

Confidentiality Agreements May Violate Dodd-Frank Act

By Richard J. Cino, David R. Jimenez and Joseph C. Toris

April 2, 2015

The Securities and Exchange Commission has filed, and settled, its first administrative proceeding and enforcement action against an employer under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (DFA), based on the employer's use of a form confidentiality agreement. The SEC asserted that certain language in the employer's agreement could impede communications between employees and the Commission's staff about securities law violations.

Among other things, the DFA established the statutory framework for the SEC's whistleblower program. After developing and implementing the program, the SEC said that it would turn its focus to employer agreements — whether separation agreements, confidentiality agreements, or other restrictive agreements — that may operate to bar or chill an employee from calling the Commission's Whistleblower Program.

Based on the enabling language of the DFA, the SEC adopted Rule 21F-17, which provides, in relevant part:

(a) No 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.

In this first enforcement action, the confidentiality agreement at issue was used by the employer in connection with its internal investigations. The agreement reminded employees that they are not to discuss the interview or the subject matter of the interview without prior law department authorization.

Under the terms of the settlement, the employer is required to contact employees who signed the form agreement over the past four years and clarify that they need not seek permission from the employer or its law department before communicating with any government agency or entity, including the Department of Justice, the SEC, the Congress, and any agency Inspector General regarding possible violations of federal law or regulation.

Although many employers were aware of both the DFA rule and the SEC's stated plan to enforce it prior to this development, it was unclear how the SEC would seek to enforce Rule 21F-17. This action, therefore, puts employers on notice that they should consider reviewing and, if necessary, revising, employee agreements (especially frequently used templates) that contain restrictive terms, including employment agreements, standalone confidentiality agreements, non-competition agreements, confidentiality policies within handbooks or codes of conduct, and confidentiality and non-disparagement provisions in separation agreements.

The Jackson Lewis [Corporate Governance and Internal Investigations](#) practice represents employers against Sarbanes-Oxley and Dodd-Frank Act whistleblower claims and conducts internal investigations.

©2015 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.

Meet the Authors



[Richard J. Cino](#)

Office Managing Principal
Berkeley Heights
908-795-5131
Email



[David R. Jimenez](#)

Principal
Hartford
860-522-0404
Email



[Joseph C. Toris](#)

Of Counsel
Berkeley Heights
908-795-5220
Email

Practices

Corporate Governance and
Internal Investigations

©2022 Jackson Lewis P.C. All rights reserved. Attorney Advertising. Prior results do not guarantee a similar outcome. No client-lawyer relationship has been established by the posting or viewing of information on this website.

*The National Operations Center serves as the firm's central administration hub and houses the firm's Facilities, Finance, Human Resources and Technology departments.