

## SEC Order May Impact Employee Confidentiality Obligations

April 1, 2015

Employee Benefits, Employment, Securities Litigation, and White Collar

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Today the Securities and Exchange Commission issued its first order addressing the permissible limits of employee confidentiality obligations under the regulations implementing the Dodd-Frank Act's whistleblower provisions. *In re KBR, Inc.*, Exchange Act Release No. 74,619 (Apr. 1, 2015). The order highlights the Commission's commitment to ensuring that employees are free to contact the Commission directly about possible securities law violations, and demonstrates the Commission's willingness to take action against any conduct that might discourage or prevent those contacts.

In light of the order, companies will want to review any policies, procedures, practices, forms, agreements, or plans that impose confidentiality obligations on employees—potentially including, for example, codes of conduct, confidentiality policies, employment agreements, termination or severance agreements, releases, severance plans, or other compensation or benefits arrangements.

The applicable regulation is Rule 21F-17:

(a) 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.<sup>1</sup>

Today's order was based on a confidentiality provision in a form statement that a company used with employee witnesses in internal investigations, which stated in relevant part:

I [the employee] 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.

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<sup>1</sup> See Securities and Exchange Commission, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, at p. 198 (May 25, 2011). Rule 21F-17 became effective on August 12, 2011.

The order recited that the Commission was not aware of evidence that the company took any action to enforce the confidentiality provision or to prevent communications with the Commission in any other way, nor was it aware of evidence that the provision prevented any employee from making such communications. The company's use of the confidentiality provision pre-dated Rule 21F-17 and continued after the Rule's effective date.

The Commission issued a cease and desist order, imposed a fine of \$130,000, and agreed to the company's undertaking to try to contact its employees in the United States who signed the statement at any time after August 21, 2011. (It is not clear what significance, if any, should be attributed to the use of the August 21 date instead of August 12, the date Rule 21F-17 became effective.)

The Commission also cited with approval the company's amended confidentiality provision:

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

In light of the Commission's order, companies will want to review any policies, procedures, practices, forms, agreements, or plans that impose confidentiality obligations on employees and consider, if necessary, whether revisions should be made in accordance with this most recent action by the Commission.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

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