

SEC Brings First Enforcement Action Over Confidentiality Agreement

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On April 1, the Security Exchange Commission (SEC) announced its first 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 the 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, Houston-based Kellogg Brown & Root (KBR) violated Dodd-Frank Act's whistleblower protection provision, Rule 21F-17.

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Securities Exchange Act to include Section 21F, "Whistleblower Incentives and Protection." In response, the SEC adopted Rule 21F-17 which provides, in relevant part, "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."

This matters arose after a former KBR employee filed complaints with the SEC and Department of Justice charging that KBR's long-standing confidentiality agreement threatened discipline up to and including termination if a signor discussed the subject matter of an internal investigation with anyone, including government officials, without the prior approval of KBR's legal department. Since these investigations included allegations of possible securities law violations, the SEC found that these terms violated Rule 21F-17.

According to the SEC's cease and desist order outlining its agreement with KBR, there were no apparent instances in which the company prevented an employee from communicating with the SEC about specific securities law violations. However, the SEC concluded that the blanket prohibition against witnesses discussing the substance of the interview had a potential chilling effect on whistleblowers' willingness to report illegal conduct to the SEC, and therefore undermined and violated Rule 21F-17.

Without admitting or denying the charges, KBR agreed to pay a \$130,000 penalty, cease and desist from committing or causing any future violations of Rule 21F-17, and voluntarily amend its confidentiality statement to include the following:

Nothing on this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of

Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

In light of the SEC's position, employers should review confidentiality clauses in employment, non-disclosure, severance, settlement and other agreements, as well as in policies and handbooks, to ensure compliance with all applicable laws and regulations.

Significantly, the SEC's order follows just weeks after the National Labor Relations Board's General Counsel released a [report on employee rules](#), including Board assessment of lawful confidentiality provisions. See our client briefing, [NLRB GC Releases Guidance on Employer Handbook Rules](#).

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