

LEGAL UPDATES

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SEC Files First Whistleblower Protection Case Regarding Restrictive Language

On Wednesday, April 1, 2015, the Securities and Exchange Commission (SEC) brought its first enforcement action against KBR, Inc. for using restrictive language in confidentiality agreements that the SEC claimed had the potential to suppress the whistleblowing process. The time is now for employers subject to Dodd-Frank to reexamine their separation, nondisclosure and other employee agreements.

Background

In March 2015, the SEC began sending letters to companies seeking production of agreements entered into with employees, including separation and nondisclosure agreements. The SEC sought the agreements as part of its initiative to search out examples of companies that entered into agreements that the SEC believes are in violation of SEC Rule 21F-17, which prohibits companies from making "any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."

SEC's Action Against KBR, Inc.

In its action against KBR, the SEC questioned KBR's practice of requiring certain witnesses to sign confidentiality agreements in its internal investigations. The form agreements contained provisions that threatened discipline or termination of employees who discussed internal investigations without KBR's prior approval. The SEC took the position that the language in those form agreements violated SEC Rule 21F-17, because the investigations

included allegations of potential security violations and the agreements stifled the witnesses' ability to report potential violations.

KBR agreed to settle the claim. In addition to paying a civil fine, KBR revised its confidentiality agreement to clarify that employees are free to report possible violations of law to any governmental agency without seeking the company's approval and without fear of retaliation. Further, the revised provisions clarify that, if an employee does report a possible violation, the employee is under no obligation to notify KBR.

What This Means to You

Employers subject to Dodd-Frank need to reexamine their separation, nondisclosure and other employee agreements to ensure that such agreements do not contain provisions that can be viewed as obstructing employees from disclosing information to the government about potential violations of the law. Specifically, employers should look for provisions that force employees (i) to disclose any concerns of violations to the company before reporting the concerns externally, (ii) to agree not to disparage the company, or (iii) to relinquish any awards from an enforcement action brought by the government. Consequently, employers should pay particular attention to confidentiality provisions contained in any of their employee agreements.

Contact Information

For more information concerning this or other issues affecting labor and employment, please contact your Husch Blackwell attorney or an attorney in our Labor & Employment practice group.