

CLIENT ALERT

Navigating Compensation Governance

Do Your Employment Agreements Comply with Whistleblower Requirements?

Employment (and other) agreements with nondisclosure provisions must safeguard the rights of corporate whistleblowers.

Recent Securities and Exchange Commission actions affirm the Commission's continued focus on enforcement of whistleblower protections.

Companies should confirm that their employment agreements (and other impacted agreements) do not impede an employee's ability to report potential security law violations to the SEC.

Background on Whistleblower Protection Rules

The 2010 Dodd-Frank Act established the whistleblower protection program to achieve the following objectives:

- Encourage individuals (i.e., whistleblowers) to report possible securities law violations through the use of financial incentives, which are paid when information provided to the SEC leads to a successful enforcement action;
- Prohibit employers from taking any action that could impede a whistleblower from communicating directly to the SEC, including by enforcing or threatening to enforce a confidentiality agreement; and
- Prohibit any form of retaliation by an employer against a whistleblower.

The whistleblower program has yielded impressive results; the SEC has collected \$6.3 billion in corporate fines since the program's inception and, in 2022 alone, the SEC has awarded approximately \$229 million to whistleblowers.

Meridian reported on prior SEC enforcement actions against two companies for violating the SEC's whistleblower protection in severance arrangements (see [Meridian Client Update dated September 28, 2016](#)).

Several recent enforcement actions demonstrate a heightened emphasis by the SEC on maintaining whistleblower protection and provide important reminders as to the type of employer conduct prohibited under the whistleblower program.

Recent SEC Enforcement Actions

In September, SEC enforcement actions against three companies found the following contractual provisions violated the whistleblower rules:

- Prohibition on departing employees from receiving whistleblower awards as a condition to receiving separation payments.¹
- Requirement that departing employees represent that they had not filed complaints or charges against the company in any court or with any governmental agency as a condition to receiving separation payments.²
- Requirement that departing employees (i) agree to a non-disclosure covenant, without a carveout for whistleblower protection and (ii) represent that they had not filed complaints or charges against the company in any court or with any governmental agency as a condition to receive deferred compensation.³

The SEC imposed fines ranging from \$225,000 to \$10 million on the subject companies for such violations.

Meridian comment. Corporate boards and senior management should not assume employment and separation agreements adequately comply with Dodd-Frank’s whistleblower protection rules. To avoid possible SEC enforcement action and imposition of financial penalties, companies should ensure that applicable agreements abide by the following:

- Confidentiality provisions/agreements must expressly permit an employee to report alleged violations of law to appropriate governmental agencies.
- Confidentiality provisions/agreements may not limit an employee’s ability to recover monetary awards that the employee may be eligible to receive for reporting alleged violations of the law by their employer.
- Companies may not require employees to obtain permission or notify the company before reporting alleged violations of law.
- Severance and other agreements may not condition payment of benefits on representations that a covered employee has not filed a complaint or charges against their employer with a governmental agency.
- Severance and other agreements may not condition payment of benefits on a covered employee’s agreement not to file a complaint or charges against their employer with a governmental agency.

* * * * *

The [Client Update](#) is prepared by Meridian Compensation Partners’ Governance and Regulatory Team led by Donald Kalfen. Questions regarding this Client Update or executive compensation technical issues may be directed to Donald Kalfen at 847-347-2524 or dkalfen@meridiancp.com.

This report is a publication of Meridian Compensation Partners, LLC, provides general information for reference purposes only, and should not be construed as legal or accounting advice or a legal or accounting opinion on any specific facts or circumstances. The information provided herein should be reviewed with appropriate advisors concerning your own situation and issues. www.meridiancp.com

¹ The SEC imposed a \$225,000 penalty on the subject company, Monolith Resources LLC, even though the SEC did not find any employees failed to report violations due to such prohibition.

² The SEC imposed a \$375,000 penalty on the subject company, CBRE Inc.

³ The SEC imposed a \$10 million penalty on the subject company, D.E. Shaw & Co., L.P.