

Reducing the Risk of Whistleblower Complaints

by Mark E. Schreiber and David R. Marshall

Whistleblowers come in all stripes, from disgruntled present or former employees or customers to high-level executives trying to do what they see as the right thing. Sometimes their complaints have merit or at least partially so, and other times they are based on inappropriate or venal motives, exaggerating events or manipulating facts to the author's advantage.

Whether they concern securities fraud, sexual harassment or other contentious areas, addressing whistleblower complaints has proven especially demanding for companies. Some laws mandate procedures to allow for these complaints, others require investigation of certain types of claims and still others protect the whistleblower from retaliation.

As this has become increasingly prevalent, best practices have emerged for how to handle the whistleblower, the substance of the complaints and the risks that go with them.

These range from establishing clear complaint channels, basic internal investigation procedures, and an investigatory team and plan, to developing appropriate educational and training programs for managers and compliance officers in this area. Executives need to be trained in how to deal with employees who make reports of possible wrongdoing and how to handle sensitive situations that might give rise to whistleblowing claims.

Minimizing the risk of liability from retaliation claims by alleged whistleblowers can be achieved by a proactive approach on the part of corporate management that anticipates the receipt of reports from actual or self-styled whistleblowers, establishes well-defined and well-publicized procedures for receiving and investigating such reports, identifies the appropriate corporate executives and advisors to evaluate the results of the investigation, determines whether and what corrective actions are necessary, and creates a protocol for protecting employee complainants and witnesses from possible retaliation.

Reporting Complaints

To encourage employees to report corporate fraud and other transgressions, federal and state statutes protect employees who raise concerns about various types of workplace misconduct.

For example, Sarbanes-Oxley requires publicly traded companies in the United States to implement policies and procedures for receiving reports from employees regarding "questionable accounting or auditing matters." Sarbanes-Oxley grants extensive protections to employees who report to their supervisors, Congress or any federal agency conduct that the employee reasonably believes violates certain federal fraud statutes, any SEC rule or any regulation concerning fraud against shareholders.

Substantial penalties may be imposed for violations of Sarbanes-Oxley's whistleblower protection rules, including reinstatement, backpay with interest, special damages, attorneys' fees and litigation costs, as well as criminal sanctions. Liability may be imposed not only for the actions of the company itself, but also for retaliatory acts by individual

officers and employees, the company's contractors, subcontractors or other agents.

Companies have established a variety of whistleblowing reporting mechanisms, including drop-boxes, hotlines and e-mail or web-based reporting vehicles, both anonymous or self-identified, and often administered by third-party service providers. Reporting categories, complaint tracking, responsible management recipients, other internal company routing, progress monitoring, investigative follow-up, case result and closure, and even relevant data archiving are part of current service provider offerings. These are all tailored to the corporation's particular selections and practices, both in the United States and in foreign countries. Ethics and compliance officers now routinely receive training on establishing, monitoring and executing whistleblower compliance programs.

Conducting the Investigation

Once a complaint is received and routed, the next stage is the internal investigation, its scope and the process surrounding it. A well-conducted investigation is an essential component of an employer's efforts to protect itself and its employees from the effects of purported wrongdoing by co-workers and third parties. Conversely, a flawed investigation may not only fail to achieve its protective purpose, but also impair the defense of the employer against claims by purported whistleblowers, government investigators or others.

The statutes that require employers to investigate allegations of employee misconduct do not dictate who should perform the investigation, what steps to take, how quickly to conduct and conclude the investigation, or what response is necessary or appropriate. These issues are left to the employer's discretion, which in turn allows the employer to tailor the investigation to the nature of the complaint and to adjust for other circumstances.

Certain core principles can guide the formulation of an effective investigation process. It should:

- discover and preserve relevant facts and documents
- compile the product of the investigation in a logical, complete and neutral fashion
- subject the results of the investigation to careful and thorough evaluation by management and/or counsel with the competence to make determinations regarding credibility and ultimate issues of fact
- produce informed and fair conclusions by those with authority to decide what, if any, corrective action should be taken

Elements to consider in designing and implementing an effective investigatory process include:

Timing. An investigation should be done as soon as possible. The scope and timing of the investigation will necessarily vary with the nature of the complaint, its seriousness and breadth, and the number and location of possible witnesses. Keep in mind that the complainant's perception of delay is often cited as the reason for contacting a plaintiff's lawyer, a government agency or the media.

Consultation with counsel. The employer must decide whether or not to engage legal

counsel to perform some or all of the steps in the investigation. Sometimes the employer will handle the complaint in-house, or even change its mind after the process becomes too problematic or conflicts arise. Appropriate use of attorneys, particularly outside counsel, does enable the employer to take full advantage of the attorney-client privilege, whereas an investigation conducted by in-house staff may not.

Notification to the board of directors or the audit committee. With certain types of complaints, Sarbanes-Oxley may require the employer to notify the audit committee of the board. Private companies may have similar internal reporting to the board or one or more of its committees. In some instances the investigation may be conducted by or for the board and reporting may be to a board committee, not to management.

Involvement of human resources. Key human resources officials should be informed of the existence of the complaint as soon as possible, and they will have an important role. They may or may not be involved in the internal investigation itself. These officials can, however, help ensure that no adverse actions are taken with respect to the terms and conditions of the employment of the complainant or any witness, except those that are supported by a legitimate business reason.

Creating an investigative plan. Deciding who the investigators are and who the team reports to is a critical step. Next comes deciding who to interview and in what order. Relevant documents are then identified and located. The employer should make a careful and thorough map of the specific allegations in the complaint, tying it to possible witnesses and documents. Sometimes the complainant is available to be interviewed; other times the complainant may be anonymous or entirely unavailable.

Interview preparation. The investigator should prepare an outline of topics and script to be covered in each interview. The investigator should prepare in advance and deliver in each interview a uniform, standard opening that describes who the investigators are, the general purpose of the interview, and any disclosure or disclaimers that must be given about, for example, the attorney-client relationship, limits on confidentiality, the sharing of information obtained in the interview, nonretaliation or the interviewee's right to union representation (if applicable.)

Making and communicating a decision. The employer must make a decision about what happened and what action should be taken (e.g., discipline offenders, notify regulatory agencies, correct defective procedures, remedy any harm, implement retraining or clear the accused). Although not every investigation will produce clear and convincing evidence of misconduct or innocence, one must nevertheless make a decision as to whether any of the allegations have sufficient merit to require corrective action.

Protecting Privacy

When a whistleblower complaint is made, the employer must be mindful of the need to minimize unnecessary disclosure to the workforce while actively investigating the employee's concerns in an expeditious and thorough manner. The employer cannot guarantee complete anonymity to the employee making the complaint (unless, of course, the complaint itself was made anonymously), or any other person interviewed as part of the investigation.

At the same time, the matter should be kept as confidential as possible and should not be disclosed beyond what is reasonably necessary. All witnesses should be advised to maintain appropriate confidentiality and not gossip or disclose questions asked of other

co-workers. Of course, the employer should also make clear that it will not tolerate any retaliation against anyone who participates in the investigation.

Logistical considerations for conducting interviews are equally important. This means careful practical arrangements and thought given to a number of basic items, including:

- Where will the interviews be held?
- Who might see or hear interviewees coming and going?
- Who else will be present at interviews?
- Which supervisors need to be told about employee time off for interviews, where post-interview discussions take place and the like?

With the emergence of new rules about data protection in whistleblowing protocols, particularly in the European Union, employers face an even greater challenge in conducting lawful and effective investigations. In those countries, U.S. public companies are still required have to a Sarbanes-Oxley whistleblower program and code of ethics in place. However, the EU now has whistleblower guidelines and some countries, like France, have special online programs for whistleblower program approvals, which set detailed operating parameters.

EU data protection laws also put limits on internal disclosures of whistleblower complaints and mandate immediate disclosure of certain details of the complaint to the accused person, unless certain exceptions apply. The hotline report or investigation details, if containing personal information, cannot be transmitted to corporate headquarters in the United States without particular precautions, for example, consent of the individual(s), data protection agreements or enrollment in the U.S. Safe Harbor program.

Also under EU guidelines, once the complaint is lodged, the incriminated person is to be notified of the details, provided that the identity of the whistleblower must not be so disclosed. This notice to the accused can be delayed for evidence preservation purposes, such as backing up the computer, mirroring the hard drive or other procedures. This individual also has the right to correct or contest the data, if inaccurate, and has what are known as "access" rights to know what data is held about him or her in the process.

Preventive Measures

Because of the variety of state and federal statutes that protect potential whistleblowers, few corporations are free from liability for claims by employees who allege that they are victims of retaliation for whistleblowing. For global corporations, the liability risk is significantly greater in light of recent case law indicating that Sarbanes-Oxley's whistleblower protection provisions can reach across international boundaries.

To reduce the risk associated with whistleblower claims, companies should take the following preventive measures in addition to developing an effective process for receiving, investigating and evaluating whistleblower complaints:

- All subsidiaries, foreign and domestic, should have well-publicized and readily accessible policies and procedures for reporting corporate wrongdoing. Care should be taken to tailor the procedures to the requirements of foreign jurisdictions, particularly where those jurisdictions regulate or prohibit anonymous

complaints.

- Complaint procedures should expressly prohibit retaliation against individuals who report possible wrongdoing. At the same time, separate procedures should be created for reporting retaliation complaints. The complaint procedure should specify the individuals to whom employees can report retaliation complaints and provide employees with alternative channels for reporting.
- Employers should develop training programs to educate officers, directors, managers and all other employees as to complaint policies and procedures, as well as the prohibitions against retaliation under Sarbanes-Oxley, and educate the personnel who handle these complaints to the possibility of extraterritorial applications of Sarbanes-Oxley and its regulations.
- Managers should focus on documenting performance deficiencies in the ordinary course of business so that a documented record exists prior to an employee's engaging in whistleblowing activity.

There is no "one size fits all" in handling whistleblower complaints, but following necessary precautions will help manage the complaint process and reduce the risks accordingly.

***Mark E. Schreiber and David R. Marshall** are partners in the labor and employment group of the 500-attorney national law firm of **Edwards Angell Palmer & Dodge**. Mark E. Schreiber can be contacted at mschreiber@eapdlaw.com. David R. Marshall can be contacted at dmarshall@eapdlaw.com. The authors would like to acknowledge the efforts of associate Robert Young who contributed to this article.*

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