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CLIENT ALERT: SEC ORDER FINDS CONFIDENTIALITY MANDATE DURING INTERNAL INVESTIGATION MAY IMPEDE WHISTLEBLOWER PROTECTIONS

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Conducting an effective internal investigation is a delicate task, and employers often seek to prevent employees from discussing a pending investigation for a number of lawful reasons. However, a recent SEC order is cause for concern about imposing confidentiality obligations that may discourage lawful whistleblowing.

The KBR Enforcement Action

On April 1, 2015, the Securities and Exchange Commission ("SEC") reached a settlement in its first enforcement action charging a company with violating whistleblower protection Rule 21F-17 of the Dodd-Frank Act. Rule 21F-17 prohibits restrictive language in confidentiality agreements that could chill whistleblowing:

> *No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce a confidentiality agreement . . . with respect to such communications.*

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The SEC charged KBR, Inc., a Houston-based construction, engineering and technology company, with violating Rule 21F-17 by its use of restrictive language in confidentiality agreements in conjunction with its internal investigations. Under its compliance program, KBR regularly undertook investigations of complaints of illegal or unethical conduct of its employees. At the start of an internal investigation interview, KBR investigators required witnesses to sign a form confidentiality statement in which employees agreed that they were prohibited from discussing any particulars of the interview or the investigation with others without prior authorization of the Law Department. The confidentiality statement also specified that unauthorized disclosure could be grounds for disciplinary action, including termination.

In This Issue

Other agencies caution against blanket confidentiality mandates.

In its press release—tellingly titled "SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements"—the SEC's Enforcement Division took the position that this "improperly restrictive" language "potentially discouraged" whistleblowing to the SEC. Notably, the SEC acknowledged that it was unaware of any KBR employees who were in fact prevented from becoming whistleblowers, or of any actions by KBR to enforce the confidentiality agreement. In the settlement agreement, KBR agreed to pay a penalty of $130,000 and to amend the offending confidentiality statement with language that goes so far as to affirmatively state that nothing in the statement prohibits "reporting possible violations of federal law or regulation to any governmental agency or entity . . . or other disclosures that are protected under the whistleblower provisions of federal laws or regulations." It also affirmatively states that no prior authorization of the Law Department is required.

Other Agencies Caution Against Blanket Confidentiality Mandates

In the recent past, both the National Labor Relations Board ("NLRB") and the Equal Employment Opportunity Commission ("EEOC") have also taken issue with employers who institute a blanket rule imposing confidentiality in internal investigations.

In *Banner Health System*, 358 N.L.R.B. No. 93 (July 30, 2012), the NLRB held that an employer violated employees' rights to engage in protected concerted activity under Section 7 of the National Labor Relations Act, which affords employees the right to communicate freely with co-workers about the terms and conditions of their employment without fear of retaliation, by maintaining and applying a rule prohibiting employees from discussing on-going investigations of employee misconduct. During interviews of employees making a complaint, the respondent's human resources' practice was to ask employees not to discuss the matter with their co-workers while the investigation was on-going. In a controversial split-panel decision, the Board found that "[t]o justify a prohibition on employee discussion of on-going investigations, an employer must show that it has a legitimate business justification that outweighs employees' Section 7 rights." An employer's "generalized concern with protecting the integrity of its investigation is insufficient."

In an August 3, 2012 pre-determination letter, the EEOC's Buffalo office admonished an undisclosed employer who "admitted to having a written policy warning employees who participate in [its] internal investigations of harassment that they could be subject to discipline or discharge for discussing 'the matter,' apparently with anyone." The letter further warned that preventing an employee from talking with others about alleged discrimination was a "flagrant" violation of Title VII rights, and that the company's written policy "[was] so broad that a reasonable employee could conclude from reading it that she could face discipline or charge for making inquiries to the EEOC about harassment if that harassment is being or has been investigated

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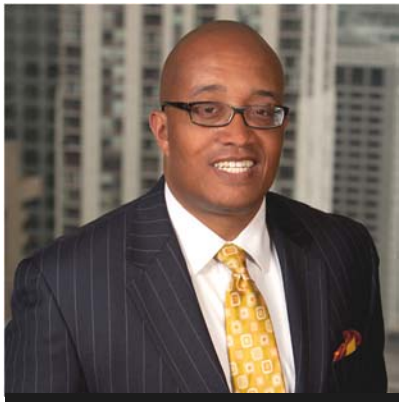

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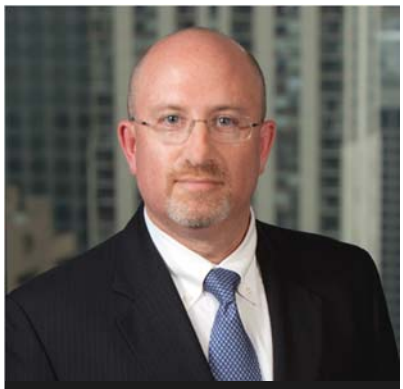

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internally by your organization." Likewise, in a 2012 interview with *CCH Employment Law Daily* following the pre-determination letter issued by the EEOC's Buffalo office and the NLRB's *Banner Health* decision, an EEOC spokesperson commented that for internal investigations of workplace discrimination complaints, "broad policies that impose discipline on those who do not abide by strict confidentiality requirements are likely to run afoul of the anti-retaliation provisions of Title VII and/or the other federal EEO statutes." The spokesperson further confirmed that "an employer who merely suggests that those who are involved in internal investigations of discrimination keep the matters discussed confidential until the investigation is complete out of concern for the integrity of the process is less likely to be found to have violated EEO laws."

Take-Away

In light of the SEC's recent order, we believe it would be prudent at this time to review your policies and procedures that impose employee confidentiality obligations to determine if any language or interview protocol improperly stifles whistleblowing to any governmental agency or entity.

The SEC has cautioned employers to review their agreements for potential violations of Rule 21F-17, which it has previously indicated it will "vigorously enforce." It is unclear whether affirmative language like that adopted by KBR is necessary under Rule 21F-17 or other of Dodd-Frank's whistleblower protections, but it is also unclear how far employers must go to satisfy the SEC. The SEC's order illustrates the delicate tightrope employers must walk in their efforts to conduct an effective and lawful internal investigation that does not stifle employees' whistleblowing or other protected activity.

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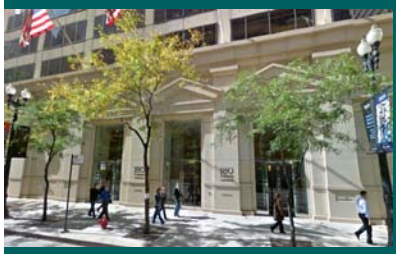

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