theguardian

Corporations cannot muzzle whistleblowers with secrecy agreements any longer

Stephen M Kohn

Restrictive non-disclosure agreements are nothing but corporate censorship. More needs to be done to crack down on them

Tuesday 7 April 2015 10.15 EDT

Corporations intent on blunting the whistleblower reforms embodied in the Dodd-Frank Act have long been muzzling their employees with non-disclosure agreements. Restrictive confidentiality agreements are nothing but corporate censorship - and it needs to end.

People working in big financial services industries need to be able to alert the public - and the courts - of questionable practices. That's why President Obama signed the Dodd-Frank Act into law in July 2010: it was designed to address the fraud that contributed to the massive financial meltdown experienced in Europe, the United States and the rest of the world.

It's thanks to whistleblowers that we learned about illegal activity at Enron, Bernie Madoff's offices and Swiss banks like UBS and HSBC, resulting in the collection of billions of dollars in sanctions. Any doubt as to the importance of whistleblower protections in exposing corporate fraud was laid to rest in 2012 by the US Attorney General Eric Holder who described them as "nothing short of profound".

No wonder that companies tried to undermine Dodd-Frank from the get go.

Numerous companies have developed broadly worded non-disclosure agreements that restrict the release of confidential information to the company's legal department as a condition of employment - though the exact number is unknown. When leaving the company, employees who have threatened to file a whistleblower claims were also forced to accept non-disclosure requirements as a condition of a settlement or before they could obtain a severance payment after they were fired or laid off.

These agreements explicitly prohibit employees from communicating with anyone, except attorneys hired by the company. Some go as far as explicitly barring communication with regulators, such as the Securities and Exchange Commission.

We have seen numerous companies require employees questioned by the government to secretly provide them with insights into the scope of the investigation. These employees can then be effectively turned into informers against the government itself.

What's even more Kafkaesque is that almost every non-disclosure agreement strictly prohibits the employee from telling the government of the existence of these secrecy agreements, and the restrictions placed upon them.

But that's about to change. On 1 April, the US Securities and Exchange Commission fined the mammoth defense contractor, KBR, Inc. (formerly Kellogg, Brown & Root), for requiring employees to sign restrictive non-disclosure agreements. It took the courage of a single whistleblower, Harry Barko, to get us to this point.

Barko reported extensive contracting fraud by KBR to regulators, to show how they unlawfully profited from lucrative contracts during the war in Iraq. But as he tried to hold the company accountable for its misconduct, he learned that witnesses at KBR who could support his claims were all required to sign secrecy agreements. Mr. Barko was the first to challenge their legality.

The action taken by the SEC is historic and the full brunt of its force has yet to be felt. This is the first time that a government regulatory agency has sanctioned a corporation for executing agreements that "chilled" an employee's ability to report financial crimes to the Justice Department, to Congress, to the SEC and to other regulatory agencies.

The SEC's action represents an important step forward, but we can't stop here. The agency must continue to spearhead its worldwide investigation to uncover and terminate a long-standing insidious corporate practices and financial fraud.

Topics