

## Contractors Must Prepare For Fallout From Classified Leaks

By **Bryan Koenig**

*Law360, Washington (April 14, 2017, 1:42 PM EDT)* -- When classified information gets leaked, most of the focus and the possible consequences fall on the person who disclosed the material — but when that person is an employee of a government contractor, the company could find itself facing the potentially devastating legal fallout as well.

While the possibility for lengthy prison sentences hangs almost exclusively over individual leakers, well-meaning or otherwise, experts caution that contractors, too, can be affected, especially in their future work prospects.

Those effects could include doubts about a company's continued ability to reliably safeguard classified material, and could even risk a company's lifeline access to secret federal information or, in unlikely circumstances, even its access to government contracts at all.

Barak Cohen, a white collar defense attorney and head of Perkins Coie LLP's Washington, D.C.-based commercial litigation practice, says the first thing he discusses with his clients when a leak issue pops up is whether there are any problems with how the company operates and how to fix it.

"One of the next things they're going to worry about is, how does this affect our current and future contracts?" he said. "Are we going to be threatened with suspension or debarment?"

Leaks can also prove to be a major reputational harm to contractors, in addition to, at minimum, the expense of performing a postmortem after the disclosure.

Former President Barack Obama was known for the leaks prosecutions carried out by his administration, which counted more individuals charged with Espionage Act violations — carrying penalties up to the death penalty — than any of its predecessors.

Obama's successor in the meantime has cast himself as a law-and-order leader, one who has railed against the leaks of sometimes classified information pouring out of his administration. How the individuals behind those leaks might face penalties under President Donald Trump has yet to become clear, but the implications are broad, with most penalties focusing on the leakers themselves.

Experts note that much of the burden on prosecuting classified material disclosure — rather than the more likely pursuit of administrative punishment — is based on intent, the willful revelation of protected information knowing that it could harm U.S. national security, with the most severe penalties

typically reserved for handoffs to foreign governments.

Proving such cases, according to Dorsey & Whitney LLP cybersecurity expert and former U.S. Department of Justice trial attorney Robert E. Cattnach, typically requires that the material bore a stamp clearly labeling it as classified.

Leakers need to be shown to have known the information was classified at the time they disclosed it. Experts also noted that proving such a case can require figuring out how to present sensitive information in a courtroom and to defense counsel. There can also be far less severe consequences for documents improperly handled and potentially exposed rather than the deliberate leaks experts say are much more rare.

Obama left behind a mixed track record on leaks that included efforts to step up whistleblower protections. However, Keith D. Burney, an Orrick Herrington & Sutcliffe LLP national security investigations attorney and former federal prosecutor and Navy SEAL, noted that those safeguards do not apply to leaking classified information publicly, although there are protections for secure-channel reporting.

Revocation of security clearance is also a major point of concern for contractors who can't work without it. Although Obama did bar clearance revocation from being used to retaliate against intelligence community whistleblowers, that 2012 executive order required internal reporting and didn't extend to contractors, meaning those who leak information to the public, like former National Security Agency contractor Edward Snowden, currently avoiding Espionage Act charges while living in Russia, are still fair game.

As for leakers' contractor companies, simply employing a leaker isn't typically enough to incur more severe penalties. Where the information came from is also important. Snowden, while employed by Booz Allen Hamilton, took his material from an NSA facility rather than a corporate one.

There can, however, still be consequences for contractors, based in part on strict safeguarding requirements imposed by the government, some of which come with serious civil penalties. And some of those mandates have been stepped up in recent years under efforts to stamp out "insider threats."

Civil and contractual penalties are far more likely for companies than criminal prosecution, experts note.

"In order to implicate a company, the company has to have done something wrong," Burney said, referring to criminal penalties.

Behnam Dayanim, a Paul Hastings LLP attorney whose work includes regulatory compliance and who co-chairs the firm's privacy and data protection practice, said the real consequence for companies is in contractual penalties based around safeguarding and other obligations like vetting workers.

"The contract may specify what those consequences are," Dayanim said. "The contract might be terminated. Or not renewed."

C. Peter Dungan, a Hogan Lovells national security and public procurement attorney and U.S. Army reservist, notes that contracts also typically require contractors to immediately disclose any leaks. Bad news, Dungan said, doesn't get any better with time.

If the contractor is found at fault from an employee's action, it could be booted off the contract, or it could lose its clearance or ability to store classified information, which would cripple work prospects.

“That would be sort of a big stick to hit them with. And the biggest stick of all would be to suspend or debar them,” from future government work, Burney said. “That's a really big stick and that's something the government rarely uses. And it would have to be really egregious. Like the company itself was taking part in the espionage, was actively selling information to a foreign government, something like that.”

Former assistant attorney general for the DOJ's National Security Division, John P. Carlin, who now heads up Morrison & Foerster LLP's global risk and crisis management team, said that scrutiny of contractors wrapped up in employee leaks is all about looking for compliance programs and enforcement efforts that show “reasonable steps” are taken both to hire trustworthy workers and to address or prevent misconduct.

Carlin argued that the current attention paid to the role of contractors in leaks makes it more likely that those companies could face severe contractual penalties.

“We are in a current climate of increased scrutiny and lower tolerance, where contractors are expected to be very aware of the risk,” he said. “And that's true both in the executive branch and I think will be true for legislative oversight.”

--Additional reporting by Max Stendahl, Daniel Wilson and Martin O'Sullivan. Editing by Rebecca Flanagan and Jack Karp.