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By Electronic Mail and First-Class Mail
April 3, 2015

Mr. Michael P. Huerta, Administrator
U.S. Department of Transportation
Federal Aviation Administration
800 Independence Ave., S.W.
Washington, DC 20591

Re: Airlines' Use of Confidentiality Agreements in Internal Investigations

Dear Mr. Huerta:

Our law firm represents airline employees in complaints of unlawful retaliation under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, 49 U.S.C. § 42121 ("AIR 21"). In the course of our representation of a group of United Airlines employees, we became aware that United requires employees who learn of conditions that they believe violate Federal Aviation Administration ("FAA") rules and regulations, and who provide information as witnesses in internal United investigations, to sign confidentiality agreements that discourage them from reporting their concerns to the FAA and other government agencies. We believe that it is likely that United is not alone among airlines in using such confidentiality agreements.

Particularly in light of recent aviation disasters, we think it is imperative that the FAA conduct a comprehensive review to determine whether the use of such agreements is an industry practice, and take appropriate enforcement action if this proves to be the case. In the meantime, we call on the FAA to immediately issue clear and decisive directives to airlines to discontinue the use of confidentiality agreements that impede the ability of employees to have an open and risk-free avenue of communication with the FAA, TSA, and all other federal agencies, regulators and members of Congress. As noted below, the Securities and Exchange Commission ("SEC") took enforcement action this week against a company that, like United, impeded employees' ability to speak to governmental agencies, upon threat of termination. The FAA should do no less.

We currently represent thirteen United Airlines flight attendants whom the company fired last year for refusing to work a flight from San Francisco to Hong Kong in the presence of what they reasonably believed to be an unresolved security threat. Shortly before departure on July 14, 2014, a pilot discovered the words "BYE BYE" in large letters and two menacing faces drawn high up on the fuselage of a Boeing 747 loaded with 300 passengers. Immediately after the thirteen flight attendants refused to fly unless the airline deplaned the passengers and conducted a full search of the aircraft, United management suspended them and later terminated their employment. The flight attendants filed a complaint of retaliation against United under AIR 21, and that

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complaint is under investigation by the U.S. Occupational Safety and Health Administration (“OSHA”), which is charged with investigating whistleblower-retaliation complaints under some 23 federal statutes.¹

In our representation of these flight attendants, we learned that United required each of our clients, and apparently all other employees who provide information in the context of internal investigations, to sign a confidentiality agreement prohibiting them from disclosing information related to the investigation.² We are writing you because we believe that United’s confidentiality agreement, and any similar agreements that other airlines impose on their employees during internal investigations, pose a serious threat to the FAA’s ability to enforce regulations that ensure the safety and security of the flying public and airline flight crews.

This week’s SEC enforcement action focused on KBR, Inc.’s practice of requiring employees who participated in internal investigations to sign a confidentiality agreement that obligated them as follows:

I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.³

The SEC found that this language in KBR’s confidentiality agreement violated SEC Rule 21F-17, which provides in relevant part:

- (a) No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.

¹ See [OSHA Complaint](http://www.kmblegal.com/wp-content/uploads/2015/04/13-Flight-Attendants-OSHA-Charge-Jan-7-2015.pdf) (Jan. 6, 2015), available at <http://www.kmblegal.com/wp-content/uploads/2015/04/13-Flight-Attendants-OSHA-Charge-Jan-7-2015.pdf>.

² See [United Airlines Acknowledgment of Confidentiality & No Retaliation Statement](http://www.kmblegal.com/wp-content/uploads/2015/04/United-Airlines-Confidentiality-Agreement.pdf) (“United Confidentiality Agreement”) (signed by flight attendant Grace Ka Wai Lam July 15, 2014), available at <http://www.kmblegal.com/wp-content/uploads/2015/04/United-Airlines-Confidentiality-Agreement.pdf> (copy enclosed).

³ [SEC Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order](http://www.sec.gov/litigation/admin/2015/34-74619.pdf) (April 1, 2015) (“SEC Order”), ¶ 6, available at <http://www.sec.gov/litigation/admin/2015/34-74619.pdf>.

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Although the SEC was unaware of any instances in which a KBR employee had been prevented from communicating with the SEC regarding potential securities violations, it found nonetheless that the language excerpted above “impedes such communications by prohibiting employees from discussing the substance of their interview without clearance from KBR’s law department under penalty of disciplinary action including termination of employment.”⁴ In settlement of the SEC enforcement action, KBR agreed this week to revise its confidentiality agreement to make clear that the company’s employees have the right to “report[] possible violations of federal law or regulation to any governmental agency,” and to do so without prior authorization from KBR.⁵

The pertinent language in the confidentiality agreement that United requires employees to sign when giving interviews in internal investigation has the same effect as the language in KBR’s agreement that the SEC found to be unlawful. United’s agreement requires witnesses to agree to the following:

I further understand that I am not to discuss the investigation or the information that I have provided during this investigation with anyone other than the members of management in charge of United’s investigation, my union representative, and my own personal legal counsel, unless I receive written permission to do so by United. ... If I fail to maintain the confidentiality set forth above, I can be subject to discipline up to and including the termination of my employment.⁶

⁴ *Id.*, ¶ 7.

⁵ KBR agreed to include the following language in its agreement:

Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

SEC Order, ¶ 8.

⁶ *See* United Agreement, *supra* note 2.

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United's confidentiality agreement is particularly troubling because it not only impedes employees in communicating with the SEC when appropriate, but it also prevents them from providing information to the federal agencies that enforce the aviation laws and regulations that are critical to the safety and security of the flying public and airline flight crews. The plain language of the agreement sends a clear message to employees: you may lose your job if you share any information discussed in the investigation with anyone other than management, your union, or your lawyer – including the FAA, the Transportation Security Administration (“TSA”) or OSHA.

The effect of United's confidentiality agreement became apparent in the case of the thirteen flight attendants whom we represent, and whom United fired for refusing to fly in the face of a potentially catastrophic security threat that they believed the airline had not adequately addressed. After United cancelled the flight and suspended them, and *even after the company terminated their employment*, the flight attendants were deeply concerned that having signed the agreement that United required them to sign, they could not discuss the matter with anyone other than management and union representatives. They were extremely reluctant to share information among themselves, with other potential witnesses, with lawyers like us whom they were interviewing for possible representation, and even with OSHA, the primary agency that investigates and prosecutes violations of whistleblower-protection laws in the aviation industry. Some of the flight attendants were concerned that the agreement United had forced them to sign effectively prohibited them from challenging their termination outside of the union grievance procedure.

This type of chilling effect on employee communications would be problematic at any time, but it is especially jarring at a time when recent aviation disasters have focused attention on the need for greater transparency in the industry, including with regard to airline employees' right to speak out about perceived security or safety issues without fear of retaliation. It is absolutely critical that no airline employee ever believe that he or she is prohibited from communicating with the FAA, TSA, OSHA or other government agencies. We have written to United today insisting that the airline revise the confidentiality agreement it uses in internal company investigations, and any other confidentiality agreements that it imposes on its 87,000 employees, along the lines that KBR agreed to do in settlement of this week's SEC enforcement action.

As attorneys who represent whistleblowers and other employees in disputes with their employers, we think it likely that United is not the only airline that uses confidentiality agreements that discourage employees from reporting potential violations of aviation safety and security regulations to the FAA and other government agencies. We urge the FAA to investigate the use of such agreements as a possible industry practice and to take decisive steps to require airlines to cease the use of such agreements at once. This is critically necessary to

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ensure that all employees have an open and risk-free avenue of communication with the FAA, TSA, and all other federal agencies, regulators and members of Congress.

Sincerely,



David J. Marshall



Debra S. Katz

Attachments

cc: Rachel B. Cowen, Esq.
Mr. Sean McKessy, Chief, SEC Office of the Whistleblower
Dr. David Michaels, Assistant Secretary of Labor for OSHA
Ms. Sara Nelson, Int'l President, Assoc. of Flight Attendants-CWA



ACKNOWLEDGMENT OF CONFIDENTIALITY & NO RETALIATION
STATEMENT

By signing below, I hereby acknowledge that I have been requested to provide information during the course of a confidential investigation being conducted by United Airlines. I also acknowledge that I have been instructed to maintain the highest level of confidentiality with respect to the investigation and the information I have provided during the investigation. In particular, I understand and agree that I must be truthful in the information that I am providing. I further understand that I am not to discuss the investigation or the information that I have provided during this investigation with anyone other than the members of management in charge of United's investigation, my union representative, and my own personal legal counsel, unless I receive written permission to do so by United.

I further understand that consistent with United's Working Together Guidelines, retaliation is specifically prohibited against anyone filing a complaint or against anyone participating in anyway in the investigation.

If I fail to maintain the confidentiality set forth above, I can be subject to discipline up to and including the termination of my employment.



Employee Signature

LAM, KA WAI

Printed Name

Employee ID

7/15/14

Date

EIM Number:

United Airlines
1200 E. Algonquin Road, WH0116
Elk Grove Village, IL 60007