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SEC Levies a Six Figure Fine Against a Private Company for Language in Its Separation Agreements, Continuing the Aggressive Enforcement of Its Whistleblower Program

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The Security and Exchange Commission ("SEC") continues to aggressively enforce its whistleblower program under the Biden Administration. As we have reported (here and here), the SEC has cracked down on employers' agreements and procedures that it contends interfere with employee access to the SEC. Most recently, on September 8, 2023, the SEC issued an Order imposing a $225,000 penalty to a private energy and technology company, Monolith Resources LLC ("Monolith"), for allegedly violating whistleblower protection rules in its employee separation agreements.

Specifically, Monolith's separation agreements stated that ex-employees have the right to participate in government investigations or actions, "but not the right to recover money damages or other individual legal or equitable relief awarded by any such governmental agency." The SEC concluded that the agreements violated Rule 21F-17(a) of the Exchange Act ("Rule 21F"), which prohibits employers from imposing policies that may impede employees from communicating with the SEC. Specifically, Rule 21F prohibits employers from raising "impediments to participation in the Commission's whistleblower program by having the employees forego the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations." Notably, the SEC imposed the sanction while acknowledging there were no instances in which an employee who signed the agreement in fact tried to communicate directly with the SEC about possible violations of securities laws, and Monolith had not enforced the provision in question or otherwise tried to prevent such communications.

Monolith's status as a private company is also worth noting. While not all private companies are under the purview of the SEC, the agency has made it a point to remind private companies that they can be subject to penalties for violating its whistleblower protection laws. "Both private and public companies must understand that they cannot take actions or use separation agreements that in any way disincentivize employees from communicating with SEC staff about potential violations of the federal securities laws," said Jason J. Burt, Regional Director of the SEC's Denver Office. "Any attempt to stifle or discourage this type of communication undermines our regulatory oversight and will be dealt with appropriately."

This order is another significant development in the SEC's oversight of employers, and signals that the agency will continue its wave of aggressive enforcement, in which it looks for any language, whether it be in an agreement, code of conduct or otherwise, that has the purpose or effect of chilling employee access to the SEC. In response, employers should work with counsel to review the following documents for language that employees could perceive as impeding unfettered access to the SEC:

- existing agreements, including severance agreements, confidentiality agreements, and non-competition agreements, to ensure that they do not include language that employees may perceive as impeding unfettered access to the SEC; and
- employee handbooks and company policies, including investigation protocols, codes of conduct and confidentiality policies.

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