Blogs
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On April 1, 2015, the Securities and Exchange Commission announced its first enforcement action against a company for using improperly restrictive language in confidentiality agreements allegedly aimed at stifling potential whistleblowers.

The SEC charged KBR Inc. with violating whistleblower protection Rule 21F-17 enacted under the Dodd-Frank Act, which prohibits companies from "imped[ing] 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 required witnesses in certain internal investigation interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department. The SEC claimed that KBR's policy had a potential chilling effect on any whistleblower activity. Without admitting or denying the SEC's charges, KBR agreed to pay a $130,000 settlement to the SEC and the company voluntarily amended its confidentiality statement making clear that employees are free to report possible violations to the SEC and other federal agencies without KBR approval or fear of retaliation. The SEC action raises new questions about how a company conducts its internal investigations. Typically, a witness is given an Upjohn warning and told that the interview is privileged, and there is an assumption that the interview is confidential. With this new case, companies now must be aware of what types of privilege and confidentiality designations are acceptable when conducting an internal investigation, including the scope of permissible things to say about keeping the investigation confidential. Moreover, the SEC action may encourage employees to avoid cooperating with their employers and proceed directly to the SEC at the first sight of any allegation of wrongdoing.

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