Published on *The National Law Review* https://www.natlawreview.com

Employers Beware: SEC Targets Employment Agreements Under Whistleblower Protection Rules

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Less than two weeks after it last penalized a private employer for alleged violations of whistleblower protection rules in its employee separation agreements, the Security and Exchange Commission ("SEC") once again takes aim at the language of a separation agreement it alleges violates Rule 21F-17(a) of the Exchange Act ("Rule 21F"). Just yesterday, the SEC issued an Order settling charges with a commercial real estate services and investment firm for such violations through a fine of $375,000, among other terms. The SEC's aggressive and continued enforcement of whistleblower protection rules is not new, but the Order is the first of its kind in one significant way: it involves an employee's past, rather than prospective, communications with government agencies.

The separation agreement in question contained the following language:

Employee represents and acknowledges [t]hat Employee has not filed any complaint or charges . . ., with any state or federal court or local, state or federal agency, based on the events occurring prior to the date on which this Agreement is executed by Employee.

The separation agreement further stipulated that the "Employee may not execute this Agreement prior to the Date of Termination." The SEC concluded that this combined language violated Rule 21F, which prohibits employers from imposing policies that may impede employees from communicating with the SEC. Specifically, the SEC stated that the separation agreement:

required, in effect, that the employee represent that at the time of executing the [separation agreement], the employee has not filed a complaint or charges based on either (i) events occurring at any time before termination, i.e., events spanning the employee's entire employment . . .or (ii) events occurring between termination and the employee's executing the [separation agreement]. By requiring this representation, [the employer] took action to impede potential whistleblowers from reporting complaints to the Commission.

Another penalty should come as no surprise to those following the SEC's aggressive enforcement of its whistleblower program. Its new approach in targeting language that requires employees to represent they have not filed a complaint or a charge with a government agency *in the past*, however,

is significant.

What should employers do in the wake of this stepped up SEC enforcement? As we recently stated in a Wall Street Journal article on this SEC Order, “such settlements are significant because they demonstrate that the SEC is becoming more aggressive on enforcement as it examines all kinds of companies for language in agreements that may stop whistleblowing reporting, both during or after employment.” Accordingly, employers should work with counsel and conduct a comprehensive review of all of their handbook policies and template agreements, including offer letters and separation agreements, identify language that the SEC may allege impedes employees from communicating with it, and modify as appropriate.

National Law Review, Volumess XIII, Number 263