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The OSC whistleblower program and employment agreements

Author: Jessica Bullock

On July 14, 2016, the Ontario Securities Commission (OSC) launched the Office of the Whistleblower, the first paid whistleblower program by a securities regulator in Canada. The OSC whistleblower program offers compensation of up to C$5 million to individuals who come forward with tips on violations of Ontario securities law that lead to an enforcement action. Anti-reprisal provisions have also been added to the *Securities Act* (Ontario) that allow the OSC to take enforcement action against employers who retaliate against whistleblowers and to nullify contractual provisions that preclude or purport to preclude whistleblowing activities by current or former employees. Given the relative infancy of the OSC whistleblower program, reporting issuers can seek guidance from the administration and enforcement of the Securities and Exchange Commission (SEC) whistleblower program, which is similar in form and substance to the OSC whistleblower program.

In early August the SEC brought two enforcement actions that reinforce its stated focus on protecting whistleblower rights.[1] In each instance, the companies included a provision in their severance agreements requiring the departing employee to waive any right to monetary recovery in any proceeding based on any communication by the departing employee to any government agency. This waiver was a condition of the receipt of any severance payments and benefits by the departing employee. Each company was found by the SEC to have violated SEC Rule 21F-17, which prohibits any person from taking any action to impede a whistleblower from communicating with the SEC about possible securities law violations.

In addition to the waiver of monetary recovery, the severance agreement for BlueLinx Holdings Inc. included a provision requiring the departing employee to notify the company's legal department in the event the employee believed he or she was required by law or legal process to disclose confidential information. Such a provision is common in severance agreements and raises the question of whether the SEC may find that such a notice requirement violates SEC Rule 21F-217 unless there is an express exclusion for whistleblowing. Although such confidentiality provisions are not intended to impede whistleblowing, the SEC may in future find that the practical effect of such provisions discourages whistleblowing by employees.

Canadian employment agreements, severance agreements, protective agreements and corporate codes of conduct frequently contain provisions requiring an employee (i) not to disclose any confidential information to any other person and/or (ii) to use confidential information solely for the purposes of the operation of the business. Ontario reporting issuers

may wish to review their current employment-related agreements to determine whether the confidentiality or other related provisions could be considered to discourage whistleblowing by employees in light of the newly implemented OSC whistleblower program. Depending on future administrative actions brought by the SEC and the OSC regarding the impact of confidentiality and other related provisions on whistleblowing activities, employers may wish to modify their existing employment-related agreements to include an express carve-out for whistleblowing by current and former employees.

[1] *In the Matter of BlueLinx Holdings Inc.* (August 10, 2016) [*BlueLinx*]; *In the Matter of Health Net, Inc.* (August 16, 2016).

If you have any questions regarding the foregoing, please contact Mindy Gilbert (416.367.6907) or Jessica Bullock (416.863.5503) in our Toronto office.