



Beware of Whistleblower Provisions: Recent Legal Actions Highlight Risks in Employment and Separation Agreements

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INSIGHTS

- The U.S. Securities and Exchange Commission and the U.S. Department of Justice are eyeing whistleblower provisions more closely recently.
- Review your employment or separation agreements to check if they discourage whistleblowers to avoid potential penalties.

Do your employment or separation agreements discourage whistleblowers? Now might be a good time to take a look.

Following a string of similar enforcement actions, the U.S. Securities and Exchange Commission announced on September 9 that it settled charges for more than \$3 million against seven different companies for violating the Dodd-Frank Act's whistleblower protection rule. SEC Rule 21F-17(a) imposes hefty fines for companies that take any actions "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."

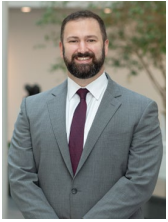
The U.S. Department of Justice is also scrutinizing these provisions through the new Corporate Whistleblower Awards Pilot Program, which was announced last month. In the Criminal Division's program guidance memorandum, the Department makes clear that any contractual provisions that impede communication by a whistleblower with the Department will be considered in assessing the company's cooperation credit and compliance program as well as in assessing the company's liability for obstruction.

In the False Claims Act context, things are a bit more nuanced by similarly perilous. There is no civil penalty provision under the FCA to worry about. But, courts are highly skeptical of these provisions and generally find releases of FCA claims unenforceable unless the allegations of fraud were already known to the government. On the other hand, some courts have enforced releases of whistleblower retaliation claims under the FCA.

At the end of the day, it is a robust compliance plan, and not contractually-mandated silence, that mitigates whistleblower issues.

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