



APRIL 2015

SEC Assault on Employee Confidentiality Agreements

The Securities and Exchange Commission recently announced an enforcement action against KBR, Inc., alleging that a form of confidentiality agreement used in internal investigations violated an SEC whistleblower rule. To settle the matter, KBR revised its form of agreement and agreed to pay a fine of \$130,000.

Rule 21F-17 prohibits a person from taking

“any action to impede an individual from communicating directly with the [SEC] about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement”

The rule also authorizes the SEC to communicate directly with company personnel without consent of company counsel.

KBR required employees being interviewed as part of internal investigations to sign an agreement prohibiting them from disclosing the subject matter or particulars of the interview with outside parties without the prior approval of in-house counsel and specified disciplinary action (including firing) that could ensue from violating the agreement. In the SEC’s view, this agreement violated its prohibition on impeding whistleblowing, even though the SEC acknowledged that it was unaware of any instance in which KBR attempted to

prevent an employee from communicating with the SEC. KBR revised the agreement to expressly permit an employee to report securities law violations to the SEC, Department of Justice and other government agencies.

Although the enforcement action related to a confidentiality agreement used specifically in connection with internal investigations, statements by SEC officials suggest that any confidentiality agreement may be similarly vulnerable. According to a recent article in *The Wall Street Journal*, the SEC reportedly sent letters to a number of companies asking for copies of nondisclosure agreements, employment agreements and other documents in use since the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act. In a speech last year, Sean McKessy, chief of the SEC’s Office of the Whistleblower, warned in-house counsel against preparing employee agreements that violate the rule.

There are reasons to disagree with the SEC that it had authority to adopt the rule under Dodd-Frank’s “anti-retaliation” provisions. In addition, the text of Rule 21F-17 appears not to prohibit KBR’s original form of agreement, but only enforcement of the agreement to

This publication may constitute “Attorney Advertising” under the New York Rules of Professional Conduct and under the law of other jurisdictions.

inhibit whistleblowing. Given the SEC's aggressive interpretation of the statute and its own rule, however, nothing – beyond self-restraint – prevents the SEC from extending the rule to confidentiality provisions ordinarily included in employment contracts and employee intellectual property agreements. Public companies should consider reviewing – and revising where necessary – provisions in all employee agreements to account for Dodd-Frank whistleblower laws.

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

© 2015 Loeb & Loeb LLP. All rights reserved.

Capital Markets Practice

ROBERT CALDWELL	RCALDWELL@LOEB.COM	+852 3923 1115	BARRY T. MEHLMAN	BMEHLMAN@LOEB.COM	212.407.4812
GIOVANNI CARUSO	GCARUSO@LOEB.COM	212.407.4866	MITCHELL S. NUSSBAUM	MNUSSBAUM@LOEB.COM	212.407.4159
ANGELA CHAN	ACHAN@LOEB.COM	+852 3923 1176	BENNY PANG	BPANG@LOEB.COM	+852 3923 1198
ROY CHOI	RKCHOI@LOEB.COM	+852 3923 1138	SIMONA S. PAPAIZIAN	SPAPAIZIAN@LOEB.COM	212.407.4941
ROBERT CHUNG	RCHUNG@LOEB.COM	310.282.2216	ROGER C. PENG	RPENG@LOEB.COM	+86 10 5954 3552
STEPHEN H. COHEN	SCOHEN@LOEB.COM	212.407.4279	RONELLE C. PORTER	RPORTER@LOEB.COM	212.407.4110
JOSEPH F. DANIELS	JDANIELS@LOEB.COM	212.407.4044	GRACE SHEN	GSHEN@LOEB.COM	310.282.2140
ALLAN B. DUBOFF	ADUBOFF@LOEB.COM	310.282.2141	ALVIN SO	ASO@LOEB.COM	+852 3923 1155
ROSS D. EMMERMAN	REMMERMAN@LOEB.COM	312.464.3357	FRAN M. STOLLER	FSTOLLER@LOEB.COM	212.407.4935
DAVID C. FISCHER	DFISCHER@LOEB.COM	212.407.4827	ALLEN Z. SUSSMAN	ASUSSMAN@LOEB.COM	310.282.2375
STEVEN E. HURDLE, JR.	SHURDLE@LOEB.COM	310.282.2187	LILI TAHERI	LTAHERI@LOEB.COM	212.407.4160
CHRISTOPHER J. KELLY	CKELLY@LOEB.COM	310.282.2263	LAWRENCE VENICK	LVENICK@LOEB.COM	+86 10 5954 3688
WALLACE LAU	WLAU@LOEB.COM	+852 3923 1128	CHLOE WANG	CWANG@LOEB.COM	+852 3923 1158
JOO HO LEE	JLEE@LOEB.COM	+852 3923 1133	JAMIE YI WANG	JWANG@LOEB.COM	212.407.4933
NORMAN LEE	NLMLEE@LOEB.COM	+852 3923 1146	MILKA WONG	MWONG@LOEB.COM	+852 3923 1168
JADA SOYUN LEE	JSLEE@LOEB.COM	+852 3923 1150	TIMOTHY WONG	TWONG@LOEB.COM	+852 3923 1136
JC LEE	JCLEE@LOEB.COM	+852 3923 1146	TAHRA T. WRIGHT	TWRIGHT@LOEB.COM	212.407.4122
FRANK LEE	FLEE@LOEB.COM	212.407.4825	CANDICE YANG	CYANG@LOEB.COM	+86 10 5954 3556
STEPHEN LEUNG	SLEUNG@LOEB.COM	+852 3923 1134	CONNIE YU	CYU@LOEB.COM	+852 3923 1126
DAVID J. LEVINE	DLEVINE@LOEB.COM	212.407.4923	JAMES ZHANG	JZHANG@LOEB.COM	+86 10 5954 3557