

The Chill is Gone: SEC Wants Unfettered Whistleblowers

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Joseph W. Swanson

The SEC continues its efforts to support whistleblowers.

The whistleblower program promulgated by the Commission under the Dodd-Frank Act offers rewards to individuals who report securities law violations. As we have reported ("Employers Warned: Hands Off Whistleblowers" in the Summer 2013 *Expect Focus*), the SEC has instructed companies to eschew employment agreements that could inhibit the reporting of corporate misconduct.

In April, the SEC went a step further, bringing its first enforcement action based on restrictive language in confidentiality agreements. In settling the case, KBR, Inc. agreed to a \$130,000 penalty and committed to revise its agreements to make clear that employees may report misconduct without prior approval or retaliation.

The company had required witnesses in internal investigations to sign statements containing language threatening discipline, including termination, if the witnesses discussed the matters with third parties without prior approval. Because the SEC's investigations covered potential securities law violations, the agreements violated Rule 21F-17, which bars companies from hindering employees from reporting such violations. The SEC cited no evidence that KBR actually prevented any employees from contacting the SEC. Andrew Ceresney, the SEC's Director of Enforcement, explained that the agreements at issue "potentially discouraged employees from reporting securities violations to us." He added, "We will vigorously enforce this provision."

Clearly, companies may need to review their existing and historical employment and severance agreements to ensure they do not chill whistleblowing. Comparable concerns apply when companies make written or oral confidentiality requests as part of internal investigations.

At the same time, we hope the SEC will allow companies to continue to prohibit unauthorized disclosure of privileged information, trade secrets, and other confidential information that is not necessary to substantiate a reported securities violation. Protecting such interests will require careful work by companies and their counsel seeking to avoid KBR's fate.