GET READY FOR THE WHISTLEBLOWERS

By

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Press reports of a $325 million payment by Northrop Grumman to the Federal Government following allegations of fraud by whistleblowers, is only one reason to take note of the fact that investigations and litigation under the federal False Claims Act is likely to become one of the most significant types of employment-related litigation faced by employers during the coming years. The False Claims Act contains *qui tam* provisions which authorize whistleblowers to file suit on behalf of the United States and receive up to a third of the Federal Government's total recovery for false claims. There is widespread support within Congress to amend the False Claims Act to legislatively overrule certain recent decisions by the United States Supreme Court which whistle-blower advocates contend have resulted in a much too narrow field of fire for whistleblowers.

Among other things, the pending legislation would eliminate the requirement that the alleged false claims have been presented to the Federal Government as opposed to a contractor, grantee or other non-governmental recipient. The pending legislation would amend the False Claims Act to include liability for false claims presented to contractors, grantees and other non-governmental recipients if the money sought by the claim is intended to be spent on behalf of the Federal Government or to advance a federal program and the Federal Government either provided the money or is responsible for reimbursing all or a portion of the funds at issue. The proposed legislation would also legislatively overrule the United States Supreme Court's decision in Allison Engine Co. v. United States ex rel. Sanders, which held that liability for a false statement requires a showing that the defendant intended that the false statement resulted in the Government's paying a false claim. Under the proposed legislation, which would be retroactive to June 7, 2008, an intent requirement would be explicitly removed from the False Claims Act and a more general definition of materiality substituted such that liability would be imposed for any false statement having a tendency to influence the payment or being capable of influencing the payment.

Other pending legislation introduced by Senator Grassley would eliminate the "public disclosure" defense to False Claims Act claims. More specifically, the False Claims Act has never before allowed whistleblowers to allege fraud which was already known by the Federal Government through other sources. The Bill introduced by Senator Grassley would limit invocation of the public disclosure defense to the Federal Government and thus eliminate the availability of the defense to private defendants. Further, the legislation significantly expands the anti-retaliation provisions of the False Claims Act to protect whistle-blower activities incidental to a False Claims Act lawsuit and, moreover, lengthening the statute of limitations for private relators from six to ten years.