMANA INC                        | BATTELLE MEMORIAL INSTITUTE INC    |
| HONEYWELL INTERNATIONAL INC       | KBR INC                            |
| BAE SYSTEMS PLC                   | OSHKOSH CORP                       |
| FLUOR CORPORATION                 | CACI INTERNATIONAL INC             |
| BOOZ ALLEN HAMILTON HOLDING CORP  | BECHTEL GROUP INC                  |

Experienced defense contract whistleblower attorneys often have a dedicated employment lawyer familiar with the complexities of anti-retaliation laws to assist in guiding clients and mitigating risks. This can be particularly important for whistleblowers who are currently employed by the company being investigated for FCA violations.

As defense contractor cases can span numerous jurisdictions, your whistleblower counsel should have nationwide jurisdictional knowledge and experience. This scope of experience can prove important in encouraging the government to dedicate resources to your case.

In addition, your whistleblower lawyer should have the skill and resources to proceed through trial without government intervention. Inexperienced

or general practice whistleblower lawyers may file your case assuming the government will handle proceedings. However, this is not always the outcome.

The government may decline to intervene in a False Claims Act case. At this point, the whistleblower is responsible for filing a lawsuit in federal court and continuing through trial if necessary. Not all attorneys are willing or able to devote this level of resources. Changing attorneys in the middle of a case is possible, but having an attorney already familiar with the case is an advantage. A whistleblower lawyer specializing in defense contractor FCA claims will have years of experience preparing claims, working with investigative agencies, and communicating with the Department of Justice. If necessary, they are able to prosecute through trial.

When you first contact a defense contract whistleblower lawyer, you will have a confidential consultation regarding your evidence or suspicions of the FCA violations. Based on your specific information, the lawyer will determine whether you are eligible to file a claim and advise you on how to proceed in a way that protects your rights as an employee and FCA whistleblower.

## **Step 2. Keep All Knowledge Confidential**

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Defense contract whistleblower claims are highly dependent on the original source information requirement. If your knowledge of a potential FCA violation becomes known to company employees, competitor companies, or the media, you can lose your eligibility to file a claim and collect the FCA award.

Do not contact company ethics hotlines or government agencies until you speak with a lawyer. Refrain from discussing your concerns with supervisors, coworkers, family, friends, strangers, or the media until consulting with your



lawyer. Once your information is released, you may lose your eligibility to file a claim and collect an award.

For example, should another individual decide to use your information and file their own whistleblower claim first, you would fail to meet the required first-to-file guidelines. In some cases, discussing your knowledge with others may violate “public disclosure” prohibitions, jeopardizing your claim. Later in the case, the Judge may issue a sealing order with the threat of fine, jail, claim dismissal, or other punitive action should you break confidentiality. If in doubt, speak with your whistleblower lawyer about what you may discuss and with whom.

Defense contractors and subcontractors often have policies in place that require employees to report concerns about potential misconduct internally. These policies may outline a specific internal reporting system. Never begin the internal reporting process without speaking to your lawyer first. An experienced defense contract whistleblower lawyer will advise you on how to proceed in a way that protects your rights as an employee and an FCA whistleblower.

In addition, communications over the phone and internet can threaten your whistleblower eligibility. Never contact your lawyer or email documents from a company phone or computer. Do not use company email accounts to discuss your case with your lawyer. Always be cautious with any dialogue involving any aspect of your case.

### **Step 3. Determine Potential FCA Violations**

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In order to file a whistleblower claim under the federal False Claims Act, you must be able to show that a defense contractor, subcontractor, or grantee has submitted a false claim to the government.

Under the FCA, a “claim” is a “demand for money or property made directly to the federal government or to a contractor, grantee, or other recipient if the money is to spent on the government’s behalf and if the federal government provides any of the money demanded or if the federal government will reimburse the contractor or grantee.”

Generally, a “false claim” is a claim submitted for payment that contains false or fraudulent information, including omissions or misrepresentations. Government contractors, subcontractors, grantees, or other recipients of government funds are prohibited from:

- A. Knowingly presenting (or causing to be presented) a false claim for payment or approval;
- B. Knowingly making or using (or causing to be made or used) a false record or statement material to a false claim;
- C. Conspiring with others to commit a False Claims Act violation;
- D. Knowingly delivering (or causing to be delivered) less than all of the money or property owed to the government;
- E. Making or delivering a document certifying receipt of property used (or to be used) by the government without completely knowing that the information on the receipt is true;
- F. Knowingly buying or receiving property from an officer, government employee, or member of the Armed Forces, who lawfully may not sell or pledge property; or
- G. Knowingly making or using (or causing to be made or used) a false record or statement in order to conceal, decrease, or avoid an obligation to pay or transmit money or property to the government.

Your lawyer will be able to determine whether an eligible FCA violation has occurred by examining the company's contractual obligations to the government and the nature of the alleged violations.

Note that evidence of intent to defraud the government is not required to file a claim. Under the False Claims Act, acts of gross negligence, deliberate ignorance, or reckless disregard are enough to create liability. Misrepresenting facts to disguise non-compliance is also enough to establish a false claim, including failing to maintain proper records, discarding records prematurely, omitting data from records, hiding records from inspectors, or making false statements regarding quality standards or equipment maintenance.

In addition, a whistleblower's own participation in the FCA violation does not prevent them from filing a claim and collecting an award. The court will determine to what extent the whistleblower contributed to the false claim(s) and adjust the award amount accordingly.

An experienced FCA defense contract whistleblower lawyer will be able to help you determine whether a company may be in violation of the False Claims Act.

## **Step 4. Gather Evidence of FCA Violations**

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Obtaining the evidence required to prove an FCA violation can be difficult. Contractors and other recipients of government funds go to great lengths to disguise acts of misconduct. However, in order to persuade the government to devote their time and resources to your case, you will need compelling evidence demonstrating that a company has submitted numerous false claims for government funds.

First, select a safe place to record information relating to your case – a personal notebook, home computer, or external hard drive (“flash drive”). Record all specific times, dates, communications, events, people, and places that may be relevant to your case. When available, include phone numbers, addresses, computer IDs, and other detailed information relating to your claim.

Next, list any relevant emails, audio recordings, video files, records, test results, invoices, or other documents that may be helpful in your case - along with their locations. Show this list of potential evidence to your lawyer who will inform you of what evidence you may safely take, and what evidence is better left to investigators to obtain. Remember that any documents, photo, audio, or video evidence taken in violation of the law may not be admissible.

Defense contract whistleblower cases rely heavily on original source information. Unless your analysis of the information is original, evidence obtained from published court documents, public study data, internet sources, or media will not generally serve as evidence for your case.

Examples of documents that may provide evidence of FCA violations (and/or an attempt to disguise FCA violations) may include:

- Shipping and receiving receipts
- Materials and parts receipts
- Billing records
- Performance records
- Email communications
- Internal inspection records
- Design documents
- Raw test data
- Audio / video files

Work quickly, thoroughly, and discreetly. If a coworker or other official discovers your intent to report misconduct, you could be fired from your job immediately without warning, resulting in the permanent loss of access to computers and files. Do not email mass numbers of documents or large files to your personal email address as these may trigger IT programs and alert company officials of your activity.

## **Step 5. Prepare and File Your Claim**

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Once you and your investigative team have gathered enough evidence to persuade the government that a company may be submitting false claims for payment, your attorney will help you organize the evidence and draft a whistleblower claim.

Next, your lawyer will assist you in scheduling a disclosure conference with government officials where you and your lawyer will persuade the government to intervene in your case. After this initial conference, your lawyer will assist you in filing your whistleblower claim in court and submitting it to the government.

In order to protect whistleblowers and preserve evidence, the False Claims Act requires that whistleblower claims be filed “under seal.” This means the company and any related parties will not be notified that any action against them is in progress. Once your claim is filed, it will remain under seal for a minimum of 60 days (and will be extended for as long as it takes the government to complete their investigation).

## **Step 6. Assist with Government Investigation**

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Once your claim is filed, the government will investigate your claims more closely and seek additional evidence of FCA violations. As the holder of

the original source information, the whistleblower's assistance with this investigation is important. The court increases a whistleblower's award amount in part by the amount of contribution they make to the investigation.

Your contribution may include supplying information from your personal notes, lists, and evidence. You may be asked to participate in interviews with government investigators. Keep a written log of any ideas you come across during interviews, including names of potential witnesses that may aid investigators. It is in your best interest to cooperate with the process and make yourself available as needed.

Depending on the results of the investigation, the government will decide whether to intervene in your FCA lawsuit. When the government intervenes, the whistleblower is eligible to collect between 15% and 25% of any government recovery. If the government chooses not to intervene, the whistleblower is free to pursue the case with the aid of their lawyer and is eligible to collect between 25% and 30% of any government recovery. In some cases, the government may decline to intervene at first, but decide to take over the case at a later date.

## **Step 7. Protect Yourself from Employer Retaliation**

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Though you, your legal team, and government investigators take all reasonable precautions to protect your identity as whistleblower, a defense contract whistleblower's identity will eventually become known. Planning for retaliatory activity in advance can help ease concerns regarding your job, career, and future.

Because of the high incidence of employer retaliation against FCA whistleblowers, the False Claims Act enables whistleblowers to file a civil

claim to collect all remedies necessary to make them whole if they are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against because of lawful acts done by them or associated others in an effort to stop FCA violations.

Under FCA anti-retaliation provisions<sup>3</sup>, any employee, contractor, or agent who experiences such retaliation has a right to the following relief:

- Job reinstatement with same seniority status they would have had without the discrimination
- Double the amount of back pay
- Interest on the back pay
- Compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

Rarely will a whistleblower receive a demotion or be fired from their job or “for reporting a False Claims Act violation.” Instead, the employer will find some other seemingly legitimate reason for the adverse action. Whistleblowers must be able to demonstrate that their attempt to report an FCA violation played even a slight role in the employer taking the adverse action. Therefore, proving a retaliation claim relies heavily on the times and dates of specific events.

Potential whistleblowers should keep careful record of any changes observed at work, including sudden job shift changes, job description changes, demotions, suspensions, terminations, or unusual interactions

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<sup>3</sup> 31 U.S.C. § 3730(h)

with coworkers – specifically recording the times and dates of these changes. This information can be vital to collecting financial compensation in a FCA retaliation claim.

In most cases, proving a retaliation claim does not require an examination into why you were fired, demoted, or harassed. Instead, it requires proving that (1) the defendant had some knowledge of your concerns about FCA violations, and (2) a brief amount of time existed between the time the defendant learned about your potential role as whistleblower and the time of the retaliatory activity.

Once those two elements are shown, the defendant must be able to prove by clear and convincing evidence that they would have taken the adverse action regardless of your potential whistleblower role. For example, should an employee claim you were fired for taking a two-hour lunch break, but you have taken two-hour lunch breaks in the past without penalty, the defendant's argument would fail.

Many whistleblowers plan for retaliatory activity in advance, considering new job and career prospects should problems arise. An experienced defense contract whistleblower lawyer will be able to help answer any questions you may have regarding employment and career concerns.

## **Step 8. Arrange for Your Cash Award**

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Whistleblower cash awards can be significant. As described in Step 6, when the government intervenes, the whistleblower is eligible to collect between 15% and 25% of any government recovery. If the government does not intervene, the whistleblower is eligible to collect between 25% and 30% of the total government recovery.



Rarely does a defense contractor submit just one false claim for payment to the government. A single defense contract whistleblower case can involve hundreds of false claims. As of 2020, any entity who violates the False Claims Act is liable to the government for a civil penalty of between \$11,665 to \$23,331 per false claim, plus three times times the amount of damages sustained as a result of the false claims.

A case involving 100 false claims could bring a government recovery of \$2.3 million in penalties. If those false claims involved the purchase of substandard materials for aircraft parts resulting in the loss of a \$200 million aircraft, the government would recover an additional \$600 million (200 x 3) – for a total government recovery of \$602.3 million.

In this case, the whistleblower could receive an award totaling between \$90.3 million and \$150.5 million. If the government did not intervene in the case, the whistleblower could receive an award of between \$150.5 million and \$180.7 million.

FCA whistleblower awards are high because the government understands the many challenges and risks that come with reporting fraud in the workplace. Just as the whistleblower should prepare for potential retaliation, the whistleblower should be smart in managing their FCA award.

Note that successful defense contract whistleblower cases take months of preparation and investigation to complete. No matter how promising a case appears, it is important to have patience and remain financially prudent. While it is advisable to obtain guidance from a financial consultant and to begin planning your estate, do not make the mistake of spending more than is currently available to you.

Your lawyer will be able to estimate your FCA cash award amount, however the exact amount cannot be known until the end of your case. The Court weighs numerous factors in calculating the whistleblower award amount, including the value of your original source information, the extent to which you aided the investigation, your ability to meet required deadlines and follow reporting procedures, the nature of the misconduct, and the extent to which you participated in the FCA violations (among other factors).

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This report is not intended to provide legal advice, but to provide a general summary of the key features of the FCA Defense Contract Whistleblower Program. It does not include a comprehensive analysis of all provisions. For detailed information about the FCA whistleblower program, including limitations and eligibility requirements, see U.S. Code, Title 31, §§ 3729 – 3733.

## **Are You Considering Reporting Misconduct by a Department of Defense Contractor?**

Speak with an experienced Halperin Bikel military contract whistleblower lawyer to learn your rights and options.

**929.290.1266**

*Confidential and No-Cost Attorney Consult*