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The SEC Joins the NLRB and EEOC in the Assault on Employee Confidentiality Agreements and Policies in Workplace Investigations

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On April 1, 2015, the United States Securities and Exchange Commission (SEC) announced its first settlement of a whistleblower enforcement action against a company for using confidentiality agreements to stifle the whistleblower process. The SEC charged Houston-based global technology and engineering firm, KBR Inc., with violating Rule 21F-17, which prohibits any person from taking "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."

The subject of the SEC's enforcement order was a confidentiality agreement that KBR used in its internal investigations. Even though the SEC could not identify any instance in which a KBR employee was in fact prevented from communicating with the SEC's staff or where KBR enforced its confidentiality agreement to impede any such communications, the SEC fined KBR $130,000, and KBR has now amended its confidentiality statement for internal investigations to make clear that nothing prohibits its employees "from reporting possible violations of federal law or regulation to any governmental agency or entity...or making other disclosures that are protected under the whistleblower provisions of federal law or regulation."

The SEC's position on confidentiality in workplace investigations is the latest in a line of governmental agencies actively pursuing employers for maintaining overly restrictive confidentiality agreements and policies. For example, in *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), the National Labor Relations Board (NLRB) declared that a blanket statement to employees that the contents of an internal complaint or investigation should not be discussed with co-workers violated the employees' rights under Section 7 of the National Labor Relations Act. Likewise, in a pre-determination letter issued in August 2012, the Equal Employment Opportunity Commission (EEOC) cautioned an employer that its policy of warning employees not to discuss harassment investigations with co-workers could be a violation of Title VII's anti-retaliation policies, which clearly ran afoul of the EEOC's longstanding enforcement guidance directing employers to "protect the confidentiality of harassment complaints to the extent possible."

Employers have a clear incentive to encourage employee confidentiality under certain circumstances (e.g., to prevent a harasser from intimidating or tampering with a witness or protect confidential and proprietary information); however, they should consider revising their internal policies and employment-related agreements to make sure that any confidentiality provisions do not impede potential whistleblowers from reporting misconduct to a governmental agency. Employers might find safe harbor with respect to what the SEC would approve by mirroring the language KBR used in its amended confidentiality statement.