Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Employee Secrecy Pacts Don't End Whistleblower Threat

By **Dietrich Knauth**

Law360, New York (August 15, 2014, 6:54 PM ET) -- Although some regulators and lawmakers have expressed concerns about companies attempting to silence potential relators with nondisclosure agreements, attorneys on the defense side say that such employee agreements can rarely inoculate a company from False Claims Act allegations.

Contractors' nondisclosure agreements have been the subject of recent discussion by lawmakers, regulators and advocacy groups, and the Washington Post has run recent stories on agreements used by KBR Inc. and International Relief & Development.

Recent debate on the topic has focused on the potential suppression of whistleblowers and False Claims Act relators, obscuring some of the legitimate and legal reasons why companies use such agreements — such as the protection of a company's trade secrets, confidential information and reputation — according to Marcia Madsen ofMayer Brown LLP, who moderated a discussion on the topic at the American Bar Association's annual meeting in Boston.

"You can't prevent someone from disclosing fraud to a regulator, but there are very legitimate reasons that companies would ask employees for confidentiality agreements," Madsen told Law360 after the ABA discussion. "Recently, whenever the subject's come up, people have tried to treat it as all or nothing."

Some of the recently debated agreements require employees to get permission from their company's lawyers before discussing their allegations outside of a company, or forbid employees and former employees from making any disparaging statements about the company, or waive their right to file a qui tam suit under the False Claims Act, all of which could limit whistleblowers' rights under federal law, according to the nonprofit Project on Government Oversight.

POGO recently asked Attorney General Eric Holder to investigate contractor confidentiality practices, saying that contractors "have no incentive to identify, report and remedy misconduct if they know their employees are afraid to step forward and report their allegations to the government."

KBR's nondisclosure agreements also came up during recent litigation in U.S. ex rel. Barko v. KBR, a False Claims Act suit accusing the company of defrauding the government by overcharging for substandard work performed by an Iraq War subcontractor. KBR argued that documents related to its internal investigation of the claims were protected both by attorney-client privilege and by employee confidentiality agreements.

The most expansive confidentiality agreements should be challenged, or else they run the risk of discouraging oversight of federal spending, according to POGO General Counsel Scott Amey.

“If companies force employees to sign nondisclosure and confidentiality statements, and the employee or the government never challenges them, the companies are in control and able to conceal the subject of the report,” Amey said. “These agreements are a new attempt to silence people who want to step forward when they see questionable activities. I think these agreements are ripe for a challenge, and we'll see balancing between the rights of the company and the rights of the whistleblowers.”

But balance doesn't mean that confidentiality agreements will go away entirely, according to the ABA panelists.

The key question when examining confidentiality agreements is whether they get in the way of the government's ability to investigate fraud, according to Kelley Hauser, a trial attorney with the Department of Justice. Hauser said at the ABA meeting that the DOJ would generally challenge overly broad confidentiality agreements that discourage an employee from reporting fraud or agreements that require relators to waive their standing as qui tam relators after a suit has already been filed.

“Conceptually trade secret protection, noncompetes, we don't have problems with those clauses,” Hauser said. “The clauses that we have problems with are the clauses that would eliminate an incentive for a whistleblower to come forward. Filing a qui tam is a powerful incentive to come forward with allegations of fraud, and if you're going to try to get a relator to release that, we may have a problem with that and we may challenge that, and we've been successful in that area."

And in cases where legitimate confidentiality agreements are in place, the DOJ has tools to compel necessary testimony despite those agreements, Hauser said.

Scott MacKay, vice president and general counsel at Lockheed Martin Information Systems & Global Solutions, said that companies should look to craft confidentiality agreements that can legally protect a company from the release of damaging information and that contractors could try to get employees to waive their standing in future qui tam suits as part of a severance agreement.

"It's probably not a great practice to try to gag people, because it's going to be unsuccessful, but I do think there are parameters that you can very legitimately seek from a departing employee, in consideration of a payment, to limit your potential exposure, consistent with the case law," McKay said.

Under recent case law, it's harder to get confidentiality agreements to stand up if they're signed before an employee leaves. But if an employee takes money and waives his or her right to file a qui tam suit as part of a severance package, courts have upheld the waiver.

The Fourth Circuit decided against an employee who took such a severance package and later filed a quit tam suit in its 2010 decision in U.S. ex rel. Radcliffe v. Purdue Pharma LP. In that case, plaintiff Mark Radcliffe alleged that Purdue defrauded the government by selling the more expensive Oxycontin when a cheaper generic would have served just as well. When Purdue brought up the waiver in the severance agreement, Radcliffe argued that the agreement only covered lawsuits related to Purdue's liability to him, personally, not claims on behalf of the government, but the Fourth Circuit sided with Purdue.

Courts have also taken the approach of separating the question of standing in qui tam suits from the

question of damages related to breaches of confidentiality agreements. The Eastern District of Pennsylvania recently allowed a False Claims Act defendant, AmerisouceBergen Corp., to countersue a relator who breached his confidentiality agreement by including Amerisource's confidential and proprietary information in his complaint, which eventually became public.

Simply getting a defensible confidentiality agreement or litigation waiver in place isn't always enough for companies looking to protect themselves, according to Angela Styles, co-chair of Crowell & Moring LLP's government contracts group.

Employees may sign documents but not fully understand their responsibilities or what information they need to protect from disclosure, so it's important for a company to clearly communicate with employees and former employees about the agreements, Styles said.

"It's not the agreement that's critical, it's the employee's understanding of what's confidential and proprietary," Styles said.

--Editing by Jeremy Barker and Philip Shea.
