Whistleblower Protections and Scrutiny of Severance, Confidentiality, and Other Agreements

Presented by Patricia W. Goodson

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Examples of Some Whistleblower Laws

- Occupational Safety & Health Administration
- Securities & Exchange Commission
- False Claims Act
- Federal Anti-Discrimination Laws
- State Whistleblower Statutes

EEOC

EEOC

- EEOC Strategic Enforcement Plan for FY 2013-2016 identified "Governing access to the legal system" as one of its 6 core priorities.

- EEOC Strategic Enforcement Plan for FY 2017 – 2021 identified "Preserving Access to the Legal System" as one of its substantive area priorities.

EEOC Priorities

- EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts. Specifically, EEOC will focus on: 1) overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims); 2) employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and 3) significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights. For example, firing a senior director who reports a pattern of discrimination at the workplace sends a strong message to others not to complain about or to report discrimination.
- Claims alleging overly broad waivers, releases and arbitration typically involve systemic cases. However, such a claim by an individual or small group may fall within this priority if it raises a policy, practice or pattern of retaliation.

Previous Language Acceptable to EEOC

"Except as described below, you agree and covenant not to file any suit, charge or complaint against Releasees in any court or administrative agency, with regard to any claim, demand, liability or obligation arising out of your employment with Kodak or separation therefrom. You further represent that no claims, complaints, charges, or other proceedings are pending in any court, administrative agency, commission or other forum relating directly or indirectly to your employment by Kodak.

Nothing in this agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency.

Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by your or by anyone else on your behalf."

Consent Decree, *EEOC v. Eastman Kodak* (W.D.N.Y. October 11, 2006).

EEOC's Version of Acceptable Language Changed

"Nothing in this Agreement is intended to limit in any way an Employee's right or ability to file a charge or claim on discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") or comparable state or local agencies. These agencies have the authority to carry out their statutory duties by investigating the charge, issuing a determination, filing a lawsuit in Federal or state court in their own name, or taking any other action authorized under these statutes. Employees retain the right to participate in such any [sic] action **and to recover any appropriate relief**. Employees retain the right to communicate with the EEOC and comparable state or local agencies and such communication can be initiated by the employee or in response to the government and is not limited by any non-disparagement obligation under this agreement [sic]."

Consent Decree, EEOC v. Baker & Taylor, Inc. (N.D.Ill. July 10, 2013)(emphasis added).

EEOC v. CVS

On February 7, 2014, the EEOC filed suit against CVS claiming that the Company's severance agreement violates Title VII because it is "overly broad, misleading and unenforceable . . ."

The lawsuit identified multiple sections in the agreement that the EEOC alleged violated Title VII because it interfered with employee's rights to file charges, communicate voluntarily and participate in investigations.

CVS agreement had language specifically advising employees that nothing in the agreement limited their right to file a charge.

EEOC v. CVS

1. **Cooperation Clause:** requiring employee to "promptly notify the Company's General Counsel by telephone and in writing" of contacts relating to legal proceedings including "administrative investigation" by "any investigator, attorney, or any other third party."

2. **Non-Disparagement**: Clause that prohibited the employees from making any disparaging statements about the Company and its officers, directors and employees.

EEOC v. CVS

3. Non-Disclosure of Confidential Information: provision prohibiting disclosure to any third party of confidential information without prior written permission of the Company's chief human resource officer. Confidential information included "information concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning . . . "

EEOC v. CVS

4. Covenants Not to Sue: The clause prohibited the filing of "any action, lawsuit, complaint or proceeding" asserting the released claims. And required employees to reimburse "any legal fees that the Company incurs" for breach of covenant not to sue.

- EEOC had long standing position that employees may not waive the right to file a charge of discrimination.
- EEOC's 1997 "Enforcement Guidance on Non-Waivable Employee Rights Under EEOC-Enforced Statutes" ("Guidance") https://www.eeoc.gov/policy/docs/waiver.html provides that "(a)n employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding under (Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, or the Equal Pay Act)."

EEOC v. CVS

5. **General Release Provisions:** releasing "charges" as well as claims of unlawful discrimination

- EEOC's position is that the agreement should specifically state that the release does not prevent the employee from filing charges with EEOC.

EEOC v. CVS

- The Agreement did contain the following sentence:

"[n]othing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation."

- EEOC noted that it was a single qualifying sentence that was not repeated anywhere else in the Agreement even though other limitations were contained in separate paragraphs.

EEOC v. CVS

- CVS moved to dismiss
  - No discrimination
  - No pattern and practice
  - Failure to conciliate by EEOC
- Court dismissed because of EEOC's failure to conciliate pre-suit but did not reach the merits. Dicta suggests that the case would have failed on the merits as well

EEOC Concerns

- Some EEOC offices are reviewing private settlement agreements as precondition to approving withdrawal requests
- Some EEOC offices take position their non-rehire provision is retaliation

What Employers Should Do Now

While it is questionable whether the EEOC will ultimately prevail in its challenges to employers' use of standard separation agreement provisions, employers should consider taking the following actions:

1. Review separation agreements for provisions which may be similar to the provisions being scrutinized by the EEOC.
2. If the separation agreement contains similar provisions, determine whether those sections should be eliminated, clarified, or otherwise revised.
3. Consider adding a disclaimer to the agreement (or disclaimers in connection with each applicable provision) that informs the employee that nothing in the agreement (or that particular provision) prohibits the employee from filing a charge with the EEOC or a FEPA.
4. To the extent that such a disclaimer is used, however, consider including an explicit waiver of monetary benefits that could be derived from any such administrative or other charges (although this may be rejected by other government agencies).

Securities & Exchange Commission

SEC

The Dodd-Frank Wall Street Reform and Consumer Protection Act protects whistleblowers who provide information relating to a violation of the securities laws.

Dodd-Frank

"No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment of any lawful action done by the whistleblower –

(i) in providing information to the Commission in accordance with this section;
(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
(iii)in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002[], the Securities Exchange Act of 1934 [], . . . and any other law, rule or regulation subject to the jurisdiction of the Commission."

Section 21F(h)(1)(A)

Dodd-Frank

- SEC adopts Exchange Act Rule 21F-2 that similarly has no Commission reporting requirement:

"[Y]ou are a whistleblower if . . . [y]ou possess a reasonable belief that the information you are providing relates to a possible securities law violation . . ."

"The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award."

Dodd-Frank

- SEC's interpretive guidance explains that individuals can report possible securities law violation internally, through their companies' respective reporting structures, and still be protected if they then suffer adverse employment consequences – even if they have not reported such information to SEC in manner required to qualify for an award under the whistleblower rules.

- Circuits are split regarding who is a whistleblower

Dodd-Frank

- Second Circuit: No Commission reporting requirement to be a whistleblower. The court held that the pertinent provisions of the Dodd-Frank Act were sufficiently ambiguous to warrant the court's deference to the SEC's rule that the statute's retaliation protections apply to employees who report securities law violations internally, regardless of whether they also report to the Commission. Berman v. Neo@Ogilvy LLC, 801 F.3d 145 (2nd Cir. 2015)
- Fifth Circuit: Limited employment retaliation protection only to those individuals who report securities law violations directly to the Commission. SEC definition of "whistleblower" is not entitled to deference. Asadi v. G.E. Energy (USA), LLC, 720 F.3d 620 (2013).
- Ninth Circuit: Joined the Second Circuit in holding that Dodd-Frank protects whistleblowers from retaliation for reporting suspected violations of securities laws to their employer. Somers v. Digital Realty Trust, 2017 WL 908245 (9th Cir. March 8, 2017).

SEC

- SEC is actively reviewing companies' non-disclosure and confidentiality agreements for compliance with Rule 21F-17.
- SEC has taken action against companies based on agreements that violate the Rule.
- SEC views itself as the "whistleblower's advocate," acting to ensure employees "feel secure in reporting wrongdoing."

SEC

- To fulfill the intent of Dodd-Frank, the SEC adopted Rule 21F-17, providing in relevant part:

  "No person may take 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." 17 C.F.R. 240.21F-17(a)

- Rule 21F-17 was adopted to "encourage individuals to report to the Commission" potential securities law violations.

SEC

In the 2016 Annual Report to Congress, the SEC stated:

"Assessing confidentiality, severance, and other kinds of agreements that may stifle a would-be whistleblower from reporting his or her information to the agency and that strip away the very incentives Congress intended for the program will continue to be a top priority for the SEC's Office of the Whistleblower."

In the Matter of KBR, Inc. (April 1, 2015)

- First enforcement action involving Rule 21F-17
- Confidentiality agreement required employees to obtain authorization from legal department before discussing information disclosed in internal investigations of whistleblower-type complaints.
- Agreement later amended to carve out communications with regulators and remove notice requirement
- SEC consent order required:
  - Notification to employees of consent order and protected rights;
  - $130,000 penalty

In the Matter of BlueLinx Holdings, Inc. (August 10, 2016)

- SEC instituted proceedings against BlueLinx Holdings, Inc. for stand-alone violations of Rule 21F-17(a) alleging that it violated the securities laws by using severance agreements that required outgoing employees to waive their rights to monetary recovery in the event they filed a charge or complaint with the SEC or other federal agency. SEC also found the confidentiality provisions "raised impediments to participation by its employees in the SEC's whistleblower program."
- SEC Consent order required:
  - Company agreed to pay $265,000 penalty
  - Notification to former employees of consent order and protected rights; and
  - Disclosure of protected rights in future agreements, including right to receive award for information provided to and Government agency.

In the Matter of Health Net, Inc. (August 16, 2016)

- Company's severance agreement allowed cooperation with government investigations, but required employees to waive their ability to obtain monetary awards from the SEC's whistleblower program.
- Company refined the agreement to claurify that employees would only waive future monetary recoveries from agency complaints "to the maximum extent permitted by law."
- SEC held both provisions violated 21F-17 by removing important financial incentives.
- SEC required:
  - Notification to former employees of consent order and protected rights;
  - $340,000 penalty

Carve Out Language Approved By SEC

"Protected Rights. Employee understands that nothing contained in this Agreement limits Employee's ability to file a charge or complaint with the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Securities and Exchange Commission or any other federal, state or local governmental agency or commission ("Government Agencies"). Employee further understands that this Agreement does not limit Employee's ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be conducted by any Government Agency, including providing documents or other information, without notice to the Company. This Agreement does not limit Employee's right to receive an award for information provided to any Government Agencies."

WHAT DO EMPLOYERS DO NOW?

Review documents for any provisions that:

- restrict an employee from voluntarily reporting a violation, cooperating with an investigation, or providing documents or information to a government entity;
- limit or restrict an employee's ability to collect a monetary award;
- require an employee to provide notice that they are reporting a violation, providing information, or cooperating in an investigation.

WHAT DO EMPLOYERS DO NOW?

Review documents such as:

- Confidentiality Agreements
- Severance Agreements
- Settlement Agreements
- Employee Handbooks and Policies
- Restrictive Covenant Agreements
- Confidentiality Stipulations in Litigation

OSHA

OSHA

- OSHA administers over 20 whistleblower protection statutes, including:
  - Clean Air Act
  - Sarbanes Oxley Act
  - Federal Railroad Safety Act
  - Occupational Safety & Health Act
  - Provisions of the Affordable Care Act

OSHA

- OSHA reviews settlement agreements between complainants and employers during investigative stage to ensure they are fair, adequate, reasonable, and in the public interest.
- OSHA issued new policy guidelines in September 2016 for approving settlements between employers and employees in whistleblower cases.
- The guidelines make clear OSHA will not approve settlement agreements that may discourage whistleblowing.

OSHA

- Under new guidelines, OSHA will not approve settlement agreements which it believes to prohibit, restrict, or otherwise discourage from participating in protected activity.
- Aim is to stop “gag” provisions.
- Protected activity can include:
  - filing a complaint with a government agency
  - participating in an investigation
  - testifying
  - otherwise providing information to the government
- Guidelines state what OSHA will not approve but also includes acceptable disclaimer language.

OSHA

OSHA will look unfavorable upon terms in settlement agreements that:

1. Restrict the complainant's ability to provide information to the government, participate in investigations, file a complaint, or testify in proceedings based on a respondent's past or future conduct.
2. Require a complainant to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.

OSHA (cont'd.)

3. Require a complainant to affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law. Such requirements may compromise statutory and regulatory mechanisms for allowing individuals to provide information confidentially to the government, and thereby discourage complainants from engaging in protected activity.
4. Require a complainant to waive his or her right to receive a monetary award from a government-administered whistleblower award program for providing information to a government agency.
5. Require a complainant to remit any portion of an award to respondent.

OSHA

- OSHA also includes a caution about liquidated damage clauses:
  - Will not approve where liquidated damages are clearly disproportionate to the anticipated loss.
  - Will review whether potential liquidated damages will exceed the relief provided to complainant, or whether, given complainant's position and/or wages, he/she, would be unable to pay the proposed amount in event of a breach.

OSHA

- OSHA will ask parties to remove offending provision(s), even if there is a disclaimer that the clause applies "except as provided by law."
- Parties may add the following language "prominently positioned within the settlement:"
    - "Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency."

What Employers Should Do Now

- Review severance agreements in matters where federal whistleblower claims might exist for clauses that could run afoul of OSHA's position.
- Consider use of OSHA's disclaimer and potentially adding appropriate references to the EEOC, the NLRB, the SEC in light of their similar positions on lawful severance/settlement agreements.

NLRB

NLRB

- NLRA Section 7:

  "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

NLRB

- NLRA Section 8(a): "It shall be an unfair labor practice for an employer…..

  (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7"

NLRB

- Confidentiality and non-disparagement provisions can violate Section 7 and 8 of NLRA
- Concerned with broad provisions that may prohibit employees from discussing terms and conditions of employment or saying anything about employer
- Confidentiality agreements should be limited to trade secrets and other non-public proprietary business information and should not cover all employee and company information
- Non-disparagement about employer should be limited to false statements that are willfully, maliciously or knowingly made.
- Employer can still prevent employee from disparaging customers, suppliers, and vendors.

NLRB

In Quicken Loans, Inc., 28-CA-146517 (March 17, 2016), the ALJ invalidated 3 common severance agreement provisions as over broad and chilling exercise of rights protected by the Act:

- Confidentiality clause
- Company property return clause
- A non-solicitation of employees and customers clause

Quicken Loans Decision

(1) The confidentiality rule contained within separation documents which requires employees to keep secret "employee information" was overly broad because it could be seen as restricting Section 7 activities

- The Act permits employers to prohibit misappropriation of trade secrets and other legally protected confidential and proprietary information

- Requiring secrecy of documents or information not maintained in secrecy, or which concern wages, work rules, or other terms and conditions of employment, should not be subject to confidentiality clause

Quicken Loans Decision

(2) The obligation to return all company property is overly broad because it restricts employees from providing items like employee handbooks to government agencies and private counsel.

- Employers can still require return of computers, phones, and intangible property (including documents containing trade secrets and legally protected confidential information).
- Employers should not include return of employee handbooks and manuals.

Quicken Loans Decision

(3) The prohibition in the rules to "refrain from contacting or soliciting Quicken Loan's employees or clients" "for any reason" is overly broad because it directly restricts Section 7 rights.

- Within certain limits, employees are allowed to criticize their employer and its products as part of Section 7 rights

- Avoid "for any reason"

Pratt Decision

Pratt, JD-08-13, found the following provisions in severance agreement too broad and "clearly prohibit employees from engaging in activity protected by Section 7"

- Provision prohibiting employees from disclosing the contents of agreement to anyone except family or financial or legal

- Provision prohibiting employees from making statements or engaging in conduct that "disparages, criticizes . . . or otherwise casts a negative characterization upon . . . Any Pratt Entity . . .or encourage or assist anyone else to do so."

Pratt Decision

- Non-disparagement clause was not saved by provision saying that it does not prevent signatory from testifying in a legal proceeding or complying with a subpoena.

- Employees must be able to consult with other employees and their union on employment matters.

NLRB

- Be careful that the agreement cannot be read to restrict concerted activity
- Consider adding a Section 7 savings clause that nothing in the agreement is intended to interfere with employees Section 7 rights
- Confidentiality provisions should be narrowly tailored
- Non-disparagement clauses should not just say that employee may not say “anything negative”