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SEC: Review Severance Agreements For Unlawful Anti-Whistleblower Provisions

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On Wednesday, the U.S. Securities and Exchange Commission (SEC) settled with Atlanta-based BlueLinx Holdings over claims that the publicly traded building products distributor's severance agreements stifle protected whistleblower claims.

The SEC contends that the severance agreements prohibited the outgoing employees from participating in the SEC's whistleblower program. Specifically, the SEC alleged that the following confidentiality provisions in various BlueLinx pre-2013 severance agreements unlawfully "chilled" employees from coming forward to make whistleblower claims:

- Language that prohibited employees from disclosing to anyone BlueLinx confidential information learned while employed by the company, unless compelled to do so by law or legal process.
- Language that required employees to provide written notice to the company, or to obtain written consent from the company's legal department, prior to providing confidential information.

None of the confidentiality provisions contained a carve-out that permitted employees to provide information voluntarily to the SEC or other regulatory or law enforcement agencies.

With the 2011 passage of the Dodd-Frank Act, the SEC rules enabled whistleblowers to collect potentially 10% to 30% of a total award when providing non-public information that leads to action recovering at least $1 million. In 2013, BlueLinx amended its severance agreements to expressly permit employees to file a charge with the SEC, among other agencies (including the Equal Employment Opportunity Commission, the National Labor Relations Board and the Occupational Safety and Health Administration). However, the following language in the company's agreements prohibited employees from participating in the SEC's incentives:

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.

The SEC contends that this provision "forced employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits." Additionally, by requiring employees to forfeit any monetary relief if they do come forward, the company "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 agreed to pay a penalty of $265,000 and to include language in its severance agreements clarifying that the agreement does not limit employees from filing charges or communicating with any government agencies or limit the right to receive an award for information provided to any agencies.

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