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Recent Legal Developments Require Immediate Changes to Employee Agreements

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*S*ignificant legal developments likely necessitate changes to your company's form of confidentiality agreement and severance agreement (as well as other documents containing confidentiality, non-disparagement and/or cooperation obligations, including codes of conduct). We have summarized below the key developments of which you should be aware, as well as the types of changes that you should consider implementing in your form agreements to ensure compliance with such developments. If you do not revise and update the aforementioned documents, you could be subject to both substantial penalties and loss of valuable rights.

SEC and OSHA Guidance

The Securities and Exchange Commission (SEC) has announced costly settlements with a number of companies for using confidentiality and severance agreements that it views as violating federal securities law. SEC Rule 21F-17 provides that "[n]o person may take any action to impede an individual from communicating directly with the [SEC] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement." The SEC has interpreted this provision to invalidate not only confidentiality provisions but also non-disparagement provisions that could be interpreted as prohibiting employees from reporting to the SEC (without notice to their employer) possible violations of law or collecting whistleblower awards for information provided to the SEC.

Additionally, the Occupational Safety and Health Administration (OSHA), which enforces the whistleblower provisions of the Sarbanes-Oxley Act, has issued guidance stating that it will not approve settlement agreements in whistleblower cases that prohibit, restrict or otherwise discourage complainants from participating in protected activity. Notably, OSHA's guidance goes further than the SEC settlement orders, disallowing not only provisions that restrict a complainant's ability to report possible violations of law without notice to the employer (including providing information to the government, participating in investigations, filing complaints and testifying in proceedings) but also provisions that require an employee to affirm that he or she has not engaged in protected activity or to disclaim knowledge that the employer has violated the law.

Although the SEC and OSHA guidance is most relevant to public companies and those that are

subject to the Sarbanes-Oxley Act, all employers are advised to, and will be well served by, reviewing carefully each of their agreements and policies that impose nondisclosure, non-disparagement or cooperation obligations, and/or include provisions that seek affirmations or representations by employees about legal rights. If any of these agreements or policies could, if read broadly, be interpreted as prohibiting conduct protected by the SEC or OSHA, the offending provisions should be revised to include clear carve-outs and exceptions for legally protected conduct (or if no carve-out would be sufficient or desirable, the offending provisions should be deleted in their entirety).

Defend Trade Secrets Act

Also impacting employer confidentiality agreements and severance agreements is the Defend Trade Secrets Act of 2016 (DTSA), which became effective in May 2016 and imposes on all employers certain notice obligations. The DTSA creates a federal, private, civil cause of action against employees who have misappropriated trade secrets, and provides employers with the potential to recover (among other remedies) punitive damages and attorneys' fees. However, such remedies are only available to employers who "in any contract or agreement with an employee that governs the use of a trade secret or other confidential information" advise the employee of the situations in which the employee may, without liability, disclose trade secrets. Such situations broadly include trade secrets disclosed (i) in confidence to a government official or attorney for the purpose of reporting or investigating a suspected violation of law, (ii) in a complaint or other document filed under seal in a lawsuit or other proceeding, or (iii) in a lawsuit alleging retaliation for reporting a suspected violation of law (if filed under seal). Although the DTSA notice requirement contains a carve-out for agreements entered into before May 2016, any new agreements entered into by employees that govern the use of trade secrets or confidential information (or that request employees to reaffirm their prior nondisclosure obligations) must comply with—and strictly adhere to the language of—the statute.

Next Steps

Employers should carefully scrutinize all employee agreements and policies and take note of those that contain provisions which, if read broadly, could be interpreted as imposing any of the following impermissible constraints:

- Restricting an employee's ability to *provide information* to a government agency about an employer's conduct
- Restricting an employee's ability to *participate in a government investigation* about an employer's conduct
- Restricting an employee's ability to *file a complaint* with a government agency about an employer's conduct
- Restricting an employee's ability to *testify* in a government proceeding about an employer's conduct
- Requiring an employee to *notify his or her employer* before filing a complaint or communicating with a government agency about an employer's conduct
- Requiring an employee to *affirm that he or she has not previously provided information* to a government agency

- Requiring an employee to *affirm that he or she has not previously engaged in protected activity*
- Requiring an employee to *disclaim any knowledge* that the employer has violated the law
- Requiring an employee to *waive his or her right* to receive a monetary award from a government-administered whistleblower award program for providing information to a government agency (or to agree to remit any portion of an award to the employer)
- Obligating an employee to not disclose confidential information *without notifying the employee of permitted trade secret disclosures* pursuant to the DTSA

If you have any of the impermissible constraints listed above in any of your agreements, we recommend that you work closely with counsel to revise all offending provisions to ensure compliance not only with the DTSA and SEC and OSHA guidance but also with guidance issued in recent years by the EEOC and the NLRB (seeking to curtail broad employee agreement language that could chill employees' exercise of their rights under the statutes enforced by these agencies). Any member of our Labor and Employment Group would be happy to assist you with this important review and update of your agreements.

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