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Labor and Employment Alert: SEC Takes Aim at Employee Confidentiality Agreements

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The National Labor Relations Board has determined that confidentiality statements used in internal investigations are unlawful. Now, the Securities and Exchange Commission (SEC) has weighed in on employee confidentiality agreements.

The Dodd-Frank Wall Street Reform Act and Consumer Protection Act provides incentives for and protections to whistleblowers to encourage the reporting of possible securities laws violations. The SEC's rules prohibit a person from "taking any action to impede an individual from communicating directly with the SEC staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement...with respect to such communications."

On April 1, 2015, the SEC issued its first enforcement order against a company because of the company's overly restrictive language in a confidentiality statement. The SEC believed the statement may have discouraged whistleblowers (*In the Matter of KBR, Inc.*).

KBR is a publicly traded engineering, procurement, and construction company headquartered in Houston, Texas. Like many public companies, KBR encourages its employees to report complaints of potential illegal or unethical conduct, including potential violations of securities laws. As part of its internal investigation into these complaints, KBR interviews employees, including the employee who made the complaint. KBR required the employees to sign a confidentiality statement that prohibited them from discussing what was said during the interview without the prior approval of KBR's legal department. Unauthorized disclosure of information was grounds for disciplinary action, including termination.

The SEC instituted cease-and-desist proceedings against KBR because that confidentiality statement "undermined" the whistleblower protections that encourage employees to report potential violations to the SEC. Notably, the SEC brought the action even though there were no instances when a KBR employee was actually prevented from communicating with the SEC and no instances when KBR actually took

action to enforce the confidentiality statement. According to the SEC's enforcement director Andrew Ceresny, "By requiring its employees and former employees to sign confidentiality agreements imposing pre-notification requirements before contacting the SEC, KBR potentially discouraged employees from reporting securities violations to us."

Without admitting or denying the allegations, KBR agreed to amend its confidentiality statement to expressly state that employees are not prohibited from reporting possible violations of federal law or regulations to any governmental entity. KBR agreed to contact every employee who had signed that confidentiality statement, provide him or her with a copy of the SEC's order, and inform the employee that he or she does not have to seek permission from KBR before speaking with the government. KBR also paid a \$130,000 civil penalty to the SEC.

SEC Director Ceresny stated that the SEC will "vigorously enforce" the SEC's rules that prohibit employers from taking measures through confidentiality, employment, severance or other agreements that may silence potential whistleblowers.

This enforcement order highlights the need for employers to review their confidentiality agreements rather than relying on "form" agreements that may have worked in the past. Contact your Vorys lawyer to assist in ensuring these agreements satisfy current requirements.