



## Labor & Employment/Securities Litigation ADVISORY ■

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### Increased Scrutiny of Nondisclosure and Other Employee Agreements by the SEC Whistleblower Division

In recent weeks, the Securities and Exchange Commission (SEC) has delivered official letters to a number of companies seeking production of agreements entered into with employees, including nondisclosure agreements and separation and release agreements. The SEC requests encompass documents dating back several years and appear to be linked to the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) and establishment of the SEC’s Office of the Whistleblower. The requests appear to be in furtherance of a whistleblower division initiative to ferret out examples of companies that have entered into employment agreements that the SEC believes are unlawful attempts to circumvent the Dodd-Frank whistleblower laws. Specifically, the SEC is looking for agreements that it believes run afoul of SEC Rule 21F-17, which makes it a separate violation of law to “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.”

In March 2014, the head of the SEC’s Office of the Whistleblower, Sean McKessy, stated in a speech at Georgetown University that the SEC is “very concerned” about agreements that incentivize employees to not bring alleged company wrongdoing to the agency’s attention and is “actively looking for examples of confidentiality agreements, separat[ion] agreements, [and] employee agreements that ... in substance say ‘as a prerequisite to get this benefit you agree you’re not going to come to the commission or you’re not going to report anything to a regulator.’” The current sweep for documents, then, appears to be the SEC putting McKessy’s words into practice.

Although the SEC has yet to file suit against any company on the basis of its use of employee agreements the SEC contends violate Rule 21F-17, the current SEC probe suggests that may be a next step. Indeed, in an October 2014 interview, McKessy stated that bringing cases based on agreements that unlawfully impede an employee from reporting to the SEC “is the new thing that I’ve got people really enthusiastic for.” Unfortunately, McKessy has been unwilling to provide any further specifics on what language runs afoul of SEC rules, making it hard for employers to know what is or is not permissible in drafting nondisclosure and other employee agreements. “You’ll see it when we bring it,” he was recently reported as saying. “We are going to bring cases that will show there is language out there.”

In the meantime, public company employers and their affiliates subject to Dodd-Frank need to be aware that nondisclosure and other agreements with employees will likely be subjected to heightened scrutiny by the government, especially contract terms that may be viewed as impeding an employee from sharing information

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with the government about financial fraud or potential violations of securities laws. Among the terms of contract that are likely to be a focus of the government's interest are confidentiality provisions, provisions mandating that employees first disclose internally any concerns about wrongdoing, promises not to disparage the company and provisions by which an employee agrees to forego any personal financial awards from a government enforcement action.

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