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Increased Governmental Scrutiny for Employee Confidentiality Restrictions

Employers should be aware of recent federal agency activity that may require modifications to employee confidentiality agreements. The federal Securities and Exchange Commission (SEC) issued a press release on April 1, 2015, trumpeting the SECs first enforcement action against an employer based upon the company's use of confidentiality agreements for its employees that included improperly restrictive language. In its press release, the SEC announced that KBR Inc., a Houston-based technology and engineering company, had entered into a settlement agreement with the SEC agreeing to pay a $130,000 penalty and agreeing to amend the company's confidentiality statement to make clear that its employees are free to share information with the SEC. The SEC was driven by a concern that confidentiality language used by KBR could have a chilling effect on possible employee whistleblowers, causing them to be reluctant to report possible securities violations to the SEC.

The SEC's action taken in the KBR matter should cause all companies, not just publicly traded companies, to review their existing employment-related agreements and policies to ensure that they do not run afoul of whistleblower protections. Similar considerations may also arise from the perspective of other governmental agencies including the Equal Employment Opportunity Commission (EEOC), the National Labor Relations Board (NLRB), and analogous state agencies, to name a few. Careful employment law attorneys regularly ensure that confidentiality provisions that exist in a variety of employment-related agreements do not improperly restrict the right of an employee (or former employee) to provide assistance or input to the EEOC on an investigation of the employer. Similarly, careful employers and their attorneys should be mindful of confidentiality requirements that might be perceived by the NLRB to improperly encroach upon workers rights to organize or exercise rights under the National Labor Relations Act (applicable to all employers, whether with unionized workforces or otherwise).

Considerations about potentially over-reaching confidentiality clauses may be raised by a variety of documents commonly generated and used in the workplace, including, for example:

- Separation/severance agreements
- Internal compliance/investigation process documents
- Front-end confidentiality agreements/employment agreements
- Other confidentiality policies used in the workplace

It would be prudent for employers to review their current confidentiality agreement wording, in all of these types of documents or agreements, to ensure that the language does not inadvertently run afoul of these whistleblower stymying concerns or other concerns of governmental agencies. At the same time, employers should still continue to be aware of the significant value that confidentiality provisions may provide in protecting a company's sensitive business

information. The key for these provisions continues to be that if they are to be used, they require careful consideration when drafting them. Using off-the-rack agreements or wording can be risky.