

Feds Propose Rules to Stop Contractors from Silencing Whistleblowers

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The Department of Defense, NASA and the General Services Administration are attempting to stop government contractors from barring their employees from blowing the whistle on fraud, waste and abuse. For many years, some government contractors have required their employees to sign gag orders that prevent them from reporting their employers to the government for misusing federal funds. A [proposed rule](#) would prevent such contractors from doing business with these three agencies. Under the proposal, any company that requires its employees to sign confidentiality agreements that would prevent the reporting of government contract fraud, waste or abuse would not be eligible for government contracts awarded by these three agencies.

This proposed rule is part of a recent, encouraging move by several federal agencies to push back on employers' efforts to prevent employees from blowing the whistle on wrongdoing by forcing them to sign restrictive confidentiality agreements.

Why Stop Government Contractors from Silencing Whistleblowers?

Employees and their advocates have become very familiar with confidentiality agreements. Companies in all sectors have increasingly made such agreements a condition of employment, often at the expense of allowing employees to report wrongdoing to legal authorities. In the case of government contractors, that can lead to unreported fraud, waste and abuse that can cost taxpayers billions. By only working with contractors who agree to remove any barriers for employees who seek to hold their employer's accountable for wrongdoing, these agencies are taking an important step in protecting not only workers but also taxpayers in general.

What Do the Proposed Confidentiality Agreement Rules Require?



The proposed rule would apply to all contracts—regardless of the amount of funding at issue—and would require all contractors making bids for agency contracts to promise that they do not, and will not, require employees to sign or comply with any internal confidentiality agreements that would prevent them from reporting fraud, waste or abuse of federal funds. The protections would extend to subcontractors as well. Any contractor who does not make such a promise would not be eligible to win a contract with the agencies. If adopted, the rule would apply to all existing contracts as well, so current contractors would have to void any such confidentiality agreements and inform their employees of the change.

Are Other Agencies Cracking Down on Contractors?

Other government agencies have also recently increased their efforts to prevent employers from requiring their employees to keep their mouths shut when they observe wrongdoing. For example, the SEC has adopted Rule 21F-17(a), which provides that no employer may take any action—including the enforcement of confidentiality agreements—to impede an individual from [reporting a securities law violation to the SEC](#). In recent years, the SEC has aggressively scrutinized companies' confidentiality agreements, an effort that culminated in the highly publicized [settlement of a case against KBR Inc.](#) based on the company's practice of forcing employees to sign restrictive confidentiality agreements.

Other agencies have also given greater scrutiny to confidentiality agreements. The [National Labor Relations Board](#), [Equal Employment Opportunity Commission](#) and [Financial Industry Regulatory Authority](#), to name a few, have taken action against confidentiality agreements in recent years. In addition, a [March 2015 report](#) by the State Department's Office of Inspector General (OIG) examined confidentiality agreements that the 30 largest State Department contractors have required their employees to sign.

What's Next for the Whistleblower Proposal?

With this proposal, DOD, NASA and the GSA now seek to join these agencies in positioning themselves against the use of broadly restrictive confidentiality. If and when the proposed rule goes into effect, it will add to the weight the federal government is putting behind its efforts to keep employees free to report wrongdoing by their employers. As whistleblower advocates know, this is an important development because all the statutory protections in the world are of little value to whistleblowers when they are forced to sign away their rights to invoke those protections.

The proposed rule is currently available for public comment through March 22. Assuming the agencies make no changes to their proposal, the rule will go into effect sometime this year. Should that happen, it will count as a major victory for whistleblower advocates.