

CONFIDENTIALITY PROTECTIONS SQUASHED BY SEC

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As we noted in a November 2014 bulletin, the U.S. Securities and Exchange Commission ("SEC") is taking an increasingly aggressive approach towards agreements which are seen to potentially constrain whistleblowers from coming forward. This SEC's rigorous enforcement was made all the more clear when it issued an April 2015 cease-and-desist order ("Order") and levied a related US\$130,000 fine against KBR, Inc.

This recent SEC Order highlights the risks associated with what are arguably common approaches which many listed companies implement. In particular, KBR used a form of confidentiality statement as part of its internal investigations which proved to be problematic.

Prior to asking them questions, KBR investigators required witnesses to sign a pre-interview statement which said that: 1) the contents of the interview could not be discussed with others without the specific advance authorization of the company's general counsel, and 2) unauthorized disclosure could be grounds for discipline, up to and including termination for cause.

This approach was, said the SEC, a breach of rules which prohibit any actions (even if only via an agreement) which impede a person from reporting securities law violations. The language in the investigator's required statement was held to undermine the stated legal objective of encouraging reporting to the SEC.

The Order was issued despite the fact that SEC was unable to point to any instances where either: 1) a KBR employee was in fact prevented from directly communicating with SEC staff about potential violations, or 2) the company took action to enforce the agreement or otherwise prevent such communications. In other words, the punishment emerged solely because of the actual or perceived chill which the agreement created.

This development reinforces the prominence which whistleblower protections now enjoy in contemporary workplaces. Even in cases where no actual harm is done, a listed company can face a six figure fine for merely creating the perception of intimidation. While the SEC's approach is no doubt well intentioned, the practical implications are rather surprising. The Order therefore highlights the need for careful review of corporate approaches to complaints, investigations, protections afforded to complainants, and related employment issues.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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