

SEC files two more actions alleging employee severance agreements violated whistleblower protections

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The SEC has announced settlement of enforcement actions against two companies stemming from each company's use of separation agreements that allegedly violated Dodd-Frank whistleblower protection rules. The settled enforcement actions demonstrate that whistleblower protection remains a priority for the SEC's Enforcement Division.

Since 2015, the SEC has brought enforcement actions against companies for provisions (such as confidentiality and non-disparagement clauses) in separation agreements and other documents that, according to the SEC, discourage employees from reporting possible securities law violations. In February 2023, the SEC announced a \$35 million [resolution](#) with Activision Blizzard relating, in part, to clauses in severance agreements that, according to the SEC, impeded whistleblowers protections. This trend continued in September 2023 with the announcement of two settled enforcement actions stemming from alleged violations of the whistleblower protection rule. In both cases, the SEC alleged a violation of whistleblower protections despite explicit override provisions in the relevant agreements stating that nothing in the agreement should be interpreted as limiting the employee's ability to file a claim or charge with a government agency or engage in certain other protected activities.

Whistleblower protection rule

Rule 21F-17 of the Securities Exchange Act of 1934 (the "Rule") prohibits an employer from interfering with employees' right to report possible securities law violations to the SEC. The Rule states: "no person may take action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement ... with respect to such communications".

SEC enforcement actions

On September 8, 2023, the SEC [announced](#) that Monolith Resources LLC, a privately held energy and technology company, agreed to pay a penalty of \$225,000 to resolve allegations that certain provisions of its separation agreements violated the Rule. According to the SEC's order, although Monolith's separation agreements explicitly permitted employees to file claims or charges with government agencies and participate in government investigations and other actions against Monolith, they prohibited employees from receiving any form of financial award for such participation. The SEC determined that this prohibition undermined the purpose of the Rule by restricting access to financial incentives designed to encourage communication with the SEC about possible securities law violations. The SEC's order emphasized that the civil penalty of \$225,000 takes into account Monolith's remedial actions, which included notifying former employees who had previously signed separation agreements that the agreements do not limit their ability to obtain financial awards in connection with providing information to government agencies.

On September 19, 2023, the SEC [announced](#) that CBRE Inc., a commercial real estate services and investment firm and a subsidiary of publicly traded CBRE Group, Inc., agreed to pay a penalty of \$375,000 to resolve allegations that its separation agreements violated the Rule. According to the SEC's order, CBRE's separation agreements in effect since 2011 included a provision found in many separation agreements requiring employees to represent, as a condition of receiving severance, that they had not filed complaints or charges against the company, in any court or with any government agency. The SEC determined that this prohibition served to impede potential whistleblowers from reporting complaints to the SEC. Notably (and similar to the SEC's order against Monolith), the SEC determined that a carveout later added by CBRE in 2015, which provided that nothing in the agreement was intended to prohibit the employee from filing a charge with or participating in any investigation or proceeding conducted by a government agency, was not sufficient to cure the violation, since the carveout applied prospectively and, therefore, did not remedy the effect of the backward-looking representation. The SEC's order emphasized that it limited CBRE's civil penalty to \$375,000 as a result of its cooperation with the SEC's investigation and swift remedial actions, which included notifying over 100,000 employees worldwide of their right to file a charge or complaint and to cooperate with any government agency, including the SEC, without notice to CBRE.

Key takeaways

These recent enforcement actions reinforce an observation made in previous client updates (available [here](#) and [here](#)) that the SEC's Enforcement Division is focused on taking action to protect whistleblowers from what the SEC views as restrictive clauses in agreements with employees. The action against Monolith also highlights that the SEC's focus on whistleblower protections extends to privately held companies.

Many companies may have already updated their form agreements and policies to address and protect whistleblower rights in light of prior SEC guidance on this issue. These enforcement actions further reinforce the SEC's view (and the [guidance](#) released by the Office of the Whistleblower) that even agreements containing provisions that expressly allow individuals to report possible violations to government agencies may still violate the Rule if those agreements also contain provisions that could be viewed as placing limitations on, or removing financial incentives for, such reporting.

These enforcement actions provide additional examples of how agreements with employees may be construed by the SEC as impeding or discouraging communications with a regulator and highlight the importance for companies to holistically review their form agreements and policies to address whistleblower rights. In particular, in light of the action against CBRE, companies should review their form agreements and policies to ensure that representations made by employees that they have not filed any complaints or charges against the company with a government regulator include clear exceptions for legally protected whistleblowing activities.

Additionally, companies reviewing their form agreements and policies for compliance with the Rule should be mindful that the National Labor Relations Board (NLRB) has also recently focused on severance agreements containing broad confidentiality and non-disparagement language. On March 22, 2023, the NLRB General Counsel issued a [memo](#) indicating that "overly broad provisions that affect the rights of employees to engage with one another to improve their lot as employees" may unlawfully restrict the exercise by employees of their rights under the National Labor Relations Act. Companies should be mindful, however, that while the National Labor Relations Act generally only protects non-supervisory employees, whistleblower protections under the Rule are extended to all employees.

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