The SEC issued enforcement orders against three companies for including terms in their employment and separation agreements that violated Rule 21F-17(a) of the Securities Exchange Act of 1942, commonly known as the whistleblower protection rule. The rule prohibits any action that impedes an individual from communicating directly with SEC staff about a possible securities law violation. Although the SEC has been enforcing the whistleblower protection rule since 2015, the recent enforcement orders reflect the agency’s renewed interest in taking a much closer look at the terms of the agreements that run afoul of the rule.

First, on September 8, 2023, the SEC announced it had settled charges against Monolith Resources LLC, a privately held energy and technology company, for requiring in its separation agreements that certain employees waive their rights to monetary whistleblower awards related to filing claims with, or cooperating in investigations by, government agencies. The SEC
found that this language dissuaded employees from communication with SEC staff about possible securities law violations, and imposed a civil penalty of $225,000. The civil penalty took into account Monolith’s remedial actions, which included notifying former employees who had signed the separation agreements that they were not limited from seeking monetary awards.

Next, on September 19, 2023, the SEC announced that it had settled charges against CBRE, Inc., a real estate services and investment firm and a subsidiary of a publicly traded company, for requiring employees to sign a release attesting that they had not filed a complaint against CBRE with any federal agency as a condition to receiving separation pay. Likewise, the SEC found that this language impeded potential whistleblowers from reporting complaints to the SEC and imposed a civil penalty of $375,000. Again, the SEC pointed out that the civil penalty took into account CBRE’s extensive remedial efforts and cooperation with the agency.

Finally, on September 29, 2023, the SEC announced that it had settled charges against D. E. Shaw & Co., L.P., an investment advising firm, for requiring incoming employees to sign employment agreements. These documents prohibited the disclosure of confidential corporate information to third parties, without a carve-out for potential SEC whistleblowers, and required departing employees to sign releases stating that they had not filed any complaints against D. E. Shaw in order to receive deferred compensation. The SEC found that the confidentiality provision was too broad and that both provisions impeded potential whistleblowers from
contacting the SEC. In contrast to its earlier orders, the SEC imposed a civil penalty of $10 million, and notably did not reference any remedial actions or cooperation efforts.

What Employers Need to Know

Employers should review and revise their employment and separation agreements and related documents to ensure that they do not include language that can be interpreted as impeding communication with the SEC for potential whistleblowers.

- Confidentiality provisions should include carve-outs for communication with the SEC.

- Separation pay and deferred compensation should not be conditioned on any agreement not to file a complaint with, or not to participate in, any investigation conducted by the SEC.

- Agreements should not prevent employees from seeking whistleblower awards.

Employers facing SEC charges should plan to cooperate and take remedial actions in order to minimize any monetary civil penalty.

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