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SEC targets separation and severance agreements that impede whistleblowers

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Since the implementation of the Securities and Exchange Commission's Whistleblower Program under Section 922 of the Dodd-Frank Act in 2011, the SEC has awarded over $1 billion to whistleblowers who have submitted tips regarding securities violations that have resulted in enforcement actions (sec.gov/whistleblower). Along with whistleblower rewards, the SEC also set forth a collection of whistleblower protections against both retaliatory actions and actions meant to impede would-be whistleblowers from reporting potential securities fraud to the SEC.

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Protection against impediments to whistleblowers is enshrined in Commission Rule 21F-17(a): "No 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 with respect to such communications."

While confidentiality agreements are mentioned specifically in the Rule, the SEC has scrutinized other types of agreements as well, such as separation and severance agreements. In certain cases where these types of agreements serve to financially punish or disincentivize individuals from reporting securities violations, the SEC has determined that these provisions violate Rule 21F-17(a).

It's worth noting, however, that policing of these agreements has been somewhat sporadic in nature. A previous crackdown in late 2016/early 2017 saw a slate of eight companies receive penalties from the SEC in a period of only seven months for Rule 21F-17(a) violations perpetrated through separation or severance agreements. In 2023, it would appear that the SEC is once again revisiting these types of agreements to address terms that impede whistleblowers — at least five companies have faced charges from the SEC this year so far.

As illustrated in the various enforcement actions below, Rule 21F-17(a) can technically be violated in a number of ways within the context of separation and severance agreements. These cases demonstrate where the SEC has penalized companies for requiring departing employees to do any of the following as a condition of receiving post-departure pay or benefits.

1. Require employees to affirm that they have not filed any complaints against the company with a government agency.

Two separate actions against D. E. Shaw & Co. [SEC File No. 3-21775] and CBRE [SEC File No. 3-21675] in September 2023 found that the companies had violated whistleblower protections by requiring departing employees to attest that they had not lodged any complaints against the company.

D. E. Shaw & Co. required some of its departing employees to sign releases stating that they had not filed any complaints with a government agency, department, or official. Deferred compensation and other benefits were contingent upon the departing employees' execution of these releases. CBRE committed a similar violation when it required departing employees to sign separation agreements attesting that they had not filed any complaints in order to receive separation pay.

In its written orders, the SEC maintained that this type of conditional payout threatens the financial interests of — and therefore creates impediments for — employees who might otherwise report securities violations.

2. Require employees to waive any reward money that they may receive from whistleblowing activity.

Companies Monolith Resources [SEC File No. 3-21629] and Gaia [SEC File No. 3-21438] were also charged earlier this year with using agreements that required departing employees to forgo any monetary awards they might reap from whistleblowing.

Of note is that Monolith Resources *did* include language in its separation agreement stating that nothing in the agreement was "intended to limit in any way [the employee's] right or ability to file a charge or claim with any federal, state, or local agency." But by the same token, the agreement took away employees' rights to accept any financial reward that might come from such claims.

Gaia also entered into severance agreements that purported to not interfere with departing employees' abilities to file charges or complaints against the company, but which subsequently required signees to waive their rights to any monetary rewards born from these complaints.

Another pitfall for employers using severance and separation agreements was the inclusion of confidentiality and non-disparagement clauses without a carve-out for communication with the SEC.

The SEC stated that these companies still violated whistleblower protections because they "removed the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission."

3. Require employees to provide notice if they receive a government request for information about the company.

In the case of Activision Blizzard [SEC File No. 3-21294], which faced an SEC order in February 2023, the company used separation agreements that required former employees to notify Activision if they received requests for information pertaining to a claim filed with a government agency.

Similar to the Monolith and Gaia cases, while the agreement contained specific language stating that nothing in the agreement should prevent an individual from *communicating* with the SEC, the Commission determined that the requirement to disclose requests for information still served as an impediment and chilling factor for potential whistleblowers.

4. Require employees to agree to non-disclosure/non-disparagement terms without a carve-out for whistleblower protection.

As seen in some of the enforcement actions in 2016 (such as NeuStar [SEC File No. 3-17736] and Anheuser-Busch InBev [SEC File No. 3-17586]), another pitfall for employers using severance and separation agreements was the inclusion of confidentiality and non-disparagement clauses without a carve-out for communication with the SEC.

NeuStar drew the SEC's ire when it included language in its severance agreements that stated that employees could not "engage in any communication that disparages, denigrates, maligns or impugns" the company and specifically prohibited these types of communications with the SEC.

Anheuser-Busch InBev, on the other hand, included very broad non-disclosure language in its separation agreements asking employees to "keep in strict secrecy and confidence any and all unique, confidential and/or proprietary information" belonging to the company. Even though this agreement didn't prohibit communication with the SEC specifically, the lack of a carve-out citing whistleblower protections was still enough for the SEC to flag it as a Rule 21F-17(a) violation.

Conclusion

While not comprehensive, the instances above give real-life examples of agreement provisions that the SEC has deemed as impediments to whistleblower laws. Many employers regulated by the SEC use separation and severance agreements in the regular course of their business, which may include similar provisions.

These companies should proactively review *all* materials provided to prospective, current, and departing employees — e.g., offer letters, restrictive covenants, employee incentive agreements, separation and severance agreements, employee handbooks, training manuals, and whistleblower policies — to ensure that none of them could be interpreted as discouraging employee engagement with the Commission. Seeking advice from trusted legal counsel can also go a long way to navigating the complex compliance requirements imposed by the SEC.

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Roger E. Barton is the managing partner of New York City-based **Barton LLP** and a litigator. He represents clients in the capital markets and financial services industries regarding securities fraud, breach of fiduciary duty, common-law fraud, 10b-5 class actions, and breach of representations and warranties. He is a fellow of the Litigation Counsel of America and can be reached at rbarton@bartonesq.com.

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