

SEC Announces Enforcement Action Against Restrictive Language in Confidentiality Agreements

April 2, 2015

The SEC, which has recently been investigating workplace agreements out of concern that they may impede whistleblowing activity protected by the Dodd-Frank Act, announced yesterday its first enforcement action against a company related to the use of restrictive language in confidentiality agreements. Companies should be mindful of this type of enforcement action and take the necessary steps to review and revise their own various agreements addressing confidentiality.

The SEC, in a [cease-and-desist order](#) accompanied by a [press release](#), charged KBR Inc. with violating Rule 21F-17, which prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC.¹ As part of certain of its internal investigations, including those related to securities law violations, KBR asked witnesses to sign a form confidentiality agreement prior to being interviewed, warning that they could face employee discipline and/or employee termination if they discussed the particulars of the interview with others without the prior approval of KBR's legal department. While the SEC noted that it was not aware of any instances of a KBR employee being prevented from communicating with the SEC about potential securities law violations nor that KBR had attempted to enforce the provision, it nonetheless was concerned about a potential chilling effect.

In connection with the resolution, Andrew J. Ceresney, Director of the SEC Enforcement Division, stated: "By requiring its employees and former employees to sign confidentiality agreements imposing pre-notification requirements before contacting the SEC, KBR potentially discouraged employees from reporting securities violations to us. SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC. We will vigorously enforce this provision."

As part of the settlement, KBR agreed to pay a \$130,000 penalty without admitting or denying the charges. KBR also voluntarily amended its confidentiality agreement to explicitly state:

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

In addition, KBR has undertaken to contact employees who had signed the confidentiality statement since August 21, 2011 and provide those employees with the SEC order and an explanatory statement.

¹ [In re KBR, Inc.](#), No. 3-16466 (Apr. 1, 2015).

In the SEC release, Sean McKessy, Chief of the SEC Office of the Whistleblower, notes KBR's amendments to the agreements and advises that "[o]ther employers should similarly review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC."

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