

SEC Drops the Hammer on Companies Stifling Whistleblowers Through Confidentiality Agreements

In a major victory for potential SEC whistleblowers, the SEC announced a settlement of securities law violations charges against a publicly-traded building products company that required outgoing employees to waive their rights to a monetary recovery under the SEC whistleblower program.

This action against BlueLinx Holdings Inc. (NYSE: BXC) removes any doubt that companies may not ask or require prospective, current, or former employees to either waive their right to anonymously report information to the SEC under its whistleblower program or to forgo any financial award the whistleblower might receive for coming forward.

Corporate attorneys at many companies had recently attempted to cleverly disguise efforts to deter reporting of securities fraud by demanding that departing employees sign agreements waiving their right to any award.

Previously, some companies had required employees to actually waive their right to confidentially report violations to the SEC at all. The SEC cracked down on that type of language last year when it fined and settled claims against KBR Inc. for requiring witnesses in internal investigations to sign confidentiality statements that interfered with reporting to the SEC.

This action against BlueLinx goes a step further by requiring the company, and therefore all companies subject to SEC jurisdiction, to remove language forcing employees to forgo any SEC award for reporting securities violations. Here, it went further and required the insertion of language in severance agreements that the agreement “does not limit Employee’s right to receive an award for information provided to any Government Agency.”

The SEC determined that the act of forcing an employee to forgo any potential whistleblower award violated securities laws, specifically the provisions of the Dodd-Frank Whistleblower Program at Section 21F which prohibit “impeding” individuals from communicating directly with the SEC about possible securities law violations.

What does this mean for whistleblowers and potential whistleblowers to the SEC?

First, it means that your company cannot ask you to sign a waiver, release, settlement or severance agreement that includes language prohibiting you from anonymously reporting to the SEC without notifying the company.

Second, it also means such agreements cannot include language requiring you to forgo any award you might receive for such reporting.

The SEC has continued to support whistleblowers under its program, and this decision is a further step in advancing those protections.

In the action against BlueLinx (*In re BlueLinx Holdings Inc.*, SEC, Admin. Proc. File No. 3-17371, 8/10/16) the Atlanta-based distributor of building materials paid \$265,000 to settle the SEC’s claims. The settlement also forced BlueLinx to notify former employees that they are not prohibited from accepting the SEC’s whistleblower awards, which can mean millions for those who report fraud. The Dodd-Frank SEC Whistleblower Program, 15 U.S.C. § 78U-6, provides substantial monetary rewards to whistleblowers who voluntarily provide original information to the SEC where such information results in a successful enforcement action with monetary sanctions exceeding \$1 million.

When these requirements are satisfied, the SEC may pay an award to one or more whistleblowers in an aggregate amount not less than 10 percent or more than 30 percent of what has been collected by the SEC of the monetary sanctions imposed in a given case, under regulations adopted by the Commission. Importantly, these rewards can also include recoveries for any related actions that might be brought by certain other federal or state authorities, including the Department of Justice.

This victory is a major step in the right direction to maintaining and protecting the rights of whistleblowers when they choose to report fraud. Of course, companies will try new ways to undermine the efforts of whistleblowers to correct wrongdoing.. Whistleblowers are under constant pressure from employers and for those in the hot seat of fraud investigations, in order to ensure a whistleblower claim is brought in the most effective manner with the highest levels of protection for the whistleblower, a skilled attorney is a must.

[Read more about choosing an SEC whistleblower attorney.](#)