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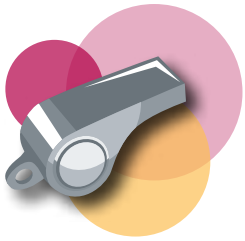

Workplace Whistleblower

SEC Targets Employment Agreements Requiring Waiver of Whistleblower Awards

By Cameron Smith, Cliff Fonstein, and Anshel Joel "AJ" Kaplan

The SEC's Office of the Whistleblower continues to examine employee severance, settlement and confidentiality agreements for language that might chill reporting of securities violations to the SEC and other regulators. The SEC announced on August 10, 2016 that BlueLinx Holdings, a building products distributor, will pay $265,000 to settle charges that its severance agreement violates Rule 21F-17 by requiring departing employees to forego whistleblower bounty awards and using confidentiality language that restricts reporting of possible securities law violations. The Order is available here.

Promulgated pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act, Rule 21F-17 states that companies may not "take any action to impede an individual from communicating directly with the [the SEC] about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."

Among other things, BlueLinx's severance agreement required departing employees to notify the company prior to disclosing any financial or business information to third parties, and to waive the right to any monetary award for filing a charge or complaint with the SEC or other administrative agencies. These restrictions, the SEC concluded, (1) forced outgoing employees to choose between outing themselves as whistleblowers or potentially losing severance pay and benefits, and (2) removed the important financial incentive that encourages people to report securities violations. Therefore, such restrictions "impeded" frank communications with the SEC and, as such, violated Rule 21F-17. While not admitting liability, in addition to paying the $265,000 penalty, BlueLinx agreed to amend its severance agreement to remove the waiver clause, as well as clarify that employees can communicate with the SEC or any government agency without prior notice. BlueLinx agreed to include the following language in all of its severance agreements and other employment agreements that contain confidentiality restrictions:

"Protected Rights. Employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Securities and Exchange Commission or any other federal, state or local governmental agency or commission ("Government Agencies"). Employee further understands that this Agreement does not limit Employee's ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be conducted by any Government Agency, including providing documents or other information, without notice to the Company. This Agreement does not limit Employee's right to receive an award for information provided to any Government Agencies."

Note the last sentence in the language blessed by the SEC in the *BlueLinx* order regarding waiver of an award for providing information to "any Government Agency." This language is arguably broader than what Dodd-Frank or Rule 21F-17 require, since neither prohibit waiver of recoveries in an EEOC action by employees who released their rights under Title VII in return for a settlement or severance payment.

This case is the third recent enforcement action targeting language deemed improperly restrictive of potential whistleblowing. On April 1, 2015, a technology and engineering firm agreed to pay $130,000 to settle charges that some of its confidentiality agreements stated employees could face discipline for discussing internal investigations with outside parties absent prior company approval. In June 2016, a financial services company agreed to pay $415 million to settle multiple alleged securities violations, including a violation of Rule 21F-17. The severance language challenged there permitted disclosure of confidential information pursuant to a court order but failed to include a carve out clarifying that an individual may voluntarily disclose confidential information to the SEC without prior notice to the employer.

Based on its recent enforcement actions, the SEC is intensely focused on language in employment agreements or policies that might impede whistleblower activity and violate Rule 21F-17. Employers should conduct a detailed review of their confidentiality, severance, and separation agreements to ensure they do not include waiver or confidentiality language that might invite SEC scrutiny. *BlueLinx* makes clear that employers subject to SEC oversight may not prohibit employees from accepting an award for giving information to the SEC.

If you would like further information, please contact your Seyfarth attorney, Cameron Smith at casmith@seyfarth.com, Cliff Fonstein at cfonstein@seyfarth.com, or Anshel Joel "AJ" Kaplan at akaplan@seyfarth.com.

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