

## Companies Should Revisit Severance and Other Agreements as the SEC Steps Up Enforcement Actions to Protect Whistleblower Rights

August 18, 2016

### *Violations of Rule 21F-17*

In less than one week, the Securities and Exchange Commission (“SEC”) announced enforcement actions against two companies that had required their departing employees to waive their rights to any monetary recovery under the SEC’s whistleblower program in violation of Rule 21F-17<sup>1</sup> under the Securities Exchange Act of 1934, as amended. The SEC announced these actions on August 10 against Atlanta-based BlueLinx Holdings, Inc.<sup>2</sup> and August 16 against California-based Health Net, Inc.<sup>3</sup> The SEC found that BlueLinx’s severance, release, and similar agreements violated Rule 21F-17 by requiring departing employees to: (1) waive their rights to monetary recovery and (2) notify BlueLinx’s legal department before disclosing any confidential information to the SEC. The SEC further found that Health Net’s waiver and release of claims agreements violated Rule 21F-17 by requiring departing employees to waive their rights to monetary recovery. By including the problematic provisions in their severance, release, and other agreements, the SEC said the companies removed a critical incentive from the SEC’s whistleblower program designed to encourage individuals to report securities law violations to the SEC and, in the BlueLinx matter, also forced departing employees to choose between identifying themselves to BlueLinx as a whistleblower or potentially losing their severance pay and benefits.

### *Settling the SEC’s Charges*

To settle the SEC’s charges, BlueLinx agreed to pay a \$265,000 penalty and amend its severance agreements to include the following provision:

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

<sup>1</sup> Rule 21F-17 applies to both public and private companies and prohibits any person from taking any action to impede an individual from communicating directly with the SEC staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communication.

<sup>2</sup> See “*In the Matter of BlueLinx Holdings Inc.*,” Release No. 34-78528 (Aug. 10, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78528.pdf>. See also “*Company Paying Penalty for Violating Key Whistleblower Protection Rule*,” SEC Press Release (Aug. 10, 2016), available at <https://www.sec.gov/news/pressrelease/2016-157.html>.

<sup>3</sup> See “*In the Matter of Health Net, Inc.*,” Release No. 34-78590 (Aug. 16, 2016), available at <https://www.sec.gov/litigation/admin/2016/34-78590.pdf>. See also “*Company Punished for Severance Agreements That Removed Financial Incentives for Whistleblowing*,” SEC Press Release (Aug. 16, 2016), available at <https://www.sec.gov/news/pressrelease/2016-164.html>.



Employee's right to receive an award for information provided to any Government Agencies.

BlueLinx also agreed to make reasonable efforts to contact its former employees who signed the problematic severance agreements to provide them with an internet link to the SEC's order and a statement clarifying that BlueLinx does not require notice of disclosure to the SEC of possible securities law violations or prohibit monetary recovery under the SEC's whistleblower program.

In settling the charges against Health Net, the SEC acknowledged that it was unaware of any instances in which Health Net's agreements actually impeded a potential whistleblower from exercising his or her rights under the SEC's whistleblower program. In addition, for a portion of the time covered by the SEC's action, the language in Health Net's waiver and release of claims agreements only restricted a departing employee's ability to recover a monetary award "to the maximum extent permitted by law." Nevertheless, to settle the SEC's charges, Health Net agreed to pay a \$340,000 penalty and, similar to BlueLinx, to make reasonable efforts to contact its former employees who signed the problematic waiver and release of claims agreements to provide them with an internet link to the SEC's order and a statement that Health Net does not prohibit monetary recovery under the SEC's whistleblower program.

### *SEC Priority*

These recent actions underscore the recent SEC focus on protecting employee rights to recover monetary awards under the SEC's whistleblower program. In April 2015, the SEC settled charges against KBR, Inc. for using confidentiality agreements to prohibit employees from discussing the substance of interviews they gave in internal investigations without the approval of KBR's legal department.<sup>4</sup> The SEC staff later cautioned that compliance with Rule 21F-17 would be a top priority for the SEC's Office of the Whistleblower.<sup>5</sup> In June of this year, as part of a broader settlement, the SEC also found that another company violated Rule 21F-17 by using language in its severance agreements that restricted employees from voluntarily providing information to the SEC.

### *What Companies Should Do Now*

Companies, whether public or private, should review their existing confidentiality and severance agreements, releases, employment agreements, orientation and training materials, internal policies, and other documents and processes to ensure they do not contain language or impose requirements that could be construed to impede or restrict a person's right or ability to voluntarily disclose information to the SEC or to collect monetary awards under the SEC's whistleblower program. Where appropriate, companies should amend agreements and update policies to remove any impediments under Rule 21F-17 and notify employees of such amendments and updates to ensure that employees subject to potential impediments are aware of their rights to communicate possible securities law violations to the SEC.

<sup>4</sup> See our prior client alert, "SEC Announces First Whistleblower Action Regarding Confidentiality Agreement Restrictions," available at <http://www.wcsr.com/resources/pdfs/cs040715.pdf> (Apr. 7, 2015).

<sup>5</sup> See the SEC's 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program, available at <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2015.pdf>. See also "SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements," SEC Press Release (Apr. 1, 2015), available at <https://www.sec.gov/news/pressrelease/2015-54.html#.VSLogaPD-Ul>.



# Client ALERT



## Contact Information

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