

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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Eyes on 2024: Will the SEC Continue Its Aggressive Enforcement of Whistleblower Laws in 2024?

The Securities and Exchange Commission (the SEC or Commission) made clear in 2023 that it intends to aggressively enforce its whistleblower protection laws, namely Rule 21F-17, which prohibits employers from taking any action that impedes an individual from communicating potential securities violations to the Commission.

In 2023, the SEC filed its greatest number of enforcement actions relating to whistleblower protection issues since 2016. In September 2023 alone, the SEC announced settlements and sanctions against three companies in the amounts of \$225,000, \$375,000 and \$10 million for violations of Rule 21F-17(a). Each of the September violations related to conditional language included in the companies' employment and/or separation agreements.

Whistleblower Protection Under Rule 21F-17(a)

The SEC has emphasized the importance of whistleblowing in its enforcement program and has adopted strong policies providing both prophylactic and reactive protection for whistleblowers. Section 21F of the Security Exchange Act of 1934 sets out provisions governing the rights and obligations of SEC whistleblowers as well as the procedures for determining and administering whistleblower awards.

Rule 21F-17(a) (the Rule) states that “[n]o 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 . . . with respect to such communications.” Under this Rule, the SEC has consistently found violations where a contract clause may have *any* potential chilling effect on whistleblowing activity.

The language of the Rule is intentionally broad. Thus, violations of the Rule are not limited to language contained in employment agreements, separation agreements or confidentiality agreements. Impermissibly restrictive language in a company's internal policies, procedures and guidelines, including employee handbooks, codes of conduct, training manuals or other documents may also violate the Rule. Further, violations are not limited to the employee-employer context. The SEC has brought Rule 21F-17(a) actions against individuals and companies in connection with agreements presented to customers and investors.

The Rule's broad language also means that violations are not limited to only publicly-traded companies. *Any* individual or company, public or private, utilizing language that potentially impedes individuals' ability to communicate possible violations with the Commission is subject to the Rule and SEC enforcement.

Notable SEC Enforcement Actions in 2023

- On Feb. 3, 2023, the SEC announced a \$35 million settlement with Activision Blizzard Inc., a video game development and publishing company, for securities violations, including Rule 21F-17(a). The SEC found that, from 2016 to 2021, Activision Blizzard utilized separation agreements that deterred whistleblowing by requiring former employees to notify the company if they received a request for information from the Commission. The separation agreements included a disclaimer stating “[n]othing in this Release prevents me from . . . giving truthful testimony, or truthfully responding to a valid subpoena, or communicating or filing a charge with government or regulatory entities (such as the . . . Securities and Exchange Commission).” In addition, the SEC admittedly was not aware of any specific instances in which a former employee was prevented from communicating with the Commission about potential securities violations. However, despite the disclaimer and any evidence of specific instances, the SEC ruled that the separation agreements violated Rule 21F-17(a).
- On Sept. 8, 2023, the SEC announced a \$225,000 sanction against Monolith Resources, LLC, a privately held limited liability company, for violating Rule 21F-17(a) by entering into separation agreements that required former employees to waive their right to claim monetary awards from governmental whistleblower programs. Despite a disclaimer stating that “nothing in this agreement is intended to limit in any way your right or ability to file a charge or claim with any federal, state, or local agency,” the SEC held that the separation agreements and the requirement to forego whistleblower awards “raised impediments to participation in the Commission’s whistleblower program” and, thus, violated Rule 21F-17(a). This case represents the first time the SEC brought a Rule 21F-17(a) enforcement action against a privately held company.
- On Sept. 29, 2023, the SEC announced a \$10 million settlement with D.E. Shaw & Co. LP. (DESCO) for willfully violating Rule 21F-17(a). DESCO, in response to several prior enforcement actions charging violations of Rule 21F-17(a), revised its employment agreement to comply with the Rule but failed to revise its separation agreements, which required former employees to sign releases attesting that they had not filed any complaints with any governmental agencies before receiving deferred compensation. The SEC stated that DESCO’s releases in the separation agreements “raised impediments to employee whistleblowing” and that the company’s failure to revise the separation agreement language constituted a willful violation, resulting in a higher sanction.

SEC Whistleblower Enforcement Trend

The SEC’s aggressive enforcement of its whistleblower protections in 2023 puts companies on notice of the Commission’s approach going forward. First, the SEC has made clear that it will pursue enforcement actions against privately held companies. Second, the SEC does not need evidence of specific instances of employees actually being prevented from communicating with the Commission for an agreement to violate Rule 21F-17(a). Finally, and most importantly, the SEC has made clear that disclaimers in agreements, such as “nothing in this agreement is intended to limit in any way your right or ability to file a charge or claim with any federal, state, or local agency,” are likely insufficient mechanisms to save an agreement that the Commission maintains otherwise impedes an individual’s ability to communicate securities violations to the Commission.

Being Prepared in 2024

Heading into 2024, there is little indication that the SEC intends to slow down its enforcement efforts. With that in mind, companies subject to the Security Exchange Act should be sure to review their employment agreements, employee handbooks, separation agreements, and other confidentiality provisions to ensure compliance with Rule 21F-17(a).

If you have any questions about the information contained in this memo, please contact [Colin Leonard](#), any attorney in Bond's [labor and employment practice](#) or the Bond attorney with whom you are in regular contact.

