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Expert Analysis

Where Rules Collide: the Problem of Confidentiality and Whistleblowers

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The U.S. Department of Justice and Securities and Exchange Commission have used whistleblower bounties to encourage employees to spill the beans on perceived corporate wrongdoing. At the same time, institutions have increasingly become alarmed at the vulnerability of their data to unauthorized disclosure driven by an employee's desire to cash-in through a multimillion-dollar whistleblower award. Given these opposing forces, it was perhaps inevitable that employers, employees and government lawyers would conflict on the use of confidentiality to protect sensitive corporate information. Two recent cases illustrate how practices around confidentiality agreements and data protection are evolving.

In September 2014, the SEC announced plans to bring enforcement actions against "companies that include language in employment agreements, non-disclosure pacts and severance settlements to prevent the employee from coming to the agency with good-faith allegations of securities law violations."[1] In April 2015, the SEC announced the resolution of just such an enforcement action, fining a company $125,000 for using confidentiality agreements whose language might discourage whistleblowers.

At the same time, employers are seeking to use internal rules governing what employees may see and do to thwart whistleblower litigation under the False Claims Act. In a pending False Claims Act case, a hospital in New York has used an employee's improper actions as a basis for dismissing the employee's whistleblower suit.

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Taken together, these cases demonstrate that the use of employee policies and agreements presents opportunities for institutions to strengthen their internal controls, but care must be taken to avoid negative reactions from increasingly skeptical government lawyers.

'In re KBR'

On April 1, 2015, the SEC announced a settlement with Houston-based global technology and engineering firm KBR, Inc. regarding the company's use of confidentiality agreements in internal investigations. As reflected in the cease and desist order[2] and an accompanying press release,[3] the SEC charged KBR with violating whistleblower protection Rule 21F-17 of the Dodd-Frank Act.[4] This provision prohibits companies from taking any action to impede whistleblowers from reporting possible securities violations to the SEC.

According to the SEC, KBR "required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department." The SEC found that "these investigations included allegations of possible securities law violations" and as such, the agreements had the potential to "stifle the whistleblowing process" in violation of Rule 21F-17.[5]

Without admitting or denying the charges, KBR agreed to cease and desist from committing or causing any future violations of Rule 21F-17 and to pay a $130,000 civil monetary penalty. KBR also "voluntarily amended its confidentiality statement by adding

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language making clear that employees are free to report possible violations to the SEC and other federal agencies without KBR approval or fear of retaliation." KBR added the following language to its form confidentiality agreement:

> Nothing in this confidentiality statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.[6]

The commission brought this action even though it found no instances in which KBR prevented an employee from communicating with the SEC about potential securities law violations or otherwise took action to enforce the form confidentiality statement.[7] The SEC took the position that "any company's blanket prohibition against witnesses discussing the substance of the interview has a potential chilling effect on whistleblowers' willingness to report illegal conduct to the SEC." In the SEC's view, the prohibition undermined the purpose of Section 21F and Rule 21F-17(a), which is to encourage individuals to report to the SEC.[8]

Sean McKessy, chief of the SEC's Office of the Whistleblower, noted that "KBR changed its agreements to make clear that its current and former employees will not have to fear termination or retribution or seek approval from company lawyers before contacting us" and recommended that other employers "similarly review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC."[9]

'Ortiz v. Mount Sinai'

On the other side of the whistleblower spectrum, in *Ortiz v. Mount Sinai*[10] an employer has asked the court to dismiss a whistleblower complaint and impose sanctions on the grounds that the employees bringing the case violated rules protecting the confidentiality of patient and hospital information. In that case, currently pending in the Southern District of New York, Mount Sinai employees Xiomary Ortiz and Joseph Gaston (the whistleblowers) sought qui tam recovery from Mount Sinai Hospital and associated entities,[11] alleging that the defendants fraudulently billed Medicare and New York's Medicaid program, in violation of the federal and New York State False Claims Acts.[12] Both the United States and New York declined to intervene, and the complaint was unsealed. The defendants then moved to dismiss.

> Employers should be wary of using confidentiality agreements that might suggest the employer is deterring the employee from reporting wrongdoing to the authorities. The SEC apparently takes the position that such language violates the purpose of Rule 21F-17.

The whistleblowers brought the qui tam claim over three years after the defendants completed an internal investigation into billing irregularities. As relayed in the complaint, Ortiz alerted compliance to billing irregularities, prompting an internal investigation and corrective action.[13] According to the defendants, this corrective action included terminating the person responsible for the billing irregularities and a "voluntary refund" to the New York Medicaid program.[14] After the investigation concluded, Ortiz "attested that she had provided her employer with a full accounting of all the billing irregularities of which she was aware."[15] Defendants said that the information in the qui tam complaint went beyond what Ortiz had then provided.[16] The defendants alleged that the whistleblowers were seeking to "inappropriately [] use the episode as a springboard for qui tam claims" using information the whistleblowers obtained "after the investigation was concluded" by searching through records they were not authorized to access.[17]

The defendants argued that the whistleblowers failed to state a claim, and that, in any event, they "should not be permitted to exploit information they have misappropriated from confidential patient and billing records."[18] The defendants alleged that the complaint relied on patient and billing records that the whistleblowers accessed without permission from defendants and in violation of internal employment policies "as well as various confidentiality statements and HIPAA attestations executed by [the employees] as a condition of their employment."[19] According to the defendants, the complaint referenced patient records that neither of the whistleblowers would have had authority to access and could only have obtained without authorization and in violation of client confidentiality.[20] Defendants cited to authority in which reliance on improperly obtained confi-

dential information precluded claims.[21]

The whistleblowers argued that "it is entirely lawful for prospective relators to obtain patient information from their employers and provide it to government personnel and/or private counsel."[22] The whistleblowers cited several provisions:

- **HIPAA:** While HIPAA regulations protect patient records containing private health information,[23] HIPAA "carves out an exception that allows 'whistleblowers' to reveal such information to governmental authorities and private counsel, provided that they have a good faith belief their employer engaged in unlawful conduct."[24]
- **Federal False Claims Act:** The FCA expressly protects relators from retaliation for "lawful acts" taken "in furtherance of" an action under the FCA or other efforts to stop one or more violations of it.[25] Such lawful acts include "investigating" possible FCA violations.
- **New York False Claims Act:** Likewise, the NYS FCA statute expressly permits whistleblowers to obtain and disclose confidential information, "even where doing so might otherwise violate a contract, employment term, or duty owed to the employer."[26]

The whistleblowers argued that "[t]he NYS FCA explicitly makes lawful exactly what defendants call unlawful 'misappropriation.'"[27] The whistleblowers also argued that there was no evidence properly before the court that they improperly obtained the records; they declined to themselves comment on how they obtained the information.[28]

Defendants acknowledged that the FCA and HIPAA protect whistleblowers who reveal confidential information but argued that these provisions do not protect employees who use improperly obtained confidential information not obtained in the ordinary course of employment.[29] The FCA does not, they said, give whistleblowers "carte-blanche to acquire information in any way they deem necessary."[30] Defendants argued that "protecting whistleblowers from retaliation for lawfully reporting fraud" is a far cry from "immunizing whistleblowers for wrongful acts made in the course of looking for evidence of fraud" and that "[n]either the FCA nor the NY FCA, nor HIPAA for that matter, permit plaintiffs like relators to use 'self-help' and exploit improperly obtained information as the basis of their claims."[31] Nor, said defendants does the FCA "vitiate this court's inherent equitable power to sanction a party that seeks to use in litigation evidence that was wrongly obtained."[32]

The court has not ruled on Mount Sinai's motion.

Guidance for Employers

As these cases indicate, employers' efforts to enforce confidentiality rules raise complicated issues. But certain best practices seem to be emerging. Confidentiality agreements and careful data control procedures may help employers defend against whistleblower litigation. Employers will likely have the best luck with a confidentiality agreement designed to protect client privacy, trade secrets, or some other public policy interest. Employers should be wary of using confidentiality agreements that might suggest the employer is deterring the employee from reporting wrongdoing to the authorities. The SEC apparently takes the position that such language violates the purpose of Rule 21F-17, even in the absence of evidence that the language dissuaded anyone from reporting wrongdoing.

It is not a stretch to imagine the Justice Department considering such language in the context of FCA investigations as part of its evaluation of an entity's culture of compliance. As *KBR* indicates, employers using confidentiality agreements for any purpose should consider incorporating language clearly stating that nothing in the agreement is intended to deter employees from reporting illegal acts or practices to the authorities.

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1. Ben DiPietro, "SEC Warns To Take Whistleblowers Seriously," Wall Street Journal (Sept. 17, 2014).
2. *In re KBR*, Exch. Act Release No. 74619 (April 1, 2015).
3. Press Release, SEC, "SEC: Companies Cannot Stifle Whistleblowers in Confidentiality Agreements" (April 1, 2015).
4. 17 C.F.R. §240.21F-17(a).
5. *In re KBR*, at 3.
6. Id.
7. Id.
8. Press Release.
9. Id.
10. No. 1:13-cv-04735 (S.D.N.Y.)
11. Defendants are Icahn School of Medicine at Mount Sinai, Mount Sinai Radiology Associates, and Mount Sinai Hospital.
12. See Amended Complaint, *Ortiz v. Mount Sinai*, No. 1:13-cv-04735 (S.D.N.Y. Nov. 10, 2014).
13. Id. ¶58-59, 62.
14. See Memorandum of Law in Support of Defendants' Motion to Dismiss at 3, *Ortiz v. Mount Sinai,* No. 1:13-cv-04735 (S.D.N.Y. Dec. 17, 2014).
15. Id. at 2 citing Shwartz Decl. Ex. C (Nov. 12, 2010 signed statement of relator Ortiz).
16. Id.
17. Id. at 3.
18. Id. at 1.
19. Id. at 4-5.
20. Id. at 4-5. In support of this, the defendants provided that "Gaston has never been authorized to access patient billing records for any purpose." Id. at 5. The defendants allowed that Ortiz may have had access to patient billing records during a 2010 internal investigation, but stated the information in the qui tam complaint went beyond what Ortiz had then provided. Id. at 5.
21. Id. at 5-6.
22. See Plaintiff-Relators' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 3, *Ortiz v. Mount Sinai*, No. 1:13-cv-04735 (S.D.N.Y. Jan. 21, 2015).
23. See Health Insurance Portability and Accountability Act of 1996 (HIPAA), 45 C.F.R. Parts 160 and 164.
24. Id.
25. See 31 U.S.C. §3730(h).
26. See NYS FCA §191.
27. See Plaintiff-Relators' Memorandum of Law in Opposition to Defendants' Motion to Dismiss at 3, *Ortiz v. Mount Sinai*, No. 1:13-cv-04735 (S.D.N.Y. Jan. 21, 2015).
28. Id. at 3-5.
29. See Memorandum of Law in Support of Defendants' Motion to Dismiss at 6, *Ortiz v. Mount Sinai,* No. 1:13-cv-04735 (S.D.N.Y. Dec. 17, 2014).
30. Id.
31. See Reply Memorandum of Law in Support of Defendants' Motion to Dismiss at 3, *Ortiz v. Mount Sinai*, No. 1:13-cv-04735 (S.D.N.Y. Jan. 30, 2015)
32. Id.