

SEC Fines Company \$265,000 for Severance Agreements that Potentially Chilled Whistleblowers

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Company agreements with employees continue to be under fire. In the latest example, the Securities and Exchange Commission has issued a [cease-and-desist order](#) against BlueLinX Holdings Inc. over the use of severance agreements the agency found improperly interfered with the rights of potential whistleblowers to obtain monetary rewards for reporting suspected illegal activity. The August 10, 2016, Order included a \$265,000 fine and other specific non-monetary remedies against the company.

The Order focused on the Atlanta-based company's severance agreements containing provisions the SEC found may dissuade employees from contacting the Commission with information about potentially fraudulent company activity. The provisions at issue prohibited employees from sharing confidential information with anyone, unless compelled to do so by law or legal process. Employees also were required to provide written notice to the company or obtain written approval from BlueLinX's legal department before disclosing confidential information.

The severance agreements did not contain any carve-out language permitting employees to provide information to the SEC or any other regulatory or law enforcement agency. Moreover, while the agreements acknowledged an employee's right to file a charge with the SEC or other administrative agency, they also required the employee to waive his or her right to any monetary recovery in connection with such a charge.

In the Order, the SEC found the agreement provisions violated the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act revisions to Section 21F of the Securities and Exchange Act of 1934. The statutory revisions provided financial incentives to whistleblowers for reporting possible violations of securities laws to the Commission. In enacting these revisions, Congress noted the financial incentives to whistleblowers were "a critical component of the Whistleblower Program" and were "the minimum payout that any individual could look toward[]" in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud."

The SEC determined the severance agreement provisions requiring notice to BlueLinX's legal department before disclosing confidential financial or business information to third parties, without expressly exempting the SEC or other agencies from the restriction, could force individuals to choose between identifying themselves as whistleblowers to the company or potentially losing their severance pay and benefits. The Commission further found that requiring employees to forgo any monetary recovery in connection with providing information to the SEC thwarted the purpose, and Congressional intent, of providing financial incentives to whistleblowers who report potential securities law violations to the Commission.

In addition to the \$265,000 fine, the Order required BlueLinX to amend its severance agreements to include language advising employees that nothing in the agreement limited their ability to file a charge or complaint with the SEC, the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, or any other federal, state, or local agency or commission. Further, the agreements must advise employees that nothing in the agreement limits an employee's ability to communicate with any government agency, to participate in any investigation or proceeding by these agencies, or to receive an award for providing information to these agencies. BlueLinX also must make reasonable efforts to communicate with all former employees who executed the severance agreement with the offensive provisions from August 12, 2011, to August 10, 2016, to advise them that they were not prohibited from providing information to the Commission without notice to the company or from accepting a whistleblower award from the SEC pursuant to

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The Order is the latest example of the greater scrutiny the SEC and other agencies have put on agreements that may restrict or inhibit an employee's ability to provide the Commission with information about potential securities laws violations.

In April 2015, the Commission issued an order and fine against another company for agreement provisions used in internal investigations that required employees to obtain permission from the company's legal department before disclosing to any third party any information about such investigations. (See our article, [Confidentiality Agreements May Violate Dodd-Frank Act.](#)) While similar issues were present in the BlueLinx agreements, the BlueLinx agreements also addressed a new area of concern for many employers: provisions that attempt to limit the ability of an employee receiving a severance payment from collecting additional monies by filing a charge with a government agency.

The SEC's continued focus on this issue, as well as the National Labor Relations Board's aggressive stance on the restrictions of certain company agreements (see our article, [NLRB Doubles Down In Curbing Secrecy of Employer Investigations](#)), should prompt employers, whether publicly traded or privately held, to consider reviewing their company agreements and policies and to revise provisions that may discourage or otherwise inhibit employees from contacting government agencies.

Jackson Lewis can answer your questions about the Order or assist in reviewing policies and agreements.

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