Published on *The National Law Review* https://natlawreview.com

Proposal Would Prohibit Government Contractors' Confidentiality Agreements Restricting Employees' Reporting of Alleged Fraud, Waste, or Abuse

Article By:

F. Christopher Chrisbens

Laura A. Mitchell

Mickey Silberman

The Federal Acquisition Regulatory Council has proposed a rule barring employers from using confidentiality agreements that restrict employees or subcontractors from reporting "waste, fraud or abuse" to the government.

The proposal would apply *retroactively* to existing confidentiality agreements and, thus, would obligate employers to modify agreements already signed by current employees. Aside from the administrative burden this would impose, it could raise questions from employees about the reason employers are making "mid-stream" changes. This is the latest in a series of new and proposed requirements imposed on government contractors.

Interested parties must submit comments to the proposed rule by *March 22, 2016*.

Expansive Coverage

The proposed rule would add a clause to the Federal Acquisition Regulation (FAR) that would broadly and retroactively apply to fiscal-year 2015 contracts. Highlights of the proposal include:

- *Existing* federal contracts also must be modified to include this new prohibition before fiscal-year 2015, or subsequent-year, funds will be used to pay contractors.
- For new fiscal-year 2015 contracts and beyond, a contract bidder would be required to represent it has in effect no such confidentiality agreements.
- Additionally, contract bidders would need to represent they do not otherwise require employees or subcontractors to comply with "*statements prohibiting or otherwise restricting*" the lawful reporting of waste, fraud, or abuse. As discussed below, the scope of this is not yet clear.

- The proposed rule does *not* include an exemption for contractors providing commercially-available off-the-shelf (COTs) items, a category of goods traditionally exempted from similar employment law requirements.

- In addition to the prohibition of confidentiality agreements, covered employers would be required to affirmatively communicate to employees that any existing agreements or statements inconsistent with the prohibition are "no longer in effect." The preamble to the proposed rule suggests such notice "could be accomplished through normal business communication channels, such as email."

- Prime contractors would need to include the FAR clause in all subcontracts under the prime contracts.

Open Issues

This proposed regulation leave open many questions and raises compliance concerns for contractors. For example:

- Contractors may not require employees to comply with "statements" "restricting" such reporting. This could include *arbitration agreements* and confidentiality and other*employee policies* addressing employee communications. Therefore, the rule could require employers to review and revise may policies addressing confidentiality and employee communications.

- The proposed rule refers to the *lawful*reporting of "waste, fraud or abuse," but it provides no definition, guidance or practical examples to help employers understand those terms. The proposed rule appears to give employees broad rights to go to the government regardless of what information (confidential or otherwise) the employee would like to report.

- The preamble to the proposed rule suggests contractors can use e-mail to satisfy their obligation to affirmatively communicate to employees that existing confidentiality agreements or policies are "no longer in effect" if they are not compliant with the prohibition. However, the rule provides no guidance to employers on what should be included in such a message or whether such a disclaimer eliminates the need to revise existing policies or agreements.

Implications

Covered employers will continue to have the right to protect their confidential information and trade secrets under the proposal. However, the proposed rule would require employers to draft those restrictions very carefully, adding still another legal restriction — and exposure, if there is a failure to comply — on employers who do business with the federal government.

This proposed rule is in line with recent enforcement activity by the Securities and Exchange Commission, finding that confidentiality agreements imposed in connection with internal investigations, releases or otherwise may violate the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. (Read more here.) Likewise, the Equal Employment Opportunity Commission and the National Labor Relations Board have long been skeptical of employer actions or agreements that may tend to chill employees away from filing complaints with those agencies.

National Law Review, Volume VI, Number 30