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Meridian Client Update

Waiver of Legal Claims and Non-Disclosure Covenants May Violate SEC Whistleblower Protections

Recent SEC enforcement actions may require companies to revise existing employment and severance arrangements to modify non-disclosure requirements and provisions relating to waiver and release of legal claims.

Two ubiquitous provisions found in employment and severance arrangements include non-disclosure covenants and a waiver and release of legal claims. These provisions impose significant restrictions on an employee's or former employee's ability to publicly disclose sensitive corporate matters or to bring suit against his or her employer on a wide range of matters. The Securities and Exchange Commission (SEC) has determined that these restrictions violate the SEC's "whistleblower" rule when they conflict with the agency's "whistleblower" program.

Under the whistleblower program, individuals are encouraged to report potential violations of federal securities laws in return for monetary awards if the SEC should impose monetary sanctions on that subject matter for the company. Recognizing that reporting such violations may place an individual at odds with his or her current employer, the SEC's whistleblower rule prohibits employment-related retaliation against a whistleblower and provides a whistleblower various confidentiality guarantees. Further, the SEC's whistleblower rule specifically prohibits companies from taking any actions that impede individuals from providing information on potential securities violations to the SEC.

The SEC recently settled enforcement actions under the whistleblower program against two public companies due to provisions in their severance arrangements. In one instance, the company's severance benefits were conditioned upon an employee's waiver of his or her rights to file complaints with the SEC or other governmental agencies. The other company's severance arrangements (1) prohibited employees from disclosing confidential information to governmental agencies without the consent of or notice to the company and (2) provided that the employees waived the right to any monetary awards arising from their filing whistleblower charges. In both cases, the SEC found that these provisions impeded employees from providing information on potential securities violations to the SEC.

As part of the settlement action, both companies agreed to (1) pay civil monetary penalties and (2) notify former employees that had signed the severance agreements that they are not prohibited from

communicating with the SEC without prior notice to the company and they are not prohibited from receiving a whistleblower award.

In addition, one company agreed to amend its current severance agreement to include the following language:

*“**Protected Rights.** Employee understands that nothing contained in this Agreement limits Employee’s ability to file a charge or complaint with the Equal Employment Opportunity Commission, the National Labor Relations Board, the Occupational Safety and Health Administration, the Securities and Exchange Commission or any other federal, state or local governmental agency or commission (“Government Agencies”). Employee further understands that this Agreement does not limit Employee’s ability to communicate with any Government Agencies or otherwise participate in any investigation or proceeding that may be conducted by any Government Agency, including providing documents or other information, without notice to the Company. This Agreement does not limit Employee’s right to receive an award for information provided to any Government Agencies.”*

Meridian Comment. In light of these recent SEC enforcement actions, companies should consider reviewing and potentially revising agreements, contracts and policies that apply to both current and former employees for language that:

- Prohibits employees from speaking with a government agency without the prior consent of the company,
- Requires advance notice (written or oral) to company of an employee’s intent to speak with a government agency,
- Requires employees to waive their right to monetary awards from government agencies, or
- Any other limiting language that may impede an employee or former employee from reporting potential violations of federal securities laws to the SEC

If such language exists in current agreements, companies should consider adding clarifying language (as described above and accepted by the SEC) expressly providing that the agreement does not (1) limit an employee’s ability to file a complaint with or otherwise communicate with a government agency or (2) impede employees from receiving a monetary award from a government agency.

Any review of and revisions to severance and employment agreements to comply with SEC whistleblower requirements should be reviewed by a company’s legal counsel.

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The **Client Update** is prepared by Meridian Compensation Partners’ Technical Team led by Donald Kalfen. Questions regarding this Client Update or executive compensation technical issues may be directed to Donald Kalfen at 847-235-3605 or dkalfen@meridiancp.com.

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