

Juggling Act: SEC Fines Three Employers for Potentially Discouraging Whistleblowers

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The SEC has continued its enforcement against employers — including privately held companies — that have provisions in their agreements or policies that could potentially discourage whistleblowing or communications with regulators. Rule 21F-17 under the Securities Exchange Act of 1934 provides that “[n]o person may take an 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.” Three September 2023 cease-and-desist orders exemplify the prominence the SEC continues to place on this rule:

- A \$225,000 civil penalty against a privately held company that had included a provision in separation agreements stating generally that its separating employees retained the right to file charges and complaints with governmental agencies and participate in investigations, but waived their right to recover an award from such agencies. Notably, the SEC imposed the penalty even though the company cooperated with the SEC, had revised the separation agreements to state that employees were not waiving such awards, had notified all employees who signed the agreements that they were not waiving such awards, and had never taken any steps to enforce the provision.
- A \$375,000 civil monetary penalty against a real estate services and investment firm because it included an attestation in its separation and release agreements that separating employees had not filed complaints against the firm with any federal agency. The SEC stated that the attestation, which is a common provision in separation agreements, was a condition to severance compensation and therefore a prohibited impediment to whistleblowers. The SEC reached this conclusion despite the agreements stating that “nothing in the agreement shall be construed to prohibit [employees] from filing a charge with or participating in any investigation or proceeding conducted by” a regulator.

- A \$10 million civil penalty against a financial institution that had included an employee attestation in its separation agreements similar to the one above, as well as a provision in its employment agreements that prohibited employees from disclosing confidential information to any person outside of the company, unless authorized or required by law. The agreements did not provide an exception for employees' communications with regulators. Additionally, the SEC alleged that at least one former employee was discouraged from communicating with SEC staff because of this provision.

As we have previously warned, the National Labor Relations Board also has increased its focus on confidentiality and non-disparagement provisions that could impede employee communications with regulators. See [“NLRB Stacks Deck in Favor of Employees: Employers Must Play Cards Defensively or Go Bust,”](#) Expect Focus – Life, Annuity, and Retirement Solutions (September 2023). Especially because of these continuing developments, employers should review their employment, separation, and confidentiality agreements, as well as employee handbooks and compliance policies, to confirm that such documents do not include any provisions that regulators could view as impeding whistleblower communications.

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