Drafting Severance and Confidentiality Agreements Amid Continued SEC, EEOC and NLRB Scrutiny

Avoiding Agency Challenges to Confidentiality/Whistleblower, Non-Disparagement, Cooperation, No Rehire, Covenants Not to Sue, and Other Provisions

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Fed’s Scrutiny of Severance, Settlement, Confidentiality And Other Agreements

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Who is a Protected Whistleblower Under Dodd-Frank?

> Dodd-Frank specifically defines a “whistleblower” as someone “who provides … information to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6) (emphasis added).

> The requirement of reporting “to the Commission” has been the subject of debate because one of the three descriptions of actionable conduct does not include a “to the Commission” reporting requirement.
Who is a Protected Whistleblower Under 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.”
The Second Circuit’s Expansion of Potential Dodd-Frank Liability

- No legislative history on Subdivision (iii): “there is no mention of the addition of subdivision (iii) much less its meaning or intended purpose, in any legislative materials … .” *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 153 (2d Cir. 2015).

- 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.”
Circuit Split Between Second and Fifth Circuits, With More to Come


  - *Berman* dissent (Jacobs, J.): Places us “firmly on wrong side” of a circuit split. Dodd-Frank has a longer statute of limitations, no administrative exhaustion requirement, and doubles the back-pay compared to Sarbanes-Oxley.

> **Fifth Circuit** *Asadi v. G.E. Energy (USA) LLC*, 720 F.3d 620 (2013): Statutory definition governs, so reporting to Commission is required; SEC definition of “whistleblower” not entitled to deference.
Circuit Split Between Second and Fifth Circuits, With More to Come

> Sixth, Seventh and Ninth Circuits currently poised to take this issue up.

> Likely will be resolved by the Supreme Court.
Why Review Nondisclosure and Confidentiality Agreements?

> SEC is actively reviewing companies’ nondisclosure 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.”
Rule 21F-17

> 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.
Whistleblower Tips Have Resulted in Significant Recoveries:

> Enforcement actions resulting from whistleblowers have resulted in orders for more than $500 million in financial remedies.

> Since inception, the Office of the Whistleblower has received more than 14,000 whistleblower tips from individuals in all 50 states, DC and 95 foreign countries.

> SEC views whistleblowers as among the “most powerful weapons” in its law enforcement arsenal.

> SEC awards to whistleblowers has surpassed the $100 million mark.
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 civil penalty.
In the Matter of Health Net, Inc.  
(August 16, 2016)

> Company’s severance agreement allowed cooperation with government investigations, but precluded employee from receiving any monetary award from investigation.

> SEC consent order required:
  
    - Notification to former employees of consent order and protected rights;
    - $340,000 civil penalty.
In the Matter of BlueLinx Holdings, Inc.
(August 10, 2016)

> Severance and other agreements prohibited sharing of information unless compelled by legal process and required prior notice to company’s legal department.

> Later agreements included carve out for cooperation with SEC, but waiver of right to receive monetary recovery.

> SEC consent order required:

  - Notification to former employees of consent order and protected rights;
  - $265,000 civil penalty; and
  - Disclosure of protected rights in future agreements, including right to receive award for information provided to any Government agency.
Considerations Going Forward

- Nondisclosure/Confidentiality Agreements
- Employment/Restrictive Covenant Agreements
- Severance Agreements
- Settlement Agreements
- Employee Handbooks; Codes of Conduct and Other Policies
- Confidentiality Stipulations in Litigation
- Employee Training
Provisions SEC Likely to Scrutinize

> Any provisions that restrict an employee from *voluntarily*:

  (a) reporting a violation;

  (b) cooperating with an investigation; or

  (c) providing documents or information to a government entity.

> Provisions that limit or restrict an employee’s ability to **collect a monetary award**.

> Provisions that require an employee to *provide notice* that they are reporting a violation, providing information or cooperating in an investigation.
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.”

> This very pro-employee language is likely more than is required to ensure compliance with the SEC Rules (or any other agencies’ rules).
This Agreement does not require you to notify Company of such communications or inquiry described in the preceding provisions.
Carve out Language to Consider: Monetary Awards

> Unclear whether affirmative language regarding monetary award is required.

> Although one consent order included such language, other orders have not required affirmative language in go forward agreements.
Remedial Measures

> Review agreements previously entered into for potential violations of Rule 21F-17.

> Consider providing notice to affected employees of protected rights and that Company will not enforce provisions of prior agreements to the extent they conflict with Rule 21F-17.
Other Considerations

> Update Code(s) of Conduct, as well as other relevant agreements, policies and procedures to ensure that employees understand their protected rights.

> Incorporate “Notice of Protected Rights” in employee training.

> Confidentiality Stipulation in Litigation/Arbitration

> Cooperation/Non Voluntary Assistance Provisions in settlements
EEOC & OSHA Scrutiny of Severance, Settlement and Confidentiality Agreements and Key Issues for Employers

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EEOC Focus on Severance Agreement

- EEOC Strategic Enforcement Plan for FY 2013-16 identified “Governing access to the legal system” as one of its 6 core priorities.

- EEOC’s position:

  “The EEOC will also target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC’s investigative or enforcement efforts. These policies or practices include retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations.”
EEOC’s Prior Position — Kodak Consent Decree

“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 you or by anyone else on your behalf.”

Consent Decree, EEOC v. Eastman Kodak (W.D.N.Y. October 11, 2006).
1. Covenants Not to Sue: Covenants that generally require an employee agree not to sue or institute any complaint pertaining to his or her employment or termination in any forum, including, but not limited to, an administrative agency.

• 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’s longstanding position, as recognized by federal courts, has been that, as a matter of public policy, employees may not waive the right to file a charge of discrimination with the EEOC.
2. Non-Disparagement: These clauses generally include an assertion that the employee will not make statements that disparage the business or reputation of the employer or its employees.

- EEOC contends such provisions are contrary to public policy as they supposedly will lead employees to believe that participating in an Agency investigation or testifying in a proceeding in which they will be critical of the employer would breach the severance agreement.
3. Non-Disclosure of Confidential Information: Generally, confidentiality provisions challenged by EEOC require employees not disclose information pertaining to items such as the company’s personnel, including the skills, abilities and duties of the company’s employees, wages, and benefit structures, succession plans, information concerning affirmative action plans or planning, etc.

- EEOC maintains employees must be able to share information in connection with filing or testifying about a charge of discrimination, and such clauses could impede their ability to do so.
4. Cooperation Clauses: Clauses that generally require departing employees to, among other things, notify their employer upon receiving a subpoena, deposition notice, interview request, or other inquiry regarding proceedings, such as administrative investigations and/or to be available for interviews, etc.
   • According to the EEOC, such provisions will not allow, or could negatively impact the ability of, departing employees, to cooperate with the Agency in an investigation or testify in connection with proceedings at the EEOC and state or local fair employment practices agencies (“FEPAs”).

5. General Release Provisions: These provisions include releasing “charges” as well as claims of unlawful discrimination of any kind.
   • EEOC’s position is that release language should expressly state that the release does not prevent the employee from filing charges with the EEOC or FEPAs.
EEOC Severance Agreement Litigation


- Suit under Section 707(a) alleged severance agreement was “overly broad, misleading and unenforceable.”
  - EEOC challenged five provisions of CVS severance agreement
    - Cooperation
    - Non-Disparagement
    - Non-Disclosure of Confidential Information
    - General Release of Claims
    - Covenant Not-to-Sue and No Pending Action Language
  - CVS agreement had language specifically advising employees that nothing in the agreement limited right to file a charge.
EEOC Severance Agreement Litigation

- CVS moved to dismiss arguing
  - 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
EEOC Severance Agreement Litigation

• EEOC’s Phoenix Office filed EEOC v CollegeAmerica Denver, Inc. (U.S.D.C. D. Colo. 1:14-cv-01232)
  o Employee resigned and signed settlement agreement
    Terms: $7k payment and employer not contest unemployment benefits
    Agreement not to contact government agency
    Agreement to forward complaints and non-disparagement
• Employee allegedly sent disparaging emails with another former employee that were sent to the employer
• Employee filed EEOC charge
• Employer sued employer seven days later
• Employee filed two EEOC retaliation charges
• CollegeAmerica, like CVS, filed Motion to Dismiss
• As in CVS, Court dismissed for failure to conciliate but said factual questions as to retaliation claims
Requests for Withdrawal of EEOC Charges

- Some Employer settlement agreements provide that the employee will request withdrawal of any pending charges as part of agreement.

- Some EEOC offices are reviewing private settlement agreements as precondition to approving withdrawal requests from Charging Parties.

- EEOC NY office has refused to approve withdrawal request if submitted agreement includes a general release negotiated directly with a Charging Party not represented by counsel.
While there is considerable reason to question whether the EEOC will ultimately succeed in its challenges to employers’ use of standard form separation agreement provisions, employers should consider taking the following four actions:

1. Review your separation agreements to determine which sections may be similar to the provisions being scrutinized by the EEOC.

2. To the extent that your separation agreements contain the same/similar sections to those identified by the EEOC as problematic, determine whether those sections should be eliminated, clarified, or otherwise revised.

3. Consider adding a clear 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. Be mindful, however, that the EEOC has also challenged the sufficiency of including one such disclaimer in a five-page single-spaced agreement without specifically referencing the clauses to which it pertains.

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 OSHA, as we will next review, will likely reject such a provision in any agreements they review.
New and Expansive OSHA Guidelines for Approving Private Whistleblower

- OSHA administers more than 20 federal whistleblowing statutes, including Sarbanes-Oxley, Dodd-Frank, the Affordable Care Act, OSHA and other occupational safety laws, and transportation industry laws.

- New policy: OSHA will not approve a “gag” provision that prohibits restricts, or otherwise discourages employees from participating in protected activity, whether in confidentiality or non-disparagement clauses or otherwise.
  

- Protected activity includes, but is not limited to, filing a complaint with a government agency, participating in an investigation, testifying in proceedings, or otherwise providing information to the government.

- Guidelines state what OSHA will not approve but also state acceptable disclaimer language.
OSHA will Reject:

- Any restriction on the ability to assist the government, whether by providing information, filing a complaint, participating in investigations, or testifying.

- Any requirement to notify his or her employer before filing a complaint or voluntarily communicating with the government regarding the employer's past or future conduct.

- Any requirement “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.”
  - OSHA states such a limitation may discourage individuals from providing information confidentially to the government and thereby “compromise statutory and regulatory mechanisms” allowing such activity.
  - Silent on whether employees can be asked voluntarily to notify the employer after-the-fact regarding an injury or exposure.
  - Of concern to employers is any bar to having employees (truthfully) state that they are not aware of any facts indicating the employer has violated the law. Indeed, this provision can frustrate early notice of wrong doing to the employer and the opportunity to promptly address any such wrong doing.
OSHA will Reject:

- A requirement to waive the right to receive a monetary award from a government-administered whistleblower award program for providing information to a government agency, or to give back any portion of such reward.
  - For example, OSHA will not approve an agreement that waives the right to receive a monetary award from the Securities and Exchange Commission for providing information to the government related to a potential violation of securities laws.
  - OSHA sees these as discouraging employees from engaging in protected activity.

- OSHA also may reject settlements with liquidated damages provisions it finds “clearly disproportionate to the anticipated loss” and will consider whether potential liquidated damages would exceed the relief provided or whether the employee would be unable to pay the proposed amount.
OSHA-Required Disclaimer

- OSHA will ask parties to remove the offending language, even if there is a disclaimer that the clause applies “except as provided by law.”

- Alternatively, 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 modifying or removing clauses with which OSHA might take issues.
- Consider use of OSHA’s disclaimer and potentially adding appropriate references to the EEOC, the NLRB, the SEC (and CFTC where application) in light of their similar positions on lawful severance/settlement agreements.
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NLRB REQUIREMENTS AND LEGAL FRAMEWORK FOR SEVERANCE AGREEMENTS

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CAN A SEVERANCE AGREEMENT WAIVE CLAIMS UNDER THE NLRA?

• General Rule is that Severance Agreements should be treated as any other non-Board settlement and Board would defer after examining:
  – Whether the parties have agreed to be bound, and the position taken by the General Counsel regarding the settlement;
  – Whether the settlement is reasonable in light of the violations alleged, the risks inherent in litigation, and the stage of litigation;
  – Whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and
  – Whether the respondent has a history of violations of the Act or has breached past unfair labor practice settlement agreements (Independent Stave Co., 287 NLRB 740, 743 (1987))
CAN A SEVERANCE AGREEMENT WAIVE CLAIMS UNDER THE NLRA (CONT.)

• NLRB may or may not defer to the terms of the severance agreement

• Even an employee who signed a severance agreement may later file an unfair labor practice charge or recover money in the event a charge is filed on the employee’s behalf
WHY HAS THE NLRB BEEN ACTIVELY REVIEWING SEVERANCE AGREEMENTS?

• Memorandum OM 08-13 (December 5, 2007)
• Issued to all Regional Directors Calling for them to Actively Investigate Waivers
CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS: Why Does the NLRB Care?

• 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 . . .”
CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS: When Did the NLRB Start Caring?

• Not a new concept
• See, for example, Metro Networks, Inc., and American Federation of Radio and Television Artists, Philadelphia Locals, AFL-CIO, Cases 4-CA-26812 and 4-CA-27207 (September 28, 2001)
• Violation of Section 8(a)(4) where fired employee for union activity and then gave release with unlawful confidentiality provision:
  – Stating employee would not “publish, publicize, disseminate, communicate or cause to be published, information concerning your employment . . . , the existence of this Agreement or the terms described herein except to your immediate family, attorneys, accountants, or tax advisors.”
BUT WHY THE SUDDEN FOCUS?

• In part, because this has become an enforcement issue at the federal level with the EEOC

• As overall union representation declines (now approximately 8%), NLRB has been more aggressive about enforcing rights to engage in concerted activity in actively reviewing handbooks, social media policies and severance agreements
CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS: What Does the NLRB Care About?

• Broad provisions that prohibits or would reasonably lead an employee to believe that they are prohibited from saying anything about the employer or that restrict right to concerted activity
CONFIDENTIALITY AND NON-DISPARAGEMENT PROVISIONS: How Much Does the NLRB Care?

• Not uncommon for NLRB to include in Notices to Employees where violation is found that the employer “will not require you to sign a severance agreement or any agreement that contains confidentiality or non-disparagement clauses that restrict you from engaging in protected concerted activities

  – See Board Decision in Pratt (Corrugated Logistics), LLC and Teamsters Local 773, Cases 04-CA-07963, 04-CA-079858, 04-CA-079976, and 04-RC-080108 (February 21, 2014)
PROBLEMS WITH SEVERANCE AGREEMENTS IN PRATT (CONT.)

• 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
PROBLEMS WITH SEVERANCE AGREEMENTS IN PRATT

• Extensive discussion in the ALJ decision (JD-08-13) of problem provisions:
  – Provision that prevented the employee from disclosing the “contents” of the agreement with anyone except family or financial or legal
  – Provision that prevented the employee from making statements or engaging in conduct that “disparages, criticizes . . . or otherwise cases a negative characterization upon . . . any Pratt Entity . . . nor encourage or assist anyone else to do so.”
Recent Case Law: Quicken Loans

• The NLRB ordered Quicken Loans to “Rescind and remove the overly broad confidentiality rules from Respondent's separation documents.”
  • Quicken Loans, Inc., 28-CA-146517, 2016 WL 1072075 (Mar. 17, 2016)

• The GC argued that part of the separation documents that were provided to Complainant violated the act by asserting their impact on Section 7 exercise of rights (i.e. the right to engage in concerted activities for mutual aid and protection).
• The Quicken Loans, Inc. decision concluded that the following language in the separation documents were found to violate the Act:

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

(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; and

(3) The prohibition in the rules to “Refrain from Contacting or Soliciting Quicken Loans' Employees or Clients” “For Any Reason” is Overly Broad because it directly restricts Section 7 rights.
DRAFTING BEST PRACTICES

• Give employees sufficient time to review the Agreement
  – Decisions applying the Independent Stave analysis have upheld waivers of claims where employees had 45 days to review to the Agreement
    • See BP Amoco Chemical – Chocolate Bayou, 351 NLRB No. 39 (September 29, 2007)
    • Hughes Christensen Co., 317 NLRB 633 (1995)
DRAFTING BEST PRACTICES (cont.)

• Set forth in the Agreement that the employee has the right to consult with an attorney
• Consider also adding “union representative”
• Be careful that other provisions of the Agreement may not be read to restrict concerted activity such as:
  – Statements that no further legal action will be filed
  – Non-cooperation and/or non-solicitation clauses
DRAFTING BEST PRACTICES (cont.)

• Add a Section 7 savings clause that nothing in the Agreement is intended to interfere with an employee’s Section 7 rights
DRAFTING BEST PRACTICES (cont.)

• Confidentiality provisions should be narrowly drafted.
  – Generally the money is really what an employer wants to keep confidential.
    • Confidentiality provision can lawfully provide that employee cannot disclose the amount paid except to family, tax or legal advisors
  – Be careful about including broad provisions that forbid an employee from discussing his or her employment
  – If there are specific things that you require to be confidential such as trade secrets and proprietary business information, provide specific examples of what those terms mean
DRAFTING BEST PRACTICES (cont.)

• Non-disparagement clauses should not just say that an employee may not say “anything negative”
  – Consider saying that the employee can not “defame” the employer or any released party
  – Can still prevent the employee from “disparaging” customers, suppliers, or vendors
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