U.S. Department
of Transportation
**Federal Aviation
Administration**

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# Impact of Non-Disclosure and Confidentiality Covenants on Agency Investigations

This Notice provides certificate holders and other entities regulated by the Federal Aviation Administration guidance as to the Office of the Chief Counsel's position regarding the potential impact of "Non-Disclosure and Confidentiality" agreements and covenants on the Agency's conduct of its oversight and investigation of compliance with legal and regulatory requirements.

The Office of the Chief Counsel of the Federal Aviation Administration (FAA or Agency) understands employers may interpret "Non-Disclosure and Confidentiality" agreements and covenants to prohibit current and former employees from providing non-public business information known to the employee to the FAA in connection with the Agency's oversight and investigation of compliance with federal regulations. The Office of the Chief Counsel further understands employers may rely on such covenants to require employees to not discuss with the FAA any matters involving their employment outside of the presence of a representative of the employer, to inform the employer when the FAA contacts them, and to disclose to the employer the substance of the employee's discussion with the FAA.

I.

The FAA believes that the use of such non-disclosure and confidentiality agreements and covenants and related instructions are contrary to public policy because they adversely impact aviation safety by:

- Impeding the Agency's ability to fulfill its statutory mandate to ensure compliance with safety of flight regulations (49 U.S.C. §§ 44701(a); 44709(a));
- Effectively instructing employees not to confidentially report to the FAA alleged safety violations or otherwise confidentially communicate to the FAA safety-related information; and
- Interfering with and instructing employees to not confidentially cooperate in FAA investigations of possible non-compliance with safety regulations. *See*, *e.g.*, 49 U.S.C. §§ 40113(a), 44709(a), and 46101(a)(2).

The use of non-disclosure and confidentiality covenants and related instructions to preclude the employee from engaging in confidential communication with the FAA runs afoul of well-established legal principles, recognized by Federal courts and regulatory agencies. Federal courts have held that confidentiality and non-disclosure covenants may inhibit an employee's ability to provide information to governmental agencies empowered to ensure compliance with federal mandates and impede an agency's lawful investigations of potential non-compliance.

For example, the Equal Employment Opportunity Commission successfully challenged a private employer's use of confidentiality agreements or non-disclosure clauses to interfere with an

employee's right to participate in the EEO process. *See, e.g., EEOC v. Baker & Taylor, Inc.*, No. 13-cv-03729, documents #1 and 14 (N.D. Ill. May 20, 2013) (requiring alteration of an employer's agreement to include language ensuring employees retain the right to communicate with the EEOC and comparable state and local agencies). Congress also expressly incorporated this principle into the text of the Older Workers Benefit Protection Act. *See* 29 U.S.C. § 626(f)(4) ("No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.").

Similarly, the National Labor Relations Board invalidated the use of non-disclosure and confidentiality clauses in employee handbooks and other agreements that lack a specific legitimate business objective, finding that such agreements may constitute an unfair labor practice under Sections 7 and 8(a)(1) of the National Labor Relations Act. *See Quicken Loans, Inc. and Garza*, 361 N.L.R.B. No. 94 (Nov. 3, 2014); *Hoot Winc, LLC and Ontario Wings, LLC D/B/A Hooters of Ontario Mills, Joint Employers*, 2014 WL 2086220 (Oct. 22, 2014).

These same principles have been applied to protect current or former employees' ability to share information with federal regulators to support investigation of possible non-compliance with the provisions of the Sarbanes-Oxley Act. Thus, the United States Securities and Exchange Commission adopted Rule 21F-17 (17 C.F.R. § 240.21F-17), which prohibits a person from impeding communication with SEC staff about possible securities law violations – including by enforcing, or threatening to enforce, a confidentiality agreement.

In adopting Rule 21F-17, the SEC expressly recognized that "efforts to impede an individual's direct communications with Commission staff about a possible securities law violation would conflict with the statutory purpose of encouraging individuals to report to the Commission." 76 Fed. Reg. 34300. Accordingly, the SEC concluded that "an attempt to enforce a confidentiality agreement against an individual to prevent his or her communications with Commission staff about a possible securities law violation could inhibit those communications even when such an agreement would be legally unenforceable, and would undermine the effectiveness of the countervailing incentives that Congress established to encourage individuals to disclose possible violations to the Commission." *Id.* Notably, in the preamble to Final Rule 21F-17, the SEC affirmatively cites the decision in *Chambers v. Capital Cities/ABC*, 159 F.R.D. 441, 444 (S.D.N.Y. Jan. 17, 1995):

> [A]greements obtained by employers requiring former employees to remain silent about . . . potentially illegal practices when approached by others can be harmful to the public's ability to rein in improper behavior, and in some contexts [the] ability of the United States to police violations of its laws. . . . [I]t is against public policy for parties to agree not to reveal, at least in limited contexts . . . facts relating to alleged or potential violations of [Federal] laws.

*Chambers* in turn cites the decision in *McGrane v. Reader's Digest Ass'n, Inc.*, 822 F. Supp. 1044, 1046 (S.D.N.Y. May 27, 1993), which notes: "Courts are increasingly reluctant to enforce

secrecy arrangements where matters of substantial concern to the public—as distinct from trade secrets or other legitimately confidential information—may be involved."

The National Highway Transportation Safety Administration of the U.S. Department of Transportation (NHTSA) also has made clear it is unlawful to use confidentiality and non-disclosure covenants to impede oversight and enforcement regulatory obligations. The Communications Director of NHTSA issued the following statement to media, quoted in a number of articles. *See, e.g.*, http://www.nytimes.com/2016/06/10/business/tesla-model-s-nhtsa-suspension-failure.html?_r=0.

> NHTSA learned of Tesla's troublesome nondisclosure agreement last month. The agency immediately informed Tesla that any language implying that consumers should not contact the agency regarding safety concerns is unacceptable, and NHTSA expects Tesla to eliminate any such language. Tesla representatives told NHTSA that it was not their intention to dissuade consumers from contacting the agency. NHTSA always encourages vehicle owners concerned about potential safety defects to contact the agency by filing a vehicle safety complaint at SaferCar.gov.

Accordingly, non-disclosure agreements and covenants should be clear that employees retain the right and confidentiality to communicate with the FAA concerning investigations into possible non-compliance.

II.

Moreover, contractually obligating an employee not to disclose safety-related information to the FAA conflicts with the spirit and purpose of the FAA's voluntary disclosure programs, of which many regulated entities are participants. The FAA established voluntary disclosure programs to promote the free-flow of safety-related information to the FAA while the use of confidentiality and non-disclosure covenants inhibits and impedes the free and confidential flow of safety-related information to the FAA. The cornerstone of the FAA's voluntary disclosure programs is to encourage employees to voluntarily report safety information that may be critical to identifying potential precursors to accidents.

III.

To the extent instructions to employees to not discuss any matters involving their employment and to disclose to their employer the substance of the employees' discussions with the FAA are motivated by the employer's desire to protect proprietary business information, those concerns are misplaced. The FAA follows well-established precedent, and longstanding procedures are in place to protect the sensitive and proprietary business information of a broad range of regulated entities and individuals. *See, e.g.*, 5 U.S.C. § 552(b)(4), 14 C.F.R. § 413.9, FAA Order 1270.1.

An employer's instructions to employees also are not justified by concerns that the employer will be bound by the statements its employees make to the FAA. Well-established legal principles distinguish the treatment of statements of employees generally from statements made by higher-

level management and corporate officials whose statements may be construed as admissions that bind the company. *See generally, Davila v. Corporation De Puerto Rico Para La Diffusion Publica*, 498 F.3d 9, 17 (1st Cir. 2007) (noting that employees must be of sufficient stature within the company in order for their statements to be binding).

V.

Best practice is for any non-disclosure and confidentiality agreement or covenant to expressly incorporate and advise employees that no term or condition pertaining to the employee's obligation to maintain the confidentiality of non-public business information in any way requires the employee to obtain prior permission or provide notice to the employer, or otherwise prohibits or restricts the employee from confidentially disclosing such business information to the FAA or any federal regulatory agency, law enforcement authority, or legislative body for the purpose of assisting such agency, authority, or body in the performance of their oversight and investigative duties.

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