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# Heady Days for Whistleblowers

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***The SEC's first anti-retaliation enforcement action heralds a flurry of pro-whistleblower developments around the globe.***

On 1 April 2015, the US Securities and Exchange Commission ("**SEC**") announced its first anti-retaliation enforcement action against global engineering company KBR Inc. ("**KBR**") for using improperly restrictive language in confidentiality agreements during internal investigations. As well as sounding a cautionary note to all companies and their advisers when undertaking witness interviews during internal investigations, the SEC's action marked the start of a promising period of pro-whistleblower developments globally.

**The SEC's Enforcement Action**

The SEC's 'cease and desist' order (the "**Order**") states that KBR required witnesses in certain internal investigation interviews to sign standard form confidentiality statements. Witnesses were prohibited from discussing the subject matter or any particulars of the interview with anyone outside the company (including the SEC) without having first obtained approval from KBR's legal department. Such an unauthorised disclosure could, under the terms of the statement, be grounds for the witness being subject to disciplinary action, up to and including termination.

Under the Dodd-Frank Act 2010, companies are prohibited from taking any employment related retaliation should their employees communicate directly with the SEC in respect of a possible securities law violation. The SEC held that a number of the confidentiality agreements used by KBR applied to internal investigations of possible violations that fell under its jurisdiction.

Significantly, the Order makes clear that there was no evidence of KBR ever enforcing the confidentiality provisions to block potential whistleblowers reporting to the SEC. The "*blanket prohibition*" on witnesses discussing the substance of the interview did however, in the SEC's own words, have a "*potential chilling effect*" on a whistleblowers' willingness to report wrongdoing.

In addition to paying a fine of USD130,000, KBR voluntarily amended the wording of its confidentiality statements. The statements now make it clear that employees are free to report possible violations to the SEC or other US government agencies without prior approval from KBR or fear of retaliation.

**Implications**

The small financial penalty imposed in this action ought not condemn it to irrelevance. It raises a number of interesting points.

*Conduct of witness interviews in internal investigations*

Firstly, the action should serve as a timely reminder for a company's counsel (both in-house and external) to assess the protocol followed when conducting witness interviews during any internal investigation. Although the action was brought under US legislation, by a US regulator and against a US listed company, it should be framed in a wider jurisdictional context. The SEC's action forms part of an increasing recent trend for regulators and investigators on both sides of the Atlantic to challenge many of the assumptions (often held by counsel) that govern the conduct of an internal investigation, in particular the conduct of witness interviews. The most obvious example in the UK are the repeated statements made by the Serious Fraud Office (the "**SFO**") over the past year that it will challenge claims of legal professional privilege asserted over a lawyer's notes from a witness interview conducted during an internal investigation.

Any misstep in the conduct of internal investigation could prove material and will inevitably be subject to scrutiny and challenge in the robust regulatory and prosecutorial landscape that companies in the US and the UK now inhabit. The SEC's action against KBR is a case in point.

Companies and their counsel should take greater care than ever when making either written or oral confidentiality requests of individuals who are interviewed. Clearly a balance has to be struck between what KBR's confidentiality statement (prior to the SEC's action) described as the necessity for a company "*protect the integrity*" of an internal investigation on the one hand, and effectively gagging an employee's genuine concerns of wrongdoing on the other.

Typically, during interviews of witnesses in internal investigations conducted by lawyers in the UK, it is prudent for the lawyer to inform the interviewee (in addition to the provision of a warning in respect of the privilege status of the interview) that the matters to be discussed are confidential and that the interviewee should be careful to keep them so.

Such a measured approach appears to remain sound practice notwithstanding the SEC's action. Whilst the interviewee is under no general legal duty in the UK to keep the matters discussed confidential, they will typically be cooperating in the interview process as a result of their employment obligations. A clear request at the outset of the interview should therefore be sufficient to maintain confidentiality without crossing the line into the overly restrictive threats of retaliation that were employed by KBR.

*Threat of whistleblowers heading straight to the authorities*

Secondly, the SEC's action increases the risk of employees heading directly to a government agency in the first instance when faced with suspected impropriety, rather than engaging the company's own whistleblowing channels. Attendant concerns in respect of a company and its advisers losing control of an investigation are further exacerbated given the potentially huge

financial incentives on offer in the US for a successful report made directly to the SEC. The risk is not unique to the US. Although the SFO and the Financial Conduct Authority do not offer financial rewards to whistleblowers, H.M. Revenue & Customs and the Competition and Markets Authority both do. Indeed, regardless of the availability of a monetary incentive, the number of whistleblower reports received by UK enforcement bodies continues to rise year on year. Companies in the UK should be more alive than ever to the threat posed by employees heading straight to the relevant authority's door.

*A not-so confidential confidentiality statement*

Lastly and on a lighter note, it is not immediately clear how the SEC was made aware that KBR was using this restrictive language in its confidentiality agreements with witnesses in the first instance—what with them being confidential and all.

**Recent Pro-Whistleblower Developments**

The SEC's action marked a recent global flurry of pro-whistleblower developments:

- On 8 April 2015, a UK Employment Appeal Tribunal strengthened the position of whistleblowers in the UK who report misconduct and who must have a reasonable belief that their disclosure is in the public interest to qualify for protection under the Public Interest Disclosure Act 1998.
- On 13 April 2015, the International Olympic Committee ("**IOC**") launched its new Integrity and Compliance Hotline. The web based hotline guarantees complete anonymity and provides a reporting mechanism for suspicions raised in respect of financial misconduct or any other legal, regulatory and ethical breaches over which the IOC has jurisdiction.
- On 16 April 2015 it was reported that the Russian Government is considering proposals to introduce a financial reward for whistleblowers (albeit limited to reports made by public officials) who report corruption offences.

It remains to be seen whether these recent developments represent a high water mark for the rights of whistleblowers globally or simply evidence a growing awareness of the important role be played by whistleblowers in the fight against corruption.

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