Proskauer

SEC Announces Enforcement Action Regarding Employee Confidentiality Agreement

April 3, 2015

On April 1, the Securities and Exchange Commission (SEC) announced its first settlement of an enforcement action under the SEC's Rule 21F-17, which prohibits any person from taking "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 … with respect to such communications." The SEC's announcement comes on the heels of prior comments by Sean McKessy, Chief of the SEC's Office of the Whistleblower, cautioning both in-house and outside counsel who draft confidentiality agreements and company policies that the SEC will actively pursue remedies against companies and attorneys who promulgate or draft policies that the SEC might view as chilling employees' abilities to communicate with the SEC about potential securities-law violations.

The SEC's enforcement order concerned a confidentiality agreement that the company had used in some of its internal investigations. The SEC noted that it was unaware of any instance in which a company employee had in fact been prevented from communicating directly with the Commission Staff or in which the company had taken any action to enforce its confidentiality agreement to impede or chill any such communications. Nevertheless, the company was fined $130,000.

The employer has now amended the confidentiality provision in its internal-investigation protocols as follows:

> Nothing in 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 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.

The SEC issued its announcement only two days after the Office of Inspector General for the U.S. Department of State (OIG) released a report noting its concerns about government contractors potentially chilling "employees who wish to report fraud, waste or abuse to a Federal official." The OIG's report encouraged companies to adopt best practices for encouraging the reporting of suspected wrongdoing by employees, including establishing a hotline for complaints, displaying hotline posters in the workplace, encouraging the reporting of potential fraud and abuse, and cooperating with government audits and investigations.

While employers (and their counsel) have obvious interests in encouraging – if not requiring – confidentiality in certain circumstances (for example, to prevent witness-tampering in internal investigations, to protect attorney-client privilege, to protect trade secrets and proprietary information, etc.), they must make sure that such confidentiality provisions and agreements do not impede an employee's ability to report potential misconduct directly to governmental agencies. All employers, in consultation with their Proskauer counsel, should therefore carefully examine company policies and employment-related agreements (including confidentiality policies, internal-investigation protocols, offer letters, severance agreements, and noncompetition agreements) to ensure that all harmoniously contain the appropriate terms to promote compliance with applicable laws and regulations protecting potential whistleblowers.

Related Professionals

- **Lloyd B. Chinn**
  Partner

- **Gregory I. Rasin**
- **Steven J. Pearlman**
  Partner