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SEC Targeting Broad Employee Confidentiality Clauses

By Gregory Keating and Harry Jones

The Securities and Exchange Commission (SEC) has recently contacted a number of companies seeking every confidentiality agreement, nondisclosure agreement, settlement agreement, and severance agreement the companies entered into with employees since the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) went into effect. According to a February 25, 2015 *Wall Street Journal* article, the SEC is also seeking documents related to corporate training on confidentiality, as well as “all documents that refer or relate to whistleblowing” and a list of terminated employees. The SEC wants to use these documents as evidence of retaliation against whistleblowers. In the SEC’s view, these agreements can represent a form of systemic retaliation if they are overly broad and serve to silence would-be whistleblowers.

This recent action by the SEC is part of a longer-term agency campaign for a larger “portfolio.” In a September 24, 2013 interview with the *Wall Street Journal*, the SEC’s Chief of the Office of the Whistleblower, Sean McKessy, reiterated the claim that the SEC has the authority to enforce the anti-retaliation provisions in Dodd-Frank. McKessy went further: “We are actively looking for ways to be proactive in pursuing, under appropriate circumstances, a retaliation claim [...]” McKessy has characterized the SEC as having “anti-retaliation authority.”

Dodd-Frank’s amendments of the Securities Exchange Act of 1934 (“Exchange Act”) specifically identify solely individuals as having standing to sue for retaliation. Thus, it is not clear if the SEC in fact has the authority asserted.

On June 16, 2014, the SEC filed its first case against an individual employer for violating the anti-whistleblower provisions of Dodd-Frank: *In the Matter of Paradigm Capital Management, Inc. and Candace King Weir*, Exchange Act Release No. 72393, 2014 WL 2704311 (June 16, 2014). Paradigm’s head trader reported alleged prohibited transactions and conflict of interest to the SEC and then claimed Paradigm engaged in a series of retaliatory actions, including stripping him of his title allegedly leading to the head trader’s resignation. Paradigm neither admitted nor denied the allegations, but the parties settled for approximately \$2.2 million in penalties.

Thus, the issue of whether Dodd-Frank actually grants the SEC the right to sue employers for civil damages is not finally resolved. In fact, many question the SEC’s jurisdiction to pursue employers for retaliation under Dodd-Frank given that the plain language of the statute and its legislative history do not support the SEC’s position.

This new document search should be viewed in the context of the SEC looking for the kind of facts that could convince a judge to “make new law,” and turn the SEC into a frequent plaintiff.

Recommendations for Employers

The takeaway for now is that employers should audit all agreements containing confidentiality clauses and if needed, revise those agreements to include an express proviso that “nothing contained herein precludes any individual from communicating with any government agency, including the SEC.”

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