

SEC Charges Two Companies' Severance Agreements Violate Commission's Whistleblower Program

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The SEC this month has brought two actions for violation of whistleblower rules. [According to a SEC cease-and-desist order](#) released on August 10, at one company in 2011 to the present the vast majority of non-management employees who received severance payments signed agreements that prohibited an employee from sharing with anyone confidential information that the employee had learned during his employment, unless compelled otherwise by law. If required by law, the confidentiality provisions dictated that employees must either provide written notice to the company or obtain written consent from the legal department before providing such information. The SEC order alleged that the agreements did not contain any exemptions permitting an employee to provide information voluntarily to the SEC or other regulatory or law enforcement agencies, and between September 2011 and mid-2013, approximately 18 employees signed agreements that included one of these provisions.

In 2013, the SEC claimed that the company amended other agreements to include similar confidentiality clauses, and also added provisions to its severance agreements that an employee would waive his right to monetary recovery if he files complaints or charges with government agencies, including the SEC. Approximately 160 employees have signed these agreements.

The SEC charged that the company impeded their employees' participation in its whistleblower program both by requiring notification to the legal department before disclosing information to third parties and by requiring waiver of any monetary recovery from participating in the program. As part of the SEC order, the company agreed to pay a \$265,000 monetary penalty, make reasonable efforts within 60 days to contact their former employees who had signed severance agreements and finally, amend its future agreements. The amended language is included in the SEC order and may be of particular interest as a useful example to other companies. It states that employees understand that nothing contained in the severance agreements limits their ability to file charges or complaints with government agencies, communicate with government agencies or participate in investigations without notice to the company and receive awards from the agencies for the information they provided.

[In the second SEC order](#) against another company released on August 16, that company's severance agreement in 2011 included a waiver and release of claims that specified that while employees are not prohibited from participating in a government investigation, they were prohibited from filing an application for, or accepting, a whistleblower award from the SEC. Approximately 600 employees signed those agreements from 2011 to 2013. When the agreements were amended in 2013, certain provisions were removed but the company retained the restriction that employees waive rights to monetary recovery in proceedings brought based on communications from employees to government agencies.

The SEC noted that it is unaware of any instances in which employees acted as whistleblowers or this company tried to enforce these provisions, but still decided that the company had violated the whistleblower program by removing critically important financial incentives that the SEC views as undermining the purpose of the Commission's program. The penalties imposed were similar to that of the first company, except the monetary penalty was \$340,000.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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