

Let's Settle This Once and For All

Presented By:

Derek T. Rollins

**LABOR & EMPLOYMENT
LAW**

**FROM A DIFFERENT
ANGLE**

**Ogletree
Deakins**

Settlement

- General Standard
- Statutes
- Clauses
- MMSEA
- Recent Developments



General Standard

- Underlying Principles: Contract
 - Courts evaluate settlement agreements as contracts
 - Offer/acceptance
 - Consideration

- May be void if...
 - Duress, mistake, ambiguity, etc.

- Emphasis on

Statutes

- Title VII, Equal Pay Act, Rehabilitation Act, ADA, Section 1981, ERISA, WARN Act
 - Consent to release must be “knowing and voluntary”
 - When challenged, court will evaluate totality of the circumstances
 - With counsel, party is presumptively informed and willing, in the absence of fraud or duress

Statutes

- ADEA Claims
 - Knowing and voluntary test is set by the OWBPA (29 USC §626(f))
 - Statutory requirements supplemented by EEOC (29 CFR §1625.22)
 - Requires a higher burden
 - Rationale: older workers may have difficulty returning to work

Statutes

- ADEA Claims (cont'd)
 - OWBPA requirements
 - Understandable (plain language)
 - In writing
 - Not misleading
 - Advise to consult attorney
 - No waiver of future rights
 - Consideration
 - OWBPA Time periods
 - 21 days to consider
 - 7 days to revoke

Confidentiality Clauses

- *Coupons, Inc. v. Stottlemire (N.D. Cal.)*
 - Stottlemire sued for alleged hacking
 - Settled
 - Confidentiality agreement: “The terms of the settlement will remain confidential.”

Confidentiality Clauses

- *Coupons, Inc. v. Stottlemire (N.D. Cal.)*
 - Stottlemire blogged that the case was settled
 - Wired.com article published about the case: “Coupons Hacker Defeats DMCA Suit”
 - Quote: “Without being defended by an attorney, I defended myself in federal court against a company who solicited the services of two separate law firms, and in my opinion, I kicked their ass.”

Confidentiality Clauses

- Confidentiality – *Coupons, Inc. v. Stottlemire (N.D. Cal.)*
 - Court: no breach
 - Blog only disclosed that case would be dismissed with prejudice - public information
 - Wired.com article did not include terms of the agreement

Confidentiality Clauses

- *Snay v. Gulliver (Fl. Ct. App.)*
 - Age discrimination/retaliation for non-renewal
 - Parties settled
 - \$90k in wage loss
 - \$60k in attorneys' fees

Confidentiality Clauses

- *Snay v. Gulliver (Fl. Ct. App.)*
 - Confidentiality was central to agreement:

13. **Confidentiality.** . . [T]he plaintiff shall not either ***directly or indirectly***, disclose, discuss or communicate ***to any entity or person***, except his attorneys or other professional advisors or spouse any information whatsoever regarding ***the existence*** or terms of this Agreement. . . ***A breach . . . will result in disgorgement of the Plaintiffs portion of the settlement Payments.***

Confidentiality Clauses



“Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.”

Confidentiality Clauses

- *Snay v. Gulliver (Fl. Ct. App.)*
 - 10 day revocation period
 - Daughter posts on Facebook
 - Gulliver notifies Snay of breach 4 days in
 - No revocation
 - Depositions on what dad told when
 - Appellate court upheld; confidentiality agreement was “clear and unambiguous”

Recent Developments

- SEC Enforcement and Whistleblower Protections
 - Rule 21F-17

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.

Recent Developments

- *KBR, Inc. (4/6/15)*
 - Houston-based global technology and engineering firm
 - Required witnesses in internal investigations and interviews to sign confidentiality statements
 - Potential discipline and termination if discussed without prior company approval

Recent Developments

Due to the sensitive nature of this review, I understand that the information discussed during this interview is confidential. I further understand that the information that I provide will be protected and remain within the confines of this review and only authorized personnel will have access to the information contained in this report.

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the specific advance authorization of [the Company's] General Counsel.

I acknowledge and agree that I understand the unauthorized disclosure of this information could cause irreparable harm to the review and reflect adversely on [Company] as a company and/or [Company] performance in the Middle East Region and therefore, I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

Recent Developments

- SEC Office of the Whistleblower
 - SEC was “unaware of any instances in which (i) a KBR employee was in fact prevented from communicating directly with Commission Staff about potential securities law violations, or (ii) KBR took action to enforce the form confidentiality agreement or otherwise prevent such communications.”
 - Nevertheless, the SEC concluded that “the language found in the form confidentiality statement impedes such communications by prohibiting employees from discussing the substance of their interview without clearance from KBR's law department under penalty of disciplinary action including termination of employment.”

Recent Developments

- SEC Office of the Whistleblower
 - Confidentiality agreement did not make exception for right to communicate directly with the SEC
 - Therefore, “this language undermines the purpose of Section 21F Rule 21F-17(a), which is to encourage individuals to report to the Commission.”
 - Cease-and-desist Order declaring the language illegal
 - \$130,000 civil penalty
- Follows the EEOC: no charging party necessary, need only a “reasonable cause” for proceeding with challenge

Recent Developments

■ Approved language

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.

Recent Developments

- *BlueLinx Holdings, Inc. (8/10/16)*
 - Atlanta-based building products distributor
 - Severance agreements prohibited employees from sharing company's confidential information
 - No exemption for voluntary communications with the SEC or other agencies
 - Only permitted to do so when compelled by law and only after notifying the company

Recent Developments

Confidentiality:

Employee has not and in the future will not use or disclose to any third party Confidential Information, unless compelled by law and after notice to BlueLinx.

* * *

If the Employee has any question regarding what data or information would be considered by BlueLinx to be information subject to this provision, the Employee agrees to contact BlueLinx's Legal Department in writing for written clarification.

Waiver:

Employee further acknowledges and agrees that nothing in this Agreement prevents Employee from filing a charge 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 administrative agency if applicable law requires that Employee be permitted to do so; however, Employee understands and agrees that Employee is waiving the right to any monetary recovery in connection with any such complaint or charge that Employee may file with an administrative agency.

Recent Developments

■ SEC Office of the Whistleblower

- By including this language, the company unlawfully restricted its outgoing employees' ability to participate in the SEC's whistleblower program.
- “By requiring its departing employees to forego any monetary recovery in connection with providing information to the Commission, BlueLinx removed the critically important financial incentives that are intended to encourage persons to communicate directly with the Commission staff about possible securities law violations.”
- “BlueLinx forced those employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits.”

Recent Developments

- SEC Office of the Whistleblower
 - “Restrictions on the ability of employees to share confidential corporate information regarding possible securities law violations with the Commission and to accept financial awards for providing information to the Commission ... undermine the purpose of Section 21F, which is to ‘encourage individuals to report to the Commission,’ and violate Rule 21F-17(a) by impeding individuals from communicating directly with the Commission staff about possible securities law violations.”
 - Cease-and-desist Order
 - \$265,000 civil penalty
 - Revised agreement language

Recent Developments

■ Approved 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.

Recent Developments

- New OSHA policy guidelines
 - Concern that severance agreements restricted employee reporting
 - Introduced additional criteria used to evaluate settlement agreements
 - Follow the *BlueLinx* rationale
 - Extends beyond SEC to non-public companies

Recent Developments

■ OSHA's Whistleblower Statutes

Affordable Care Act	Federal Railroad Safety Act	Sarbanes-Oxley Act	Occupational Safety and Health Act
Consumer Product Safety Improvement Act	National Transit Systems Security Act	Solid Waste Disposal Act	Energy Reorganization Act
FDA Food Safety Modernization Act	Moving Ahead for Progress in the 21 st Century Act	Surface Transportation Assistance Act	Clean Air Act
Comprehensive Environmental Response, Compensation and Liability Act	Asbestos Hazard Emergency Response Act	Toxic Substances Control Act	Pipeline Safety Improvement Act
Consumer Financial Protection Act	International Safe Container Act	Aviation Investment and Reform Act for the 21 st Century	Safe Drinking Water Act
Seaman's Protection Act	Pipeline Safety Improvement Act		

Recent Developments

- New OSHA policy guidelines
 - No restriction on complainant's ability to assist the government
 - No requirement that complainant notify the employer first
 - No requirement that complainant “affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law.”
 - No waiver of right to receive full monetary award

Recent Developments

■ OSHA's suggested language

Nothing in this Agreement is intended to or shall prevent, impede or interfere with complainant's non-waivable right, without prior notice to Respondent, to provide information to the government, participate in investigations, file a complaint, testify in proceedings regarding Respondent's past or future conduct, or engage in any future activities protected under the whistleblower statutes administered by OSHA, or to receive and fully retain a monetary award from a government-administered whistleblower award program for providing information directly to a government agency.

Best Practices

- Review separation agreement language
 - Remove overbroad waiver of rights to recover
 - Tailor confidentiality provisions
 - Reconsider obligations to cooperate

- Get specific on employee rights
 - Right to file administrative charges
 - Right to participate in agency investigations
 - Rights under Section 7 of the NLRA

- Qualify/reference provisions by these rights
 - “Except as otherwise provided in paragraph X...”



Questions

Let's Settle This Once and For All

Presented By:

Dorothy D. Parson

**LABOR & EMPLOYMENT
LAW**

**FROM A DIFFERENT
ANGLE**

**Ogletree
Deakins**