Blog Post

Jingle All the Way to the SEC: Employers (Even Privately Held) Under Scrutiny for Language in Separation Agreements Impeding SEC Whistleblower Rule 21F-17

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By Ashlea A. Edwards, Sarah M. DeFranco, and Melissa S. Zinkil

While jingle bells have only just begun to ring, the U.S. Securities and Exchange Commission (SEC) enforcement bells have been ringing steadily throughout year. In recent months, the SEC announced significant settlements with employers for violations of Rule 21F-17 — the SEC's whistleblower protection rule — as a result of language in non-disclosure agreements, separation agreements, and policies found to impede employees from reporting possible violations of securities laws to the SEC. With the SEC's recent momentum, both publicly held *and privately held* employers should evaluate whether their form employment-related agreements and policies comply with the SEC's latest interpretations of Rule 21F-17.

History of Rule 21F-17

By enacting the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress amended the Securities Exchange Act to include Section 21F, which encourages individuals to report possible securities law violations by providing financial incentives and confidentiality protections to securities whistleblowers, among other things. In

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line with this purpose, SEC Rule 21F-17(a) was adopted, which prohibits any 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." The SEC brought its first enforcement action under Rule 21F-17 in 2015. Since then, the SEC has initiated almost 20 enforcement actions under Rule 21F-17.

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While this rule is not specific to the employer-employee context, the SEC has set its sights squarely on employers and their form employment-related agreements and policies, including but not limited to non-disclosure agreements, employment agreements, and separation agreements.

SEC Order Penalizing Privately Held Employer

Not only publicly held companies are susceptible to enforcement actions by the SEC under Rule 21F-17. The SEC recently imposed sanctions against a privately held company based on language in the company's form separation agreement stating that the employees *do not have* "the right to recover money damages or other individual legal or equitable relief awarded by [a] governmental agency." The SEC found the language "raised impediments to participation in the [SEC's] whistleblower program by having the employees forego the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations." The company was ordered to pay close to a quarter million dollars in a civil monetary penalty.

While the SEC's order does not provide an analysis as to why the privately held company was subject to the SEC's regulatory reach, the regional director of the SEC's Denver office sent a stern message to both public and privately held companies in a press release about that order:

Both private and public companies must understand that they cannot take actions or use separation agreements that in any way disincentivize employees from communicating with SEC staff about potential violations of the federal securities laws. ... Any attempt to stifle or discourage this type of communication undermines our regulatory oversight and will be dealt with appropriately.

With the SEC's aggressive stance, privately held employers should heed this warning and evaluate whether changes need to be made to form separation agreements.

Key Points for Employers

- Be warned that while many of the recent enforcement actions relate to separation agreements and non-disclosure agreements, Rule 21F-17 is not confined to language in these types of agreements and may apply to language in internal policies, procedures, guidance, manuals, or training materials. Employers should review all employee documents to ensure the removal of any language that may be interpreted to impede an employee's ability to file a communicate with the SEC regarding possible securities law violations.

- Using prospective language advising employees of their ability to engage in protected activity will not likely absolve an employer from liability under Rule 21F-17 for including an employee representation in a separation agreement that the employee has not filed a complaint or charge with any federal governmental agency, such as the SEC. Employers should modify language in separation agreements to clarify that employee representations regarding past or pending complaints or charges do not include any communications with or complaints made to the SEC regarding potential securities law violations.

- Ensure that confidentiality and non-disclosure provisions in employment agreements, restrictive covenant agreements, separation agreements, and policies make clear that employees are free to communicate with the SEC without advance notice or disclosure to the employer.

- Cooperation and prompt remedial action after an SEC investigation has begun may not shield an employer from civil monetary sanctions.

- The SEC need not prove that an employee actually has been discouraged from communicating with the SEC about potential violations of securities laws to find a violation of Rule 21F-17.

As the SEC is aggressively enforcing Rule 21F-17, both publicly held and privately held employers should closely review all current form employment-related agreements and policies to ensure compliance. Contact your Akerman labor and employment attorney for advice on this SEC compliance issue.

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