

***Third Thursday* –Crowell & Moring’s Labor & Employment Update**

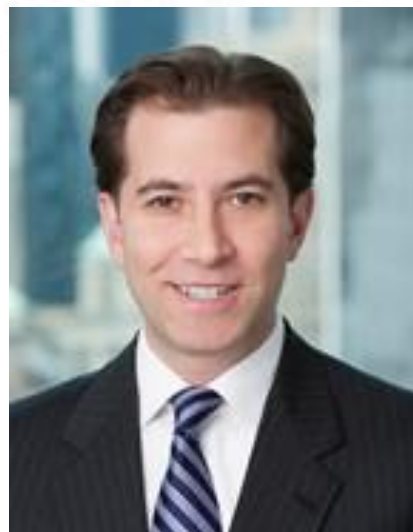
April 16, 2015

The webinar will begin shortly. You will not hear any audio until we begin. Please stand by.

Today's Presenters



Tom Gies



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The SEC Challenges Employer Confidentiality Protections

Today's Discussion

- The SEC's order in KBR
- SEC's Authority
- Other Regulatory Initiatives
- Practical Employer Takeaways

KBR Order

- Precursors to KBR order
 - *Barko* case
 - The SEC's letter campaign
- Issue in the matter
 - Whether provisions of KBR's confidentiality agreement signed by employees interviewed during an internal investigation violated Rule 21F-17

KBR Order

- Rule 21F-17 prohibits “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”

KBR Order

- Confidentiality agreement at issue
 - “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”

KBR Order

- No evidence KBR ever impeded individuals in communicating directly with SEC staff
- SEC found that the confidentiality agreement impeded communications with the Commission because it required pre-approval from the KBR Law Department to speak with the SEC
- KBR agreed to order to avoid litigation

KBR Order

- New provision agreed to by KBR
 - “Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures”

KBR Order

- Other remedial measures
 - \$130,000 fine
 - Reasonable efforts to notify employees subject to prior agreement that they are not bound to seek KBR's permission before making reports to governmental agencies
 - Certify compliance and provide evidence of attempts to contact those subject to prior agreement within 60 days after contact

SEC's Authority

- Rule 21F-17 under the Dodd-Frank Act
 - Prohibits companies from taking any actions to impede whistleblowers
 - Silent on SEC enforcement of anti-retaliation provision

SEC's Authority

- *Paradigm Capital Management* – June 2014
 - SEC enforcement action under Section 21F(h) of the Exchange Act
 - 21F(h) prohibits an employer from retaliating against a whistleblower for providing information to the SEC
 - SEC's authority derived from the Exchange Act

What Should Employers Do Now?

- Types of Agreements to Review
 - Separation agreements and releases
 - Employment agreements
 - Other employee non-disclosure agreements
 - Internal investigation agreements
 - Code of Conduct
 - Compliance Manual
 - Other relevant company policies

What Should Employers Do Now?

- Intellectual property agreements
- Agreements with independent contractors
- Subscription agreements

What Should Employers Do Now?

- Various types of ‘carve-out’ provisions
 - “Nothing in this agreement shall prohibit you from communicating directly with”
 - How broadly to define the scope of the carve-out
 - explicit statutory references?
 - Subject matter references?
 - Affirmative language regarding no obligation for prior approval by counsel or anyone else in the company

Other Agency Efforts

- EEOC
- NLRB
- State Department OIG

Selected Authorities and References

- KBR Order:
 - <http://www.sec.gov/litigation/admin/2015/34-74619.pdf>
- WSJ story re SEC letter campaign (subscription required):
 - <http://www.wsj.com/articles/sec-probes-companies-treatment-of-whistleblowers-1424916002>

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