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September 17, 2024

Whistleblower Protection Remains SEC Priority



Last week, the SEC [announced](#) settled charges against seven public companies for use of agreements that the SEC alleges have provisions that violate the whistleblower protection rule.

Coincidentally, I recently recorded a [Workplace Rules podcast](#) with Kristie Beaudoin discussing similar SEC actions.

Rule 21F-17(a) under the Exchange Act of 1934 prohibits any action to impede an individual from communicating directly with SEC staff about a possible securities law violation. Since 2015, the SEC has brought numerous enforcement actions against companies for provisions included in severance agreements, employment agreements, and customer confidentiality agreements, among others, that it considers to be in violation of this rule.

The SEC has objected to a wide range of practices over the years. An early and typical example was a [settled enforcement action](#) objecting to confidentiality provisions requiring an employee to clear any disclosure of confidential information with the company's internal legal department, with no explicit exception for communicating with a government agency or participating in an investigation conducted by a government agency. In addition, in that action, the company agreed to use a new provision going forward that specified that the agreement would "not limit Employee's right to receive an award for information provided to any Government Agencies."

Similarly, in an [administrative proceeding](#) in 2023, a private company agreed to settle charges with the SEC related to confidentiality provisions in employee severance agreements that included an express waiver of recovering money damages "or other individual legal or equitable relief awarded by" a governmental agency.

This latest round of settlements is consistent with these prior actions. Below are two key highlights from these recent settlements:

1. Consistent with past enforcement actions, one type of provision that was at issue in each of the actions was a waiver of monetary awards or relief related to administrative charges or investigations. The SEC took issue with these provisions even where the relevant agreement expressly permitted an employee or former employee to participate in administrative investigations or proceedings.
2. In each order, the SEC specified that it was unaware of any action by the subject company to enforce the provisions or any instance in which an employee declined to speak with SEC staff regarding potential securities law violations. However, the issue identified was that “these provisions created impediments to participation in the Commission’s whistleblower program by requiring former employees to forego either their right to file a complaint with the Commission staff or the financial award they might receive for doing so.”

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