



OSHA AND SEC SCRUTINY OF WHISTLEBLOWER TREATMENT EXPANDS BUSINESSES' CIVIL AND CRIMINAL LIABILITY RISKS

by Edward T. Ellis

Recent legal attacks on confidentiality provisions in severance agreements, settlement agreements, and corporate policies indicate that the federal government will use every tool at its disposal to protect whistleblowers and encourage the reporting of alleged corporate wrongdoing. The Securities and Exchange Commission (SEC) began scrutinizing such agreements in 2014. The Occupational Safety and Health Administration (OSHA) signaled it will begin scrutinizing businesses' treatment of whistleblowers in an August 23 memo. This LEGAL OPINION LETTER will discuss SEC and OSHA whistleblower protection and how their actions could also expose businesses to criminal sanctions.

At a March 2014 conference, Sean McKessy, then-head of SEC's whistleblower office, scolded corporate counsel and compliance professionals for including confidentiality provisions in corporate policies and employment agreements that he perceived as rewarding employees for concealing wrongdoing.¹ He promised SEC would take on companies and their attorneys who used overly restrictive confidentiality agreements. SEC has done so quite aggressively. It issued a cease-and-desist order against KBR, Inc. on April 1, 2015, attacking confidentiality provisions in an agreement the company used to conduct witness interviews during internal investigations.² The Commission contended the provision violated SEC Rule 21F-17(a) because it did not make an exception for an employee's right to communicate directly with the SEC.

Also in early 2015, SEC subpoenaed the personnel records and corporate policies of dozens of publicly-traded companies seeking severance agreements, litigation-settlement agreements, and corporate-confidentiality agreements that contained similar provisions. On August 10, 2016, SEC issued another cease-and-desist order, this time to BlueLinx Holdings, Inc., an Atlanta building products distributor.³ SEC found that BlueLinx used language in its severance agreements that required departing employees to prospectively waive any monetary award from SEC that might come from filing a Dodd-Frank whistleblower complaint against the company.

The language appeared in a carve-out clause acknowledging an employee's right to file a charge with EEOC, NLRB, OSHA, SEC, or any other administrative agency. It stated that the "Employee understands and agrees that Employee is waiving the right to any monetary recovery in connection with any such complaint or charge that Employee might file." SEC objected to this language on the ground that an employer cannot block the Commission from paying out its own money to an employee who reports unlawful activity.

¹ See Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, Law 360 (Mar. 14, 2014), available at <http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts> (subscription required).

² Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, KBR, Inc., Release No. 74619 (SEC Apr. 1, 2015), available at <http://www.sec.gov/litigation/admin/2015/34-74619.pdf>; see also Press Release, KBR, Inc., KBR and SEC Resolve Questions Regarding Confidentiality Agreement (Apr. 1, 2015), <http://www.kbr.com/Newsroom/Press-Releases/2015/04/01/KBR-and-SEC-Resolve-Questions-Regarding-Confidentiality-Agreement/>.

³ Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities and Exchange Act of 1934, BlueLinx Holdings, Inc., Release No. 78528 (SEC Aug. 10, 2016), <http://www.sec.gov/litigation/admin/2016/34-78528.pdf>.

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OSHA released its internal policy memorandum “for approving settlement agreements in whistleblower cases” just a few days after SEC issued its BlueLinx Holdings order.⁴ OSHA has investigative and enforcement authority over 22 federal whistleblower statutes, including the Sarbanes-Oxley Act. Many of these statutes deal with safety reports in specific industries like railroads, automobiles, pipelines, nuclear power plants, and trucking.

OSHA receives and investigates claims from employees who allege that they have suffered retaliation for activity protected by those statutes. When it makes a preliminary finding in favor of a complaining employee, OSHA can order preliminary relief, subject to the right of the employer to challenge OSHA’s preliminary finding through a hearing before a Department of Labor Administrative Law Judge. The agency has no authority to fine employers for their settlement agreements or their confidentiality policies. The OSHA internal policy memorandum only affects whistleblower cases in which the complainant-employee and the respondent-employer present a voluntary settlement agreement to the agency for its approval.

OSHA has always asserted its right to approve settlements under certain statutes, although it is not clear that the statutes themselves give OSHA that right. OSHA maintains a Whistleblower Investigations Manual (Manual)⁵ to guide its field investigative staff. Even prior to August’s policy memo, the Manual stated⁶ that OSHA would not approve a provision that prohibited or restricted a complainant from participating in protected activity in the future, and would not approve a “gag” provision that restricted the complainant’s ability to participate in an investigation or testify in a proceeding.

The August memo expands the Manual’s prohibitions. It bars provisions that require a complainant to: 1) notify the employer before filing a complaint; 2) affirm that the complainant has not previously provided information to the government or require the complainant to disclaim knowledge that the employer has violated the law; and 3) waive a reward or bounty from a federal whistleblower program. Essentially, it is OSHA’s view that finality for any dispute between the corporation and its departing employee is less important than ensuring OSHA’s unfettered access to information.

It is important to note that OSHA’s memo does not change Chapter 6, paragraph XII.D.5 of the Manual, which states that if a nonconforming settlement agreement is presented to it, OSHA will refuse to approve it and place a note in its investigation file to that effect. However, if the OSHA investigation has not proceeded to a point where it could make a liability determination, OSHA will simply close its file. The agency reserves the right to issue a determination whenever possible.

In addition to receiving a cease-and-desist order from SEC or settlement-agreement disapproval from OSHA, a corporation or its attorneys could potentially face criminal charges for impeding whistleblowing. Prosecutors could file obstruction of justice charges that allege attempts to block an employee from reporting criminal activity to law-enforcement or initiating a *qui tam* action under the False Claims Act. A settlement agreement providing a generous payout combined with (1) a prohibition against communicating with the government and (2) a waiver of a bounty or relator payment arguably would fit within 18 U.S.C. § 1510(a), which makes it a crime to “bribe” a person to prevent them from communicating information to law enforcement.

Businesses in today’s perilous regulatory environment understandably prefer that their employees report instances of wrongdoing they discover internally, so that compliance problems can be addressed immediately and voluntarily. SEC and OSHA have put regulated entities on notice that they should not actively prevent current or former employees from publicly blowing the whistle. Corporate counsel must identify what constitutes legal encouragement versus unlawful discouragement, a line that may be far from clear, but one that must be respected given the consequences for those who step over it.

⁴ US Dep’t of Labor, OSHA, Memo re: New Policy Guidelines for Approving Settlement Agreements in Whistleblower Cases (Aug. 23, 2016), *available at*: <http://www.whistleblowers.gov/memo/InterimGuidance-DeFactoGagOrderProvisions.html>.

⁵ OSHA Whistleblower Investigations Manual (Jan. 28, 2016), *available at* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=6408.

⁶ Ch. 6, ¶¶ XII.E.2 and XII.E.3.