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SEC Continues to Protect Against Use of Severance Agreements to Impede Whistleblowers

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The Securities and Exchange Commission (SEC) announced on December 19, 2016 that NeuStar Inc. (NeuStar), a Virginia-based technology company, agreed to pay a $180,000 penalty as a result of using severance agreements to unlawfully impede former employees from communicating with the SEC. As discussed in our previous client alert, Employers Beware: New Developments Require Changes in Employment Agreements, the SEC intends to continue to punish companies for violating rules meant to protect whistleblowers by including restrictions in employment related documents as a means of discouraging action by whistleblowers.

According to the SEC's order instituting cease and desist proceedings, NeuStar entered into voluntary severance agreements with employees beginning in 2008 and continuing through May 2015. The severance agreements included an impermissible non-disparagement clause in violation of SEC Rule 21F-17, which generally prohibits a company impeding an employee from communication with the SEC about securities law violations. Specifically, the NeuStar severance agreement provided the following restrictions with respect to communicating with the SEC:

[E]xcept as specifically authorized in writing by NeuStar or as may be required by law or legal process, I agree not to engage in any communication that disparages, denigrates, maligns or impugns NeuStar or its officers, directors, shareholders, investors, potential investors, partners, predecessors, subsidiaries, employees, consultants, attorneys, or any others associated with NeuStar, including but not limited to communications with accountants, investment bankers, … and regulators (**including but not limited to the Securities and Exchange Commission**, the Federal Communications Commission …) (emphasis added).

The severance agreements also included a forfeiture clause that required each employee to forfeit all but $100 of the severance compensation in the event the employee breached the non-disparagement clause. While the SEC admitted that it is not aware of any cases in which NeuStar took affirmative steps to enforce the non-disparagement provision, the SEC concluded that at least one former employee was impeded from communicating to the SEC.

As a result, NeuStar promptly revised its severance agreements after the SEC's investigation began. In addition to paying a $180,000 fine, NeuStar agreed to make "reasonable efforts" to contact former employees regarding the violation and provide them with a statement that the company does not prohibit former employees from communicating potential violations of law or regulation with the SEC.

Non-disparagement clauses provide employers with a viable option to protect themselves from negative statements by former employees which could adversely impact operations and customer relations. The SEC's continued focus on the enforcement of its rules regarding whistleblowers should prompt employers to audit their agreements. While non-disparagement provisions will and should remain as a key provision of separation agreements, employers should properly tailor these provisions so as to protect their interests to the fullest extent permitted by law while, at the same time, ensuring that such provisions do not violate laws intended to protect employees' rights.

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