

SEC Warns Companies Not To Try To Silence Potential Whistleblowers

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The Securities and Exchange Commission (“SEC”) brought a ground-breaking enforcement action against one of the country’s largest government contractors, *Kellogg Brown & Root (KBR)*, stemming from KBR’s use of a confidentiality agreement arguably aimed at intimidating employees and former employees from blowing the whistle on fraud. KBR recently settled the case, agreeing to pay a \$130,000 fine and to change its confidentiality agreement.

The dispute centered on the following language in KBR’s confidentiality agreement, which the SEC argued violated **Rule 21F-17 of the Securities Exchange Act** (17 C.F.R. 240.21F-17):

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

Rule 21F-17, enacted under the Dodd-Frank Act, prohibits any action that would “impede an individual from communicating directly with the [SEC] staff about a possible securities law violations, including enforcing, or threatening to enforce, a confidentiality agreement. . .with respect to such communications.” According to the SEC, KBR’s agreement was a “blanket prohibition against witnesses discussing the substance of [an] interview” and had “a potential chilling effect on whistleblowers’ willingness to report illegal conduct to the SEC.” This potential chilling effect was alone enough for the SEC to proceed against KBR—indeed, there were no “apparent instances in which KBR specifically prevented employees from communicating with the SEC about specific securities law violations.”

The SEC issued a grim warning to companies who may be tempted to foist agreements like KBR’s on their workers: “SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC. We will vigorously enforce this provision.”

The SEC’s action should send shockwaves through the corporate world and force corporations to reexamine their own confidentiality or non-disparagement covenants with an eye towards Rule 21F-17 compliance. The Chief of the SEC’s Office of the Whistleblower, Sean McKessy, instructed

as much: “Other employers should similarly review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC.” The SEC’s bold move against KBR—a multi-billion dollar company who has been accused of fraud against the government numerous times—reinforces the importance of holding corporations, big and small, accountable for trying to stamp out whistleblower’s strong and essential voices.

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