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# Public Company Sanctioned by SEC for Including Illegal Anti-Whistleblower Provisions in Severance Agreements

In a speech on April 30, 2015. Securities and Exchange Commission (SEC) Chair Mary Jo White noted that:

> a number of . . . concerns have come to our attention, including that some companies may be trying to require their employees to sign agreements mandating that they forego any whistleblower award or represent, as a precondition to obtaining a severance payment, that they have not made a prior report of misconduct to the SEC. You can imagine our Enforcement Division's view of those and similar provisions under our rules.[1]

Any doubts about the SEC's "views" of such provisions was resolved on August 10, 2016, when the SEC instituted and settled an enforcement action against a public company that allegedly included illegal anti-whistleblower provisions in severance agreements with departing employees. *In re BlueLinx Holdings, Inc.*, Admin Pro. No. 3-17371 (Aug. 10, 2016).

Between August 2011 and June 2013, the severance agreements:

> prohibited the employee from sharing with anyone confidential information concerning BlueLinx that the employee had learned while employed by the company, unless compelled to do so by law or legal process. The confidentiality provisions also required employees either to provide written notice to the company or to obtain written consent from the company's legal department prior to providing confidential information pursuant to such legal process. None of the confidentiality provisions contained an exemption permitting an employee to provide information voluntarily to the Commission or other regulatory or law enforcement agencies.

In June 2013, which the SEC notes was after it had adopted the whistleblower anti-retaliation rules, the company allegedly amended its severance agreements to include two new provisions. First, a provision was added "requiring departing employees to notify the company's Legal Department prior to disclosing any financial or business information to any third parties without expressly exempting the Commission from the scope of this restriction." The SEC alleged this provision was illegal because "BlueLinx forced those employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits." Second, the company amended its severance agreements "requiring its departing employees to forgo any monetary recovery in connection with providing information to the Commission." The SEC alleged

[1] "The SEC as the Whistleblower's Advocate," available here.

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this provision was illegal because "BlueLinx removed the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations." The SEC press release announcing this case placed particular emphasis on its objection to this provision in the severance agreements. [2]

According to the SEC, these provisions violated both the spirit and express provisions of the whistleblower protection rules:

> Restrictions on the ability of employees to share confidential corporate information regarding possible securities law violations with the Commission and to accept financial awards for providing information to the Commission, such as those contained in the Severance Agreements, undermine the purpose of Section 21F, which is to "encourage individuals to report to the Commission," and violate Rule 21F-17(a) by impeding individuals from communicating directly with the Commission staff about possible securities law violations.

The company was fined $265,000 for these alleged violations.

Of particular note is that the company was required to include the following new language in its severance agreements, which apparently reflects SEC-approved language for such agreements:

> "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."

The whistleblower protection rules apply to all entities, even those that are not regulated entities or public companies. The SEC has now provided clear guidance about the types of provisions it considers acceptable and unacceptable in severance agreements, which should apply to other restrictive covenants in employment arrangements, stand-alone covenants, and company policies. All companies, whether or not public, should pay close attention to the SEC's published guidance, since whistleblower protections may be available under various statutes and could apply to private companies.

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[2] Available here.