



Citing SEC's Novel 'Pretaliation' Action Law Firm Asks United to Amend Worker Pact

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By Yin Wilczek

April 3 (BNA) -- A law firm that represents whistle-blowers April 3 asked United Airlines to revise a confidentiality agreement that the firm says "gags" employees who participate in internal investigations.

In a letter, Katz, Marshall & Banks LLP said it was unlawful for the airline to require employees involved in internal investigations to agree not to discuss the investigation or any information they provide during the investigation with anyone other than United management, their union representatives and their legal counsel.

Employees who violate the agreement face discipline up to and including termination, KMB noted in its letter.

Represents Former Flight Attendants

The law firm represents 13 former United flight attendants who were fired for refusing to work in July on a flight from San Francisco to Hong Kong after the pilot discovered the words "BYE BYE" in large letters on the plane's fuselage.

The workers have filed a retaliation complaint against United under the federal aviation whistle-blower protection law. The Occupational Safety and Health Administration is investigating the complaint.

United spokeswoman Mary Ryan told Bloomberg BNA that she "cannot comment further on the details of this pending litigation, but we intend to defend United against it vigorously."

KMB's letter comes two days after the Securities and Exchange Commission announced a settled administrative action against Kellogg Brown & Root Inc. for impeding whistle-blower activity through a confidentiality agreement (13 CARE 711, 4/3/15).

KMB partner David Marshall told BBNA that Sean McKessy, chief of the SEC's Whistleblower Office, was copied on the letter to United.

The law firm also said it has asked the Federal Aviation Administration to review similar agreements used by other airlines in internal investigations following recent aviation disasters.

More Agreements to Come?

In its letter, the law firm told United that its confidentiality terms, when "used in an internal investigation focusing on United's compliance with federal securities laws, or even in an investigation of other conduct that might implicate securities laws due to United's representations to its shareholders about its business practices," would "clearly impede a witness in communicating with the SEC about perceived securities violations."

"For this reason alone the company should immediately revise its confidentiality agreement, as KBR agreed to do this week in settlement of the SEC's enforcement action," the firm said.

Marshall told BBNA that he suspects more employees and their counsel will be providing copies of similar agreements to the SEC now that the commission has taken action on one of them.

Airline Safety

The attorney noted that neither the FAA nor OSHA have language in their regulations that mirror 1934 Securities Exchange Act Rule 21F-17(a), which states that employers may not "take any action to impede" their workers from contacting the SEC about possible securities violations, "including enforcing, or threatening to enforce, a confidentiality agreement" with respect to the worker's communication with the agency.

However, the FAA and OSHA can take action against employers for retaliating against workers who contact the agencies about aviation safety issues or about unlawful retaliation, he said.

Marshall urged the FAA to use its rulemaking powers to promulgate regulations like Rule 21F-17(a). He also suggested that the FAA could enhance air safety by making "absolutely sure" that the airlines do not "in any way engender among their employees the feeling that they cannot freely discuss their concerns, or raise those concerns with various government agencies or with Congress."

"There is no reason whatsoever that the FAA should not require airlines to revise such agreements in the way KBR did this week in settlement of the SEC action," he said. "That, combined with aggressive enforcement of the prohibitions on retaliation against airline employees for speaking out or even refusing to fly when appropriate, would certainly make for safer skies."

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For More Information

The letter to United is available at <http://op.bna.com/car.nsf/r?Open=ywik-9v8q8l>.

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