Redux - federal agencies attack employment agreements, and what you can do about it: 8 steps to consider

Employment Alert

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“So we beat on, boats against the current, borne back ceaselessly into the past.”

Reading advance sheets often brings the closing line from The Great Gatsby to mind. Our alert from April 2015 is being rerun in full below because the current of recent developments bear us “back ceaselessly” there.

In our earlier alert, we itemized 8 steps to avoid agreements that create problems. Step 7 was “Discard the prohibition on the employee’s ability to recover … The SEC is likely to view such provisions as impeding the individual from communicating directly with SEC…”

It is now official. The SEC levied two fines in as many weeks against companies for overreaching in agreements with employees or ex-employees – including a fine for using that exact clause:

- A health care insurance provider paid a $340,000 penalty to resolve the SEC’s allegations that their severance agreements required ex-employees to waive any right to recover any money obtained in a government investigation or from accepting a whistleblower award.
• Just a week earlier, the SEC levied a $265,000 fine against a wholesaler of building products, whose separation agreement impermissibly required employees to inform the company before disclosing any information to a government investigator.

In each case, the SEC required the company to make reasonable efforts to contact employees who had signed the agreement and provide them with a link to the SEC’s order and to inform them that they were not prohibited from seeking and receiving a whistleblower award from the SEC. The SEC also required one company to add “Protected Rights” language to its agreements clarifying that nothing limited the employee from filing charges with any governmental agency or commission, including the EEOC, NLRB, and SEC and that the agreement did not limit the employee’s right to receive an award for any information provided to government agencies.

So, once again, we ask you to revisit the past and reread this alert. You are welcome to add The Great Gatsby to your list of what needs to be read before the kids go back to school but it will not be on the test: this alert, however, will be.

The US Securities and Exchange Commission recently caused shockwaves when it announced its first enforcement action against a company for using an allegedly improper confidentiality agreement during internal investigations. Specifically, the confidentiality agreement provided:

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

The SEC viewed this language as running afoul of its rule prohibiting “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.” 17 C.F.R. § 240.21F-17. As part of the settlement, the company agreed to pay a $130,000 penalty and modify its confidentiality agreement to expressly inform employees of their rights to disclose information.

This SEC attack on confidentiality agreements comes as no surprise. In March 2014, Sean McKessy, chief of the SEC’s Office of the Whistleblower, declared that the SEC will target companies who require employees to sign confidentiality agreements, separation agreements or other employee agreements that could potentially discourage employees from reporting improper conduct to the government. He further warned that the SEC will also be coming after the in-house and outside lawyers who draft language in severance agreements making the receipt of benefits conditioned upon the employee not reporting conduct to a regulator.

The SEC is joining an already crowded playing field. The National Labor Relations Board and the Equal Employment Opportunity Commission have not only challenged confidentiality agreements, but have also attacked separation and release agreements that potentially discourage reporting.

In Banner Health System, 358 N.L.R.B. No. 93 (July 30, 2012) – which applies to union and non-union employees – the NLRB found that the company committed an unfair labor practice when it asked an employee who was the focus of an internal investigation to not discuss the matter while the investigation was ongoing. For future cases, the NLRB imposed a steep burden on any employer seeking to use such confidentiality agreements: such employers must identify a specific legitimate business objective, such as “whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover up.”

Not one to be left out, the EEOC announced in its 2013-2016 Strategic Enforcement Plan, that it would “target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or that impede the EEOC’s investigative or enforcement efforts” including – notably – settlement provisions that prohibit filing charges with the EEOC. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016 (Sep. 4, 2012). Since then, the EEOC has filed a series of federal court actions around the country challenging numerous provisions that commonly appear in employment separation and
release agreements:

- **Cooperation**: a requirement for employees to notify the Company before responding to any subpoena or participating in any investigation by a regulatory or law enforcement agency, etc.

- **Non-disparagement**: prohibiting employees from making any disparaging statements about the company and its officers, directors and employees

- **Non-disclosure**: prohibiting disclosure of confidential information to any third party of confidential employee and other information without prior written approval

- **General release**: a release of all claims that does not include some form of direct or indirect notice that the employee may still file a charge with the EEOC

- **Covenant not to sue**: A blanket clause prohibiting the employee from filing of any future action over the released claims, and requiring the employee to pay the Company’s attorney fees in the event of a breach

- **Forfeiture of future recovery**: Waiver of the right to be part of any recovery in a subsequent action brought by the EEOC or others based upon the same conduct.

No court has yet endorsed the EEOC’s expansive arguments: all of the cases to date have either settled or were dismissed on procedural grounds. But there are some things that businesses can and should do to protect employment-related documents from further challenges by the SEC, NLRB and EEOC.

Here are eight steps to consider:

1. Confidentiality requirements appear in a variety of documents, such as employment contracts, business agreements, separation agreements, litigation-hold notices, witness confidentiality agreements used in investigations, restrictive covenant agreements, non-disparagement provisions, IP assignments and employee handbooks. Review your entire range of documents to delete overreaching and unnecessary language.

2. Consider limiting your request for confidentiality to only those specific categories of information that truly require protection (e.g., the amount of a settlement; attorney client privileged information). Likewise, keep your non-disparagement and cooperation clauses narrowly tailored, and only request these agreements from employees for whom it really matters.

3. Include a simple disclaimer in every agreement requiring some form of confidentiality, cooperation or non-disparagement: e.g., “Nothing in this agreement shall be construed to prohibit you from reporting conduct to, providing truthful information to or participating in any investigation or proceeding conducted by any federal or state government agency or self-regulatory organization.”

4. For privileged investigations, you may still advise a witness that the investigation is subject to an attorney-client privilege, the privilege belongs to the company and, therefore, the witness may not disclose the privileged discussions without the company’s consent. The best option is to do this orally in the normal course of the interview rather than in a separate written agreement. If you do memorialize this discussion in writing, it should clearly frame the confidentiality requirements in terms of privilege, while being careful not to suggest that underlying facts are privileged. It should also include the disclaimer above.

5. Simplify your severance agreements. One of the EEOC’s concerns in these cases has been the length and complexity of the agreement. Put down your James Joyce and channel your Ernest Hemingway. Write in plain English, and cut out all legalese and boilerplate wherever possible.

6. Discard the covenant not to sue. The waiver is a complete defense to a subsequent lawsuit over the released claims. The covenant, at best, provides a vehicle to recover fees from a former employee who sues even after signing. But former employees who’ve executed their severance agreements rarely sue; even more rare are the employers who recover attorneys’ fees from such employees.

7. The EEOC has demonstrated that it will go on the offensive against separation agreements when the waiver of claims is not coupled with a disclaimer that the waiver does not prevent filing charges with the agency. To
address the EEOC’s concerns, add a clear disclaimer that certain claims are not being waived.

8. Discard the prohibition on the employee’s ability to recover if the SEC, EEOC or someone else brings suit. The SEC is likely to view such provisions as impeding the individual from communicating directly with SEC staff since the potential of a whistleblower bounty is considered an incentive to reporting. On the EEOC front, once you’re in litigation with the agency or in a class action, you have bigger problems than worrying about one instance of potential double recovery (which is no more or less viable without the agreement).

It may seem that the SEC, the EEOC and the NLRB attacks are overreaching. Don’t panic. Certainly don’t respond by adding numerous additional provisions to your agreements. Now is the time to subtract, streamline and specify. What is not necessary should be jettisoned to protect what is important. Make what is important specific to legitimate confidentiality concerns. Even so, many battles lie ahead, and with apologies to Winston Churchill, this may only be the end of the beginning.

Find out more about this trend and its implications for your business by contacting the authors.

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