WINSTON & STRAWN LLP

CLIENT ALERT

SEC Continues Enforcement Actions Over Whistleblower Provisions

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The Securities and Exchange Commission (SEC) announced late last week that it entered into a settlement with an Atlanta-based building products distributor whose severance agreements included confidentiality and waiver provisions, which the SEC claimed unlawfully discouraged employees from becoming whistleblowers. *In the Matter of BlueLinx Holdings Inc*. (Case No. 3-17371). The action continues the SEC's aggressive campaign against language in agreements – particularly employment, confidentiality/non-disclosure, and severance agreements – that it perceives may discourage individuals from becoming whistleblowers.

The *BlueLinx* matter follows the SEC's April 2015 enforcement action against a company for using language in employee confidentiality agreements that the SEC deemed unlawfully restrictive with the potential to stifle the whistleblowing process. In that action, the SEC charged that by requiring employees to sign confidentiality agreements during certain internal investigations that imposed pre-notification requirements before discussing the particulars or subject matter of the interview, the company violated Dodd-Frank Act's whistleblower protection provision, Rule 21F-17. See our client briefing, *SEC Brings First Enforcement Action Over Confidentiality Agreement*.

In the *BlueLinx* matter, according to the SEC's order, the company added a monetary recovery prohibition to all of its severance agreements in mid-2013, two years after the SEC's adoption of Rule 21F-17 on August 12, 2011. Rule 21F-17 prohibits "any action to impede an individual from communicating directly with the [SEC] about a possible securities law violation, including enforcing, or threatening to enforce a confidentiality agreement … with respect to such communications." The SEC charged that BlueLinx violated the rule by using severance agreements that, in part, required outgoing employees to waive their rights to monetary recovery should they file a charge or complaint with the SEC or other federal agencies.

Without admitting or denying the findings, BlueLinx agreed to pay a $265,000 penalty and consented to the SEC's cease-and-desist order. Specifically, the company agreed: (1) to amend its severance agreements to make clear that employees may report possible securities law violations to the SEC and other federal agencies without BlueLinx's prior approval and without having to forfeit any resulting whistleblower award, and (2) to make reasonable efforts to contact former employees who had executed severance agreements to notify them that BlueLinx does not prohibit former employees from providing information to the SEC staff or from accepting SEC whistleblower awards.

Significantly, BlueLinx agreed to include remedial language in its severance agreements providing that "protected rights" include filing a charge or complaint, or communicating or otherwise participating in an investigation or proceeding, not just with the SEC, but including "the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the [SEC] or any other federal, state, or local governmental agency or commission ('Government Agencies')." The remedial language provision went on to conclude with the broad statement that the "Agreement does not limit Employee's right to receive an award for information provided to any Government Agencies."

Of specific concern is whether this broad remedial language suggests that other governmental agencies, such as the EEOC, will likewise pushback on these types of provisions. Importantly, because the EEOC takes action against employers directly on behalf of employees, it does not provide whistleblower awards for the receipt of information in the same manner as the SEC. This would appear to be a key distinction between the SEC and EEOC contexts, and employers should closely monitor developments on contractual language waiving individual recoveries. Employers should also review agreements to make sure language waiving individual monetary recovery does not apply to awards from the SEC. The SEC's continued focus on the compliance of employment and severance agreements to Dodd Frank's whistleblower provisions reminds employers to ensure that any such agreements are carefully crafted and in compliance with all federal and local laws.

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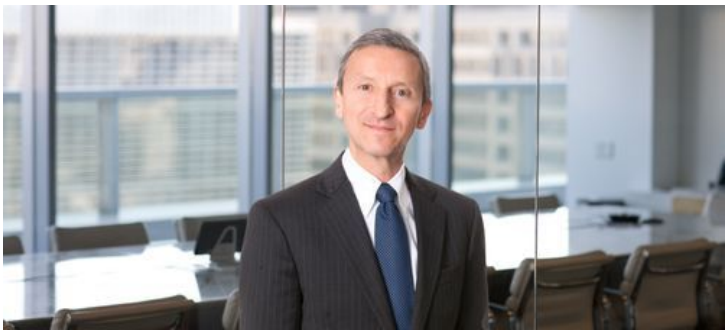

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