Molehills from Mountains:
How to Utilize Effective Internal Reporting Systems to Prevent the Escalation of Internal Corporate Disputes

Moderator:
Sarah Frazier, Berg & Androphy, Houston, TX

Speakers:
Yvette Ostolaza, Sidley Austin LLP, Dallas, TX
Tracy Preston, Neiman Marcus, Dallas, TX
Joyce Slocum, Texas Public Radio, San Antonio, TX

February 15, 2019
ABA Corporate Counsel Conference, San Antonio, Texas
Agenda

1. Myths about whistleblowers
2. Crisis management - How can we affect whether employees seek help from outside the company?
3. Prevention is key: Good compliance culture
4. #Me too: what is new from a lawyer’s perspective
5. How NOT to do it: examples of bad compliance culture from case law and the news
Myths about whistleblowers
5 Myths About Whistleblowers

(1) “Whistleblowers are motivated primarily by greed or because they have an axe to grind
➤ Whistleblowers most often feel they have no choice
➤ License protection also a motivation
➤ Matters of conscience

(2) Most whistleblowers bypass the compliance program in order to collect a reward.”
➤ According to a national 2013 survey by the Ethics Resource Center, only 8% of corporate employees who report wrongdoing went outside right off the bat

(3) Whistleblowers are often reporting on rogue activity, not concerted fraud
➤ In whistleblower suits, rarely do employees have incentives to commit fraud different from the company’s - these are not “frolics”

(4) Whistleblowers reap a windfall after little effort
➤ Retaliation
➤ Divorce & family issues
➤ Financial hardship
➤ Emotional hardship, suicide and ill health
➤ “Windfall” is after government takes more than 80%, attorney takes share for years of work, taxes.

(5) there’s little a company can do on the front end to prevent whistleblowers, due to confidentiality concerns, except maybe offer severance
➤ Filing suit is a last resort for most: the company’s actions make all the difference
Crisis management: How can we affect whether employees seek help from outside the company?
Crisis Management - when an employee raises a complaint

(1) transparency: It’s important to give feedback to the employee / whistleblower

▶ Be as transparent as possible - even in writing
▶ In delivering feedback, know your people. NPR example
  ▶ If you don’t respond back to the whistleblower, she assumes no change, concealment
  ▶ If conduct reported is OK, explain why

(2) Protect, don’t punish those who report misconduct

▶ Hotlines with fake anonymity
▶ Contested unemployment claims & bad recommendations
Crisis management: challenges

(1) *Generational*

- Younger employees look to peers, not to superiors or formal systems
Crisis management: challenges

(2) Inevitability of public disclosure

- Public view of a company
Crisis management challenges

(3) Confidentiality restrictions

- Restrictions on releases make employees hesitant to speak freely

(4) Retaliation by employees around the complaining employee
Prevention is key: Good compliance culture
Prevention through corporate culture - foundational

- A good compliance program and responsible culture mean:
  - Lead by example
  - No fake compliance departments or fake anonymous hotlines
  - No quiet divergence between policy and practice
  - Real monitoring, especially where you already gather the data
- Be a fair employer
  - Sexual harassment, family leave, lookism, sweatshop requirements, video monitoring (infidelity example)
- Set the tone at the top with an Employee Relations Committee of the Board
  - Demonstrate that the company means it when it says, “Our people are our most important resource.”
Prevention through corporate culture

(1) Establishing a corporate culture where people feel safe, heard, protected even before an event occurs

- Corporate handling of a totally different issue may set a tone that sours employees before event happens

(2) Transparency has to be norm, not something you start when a complaint arises

(3) Watch out for populations within a company that are more vulnerable

- non-English speakers
- in a global company, cultural divides and different communication styles
- Temporary employees
- Employees who travel together
- Groups who are more isolated by virtue of hours or locations

(4) People need to be familiar with compliance procedures and compliance officers

- Educating employees about policies, laws
- Making your compliance officers a familiar presence, approachable

(5) Importance of multiple pathways to Compliance - something for everyone

- Employees need to feel comfortable with the individual / path through which they report
  - Consider a confidential tip line as one path
  - Trained peer reporting paths can be helpful
Prevention through corporate culture

(6) *Conduct an anonymous culture survey*
- Take the results seriously
- Be prepared to act on what is learned
- Communicate results and actions

(7) *Establish and widely disseminate policies*
- Harassment
- Personal relationships affecting the workplace
- Use of alcohol at company events

(8) *Create a calendar of required training*
- Anti-Harassment and Anti-Bullying
- Unconscious Bias
- Responsibilities of Managers
#ME TOO

WHAT IS NEW from a lawyer’s perspective
#Me too: How these developments impacted handling issues from a lawyer’s perspective

(1) **Sexual harassment is taken seriously from outset**
- These allegations are taken all the way up to the board now

(2) **Social Media**
- A “callout” may occur in quasi-vigilante style - not within formal procedures
- Heavy influence by peers, above supervisors or policies
#Me Too - I’m with them - example of informal peer contact

**OUR MISSION:**
Reduce work-related sexual misconduct by privately connecting victims who have the same perpetrator, empowering them to take coordinated action.

**Our Approach —**

Together, we have the power to reduce sexual misconduct. Here’s our 5 step process.

1. We authenticate you are who you say you are.
2. You privately identify the perpetrator.
3. You privately characterize your experience(s) with that person.
4. We and you wait for critical mass to build around the perpetrator.
5. If critical mass occurs, we share email addresses between you and others with the same perpetrator.
How NOT To Do It: Examples of bad compliance culture from case law and the news
Example: *United States v. Millennium Laboratories, Inc.*, 1:12-cv-10132-NMG - False Claims Act settlement for over $200 million

(1) Millennium, a commercial clinical lab providing services to physicians and hospitals, fostered a culture of greed and intimidation in its sales force

- At its 2012 National Sales Meeting, the CEO gave a presentation where $2,000,000 worth of gold coins were brought out and placed on stage
- Employees in attendance interpreted these coins as a message to aspire to more wealth; some saw it as a threat
United States v. Millennium Laboratories, Inc., 1:12-cv-10132-NMG

(2) General Counsel gave a presentation on “compliance”

- One slide depicted Millennium’s competitors - and former employees who joined them - in body bags
Don’t be a weasel. . . . I don’t want to be on the other side of litigation from any of you. I hope you don’t want to be on the other side of litigation with Millennium. There is no amount of time or resources we won’t spend to hold our employees accountable. . . . [W]e will protect this company . . . .

Another slide showed these images of a former employee whom Millennium had sued - as target practice
United States v. Millennium Laboratories, Inc., 1:12-cv-10132-NMG

(3) Millennium encouraged documentation deletion policy

- “Do not write any e-mails longer than two sentences”
- “Every two weeks delete your text messages. As we have litigation with our competitors they will want to see your phone”

(4) Emphasis on increasing drug testing (Mondays and Fridays) without regard for professionalism or compliance

- “GET. THAT. PEE!!”; “Pick up the liquid GOLD before liquid goldschlager on Fridays!”
- “GOLD RUSH FRIDAYS”; “Merry Pissmass!!!”
- “The Friday pee badgers [']we take what we want![’]”
Yahoo example: mishandling the data breach
Yahoo data breach in 2013-2016

- Yahoo hired an independent committee to look into the security breaches that occurred between 2013 and 2016 and affected at least 1.5 billion users.

- As a result, Yahoo’s GC Ronald Bell resigned with “no payments...in connection with his resignation” and CEO Marissa Meyer did not receive a cash bonus for 2016 and decided to forgo equity awards for 2017.
Yahoo data breach in 2013-2016 (cont.)

- The independent Committee found that “the relevant legal team had sufficient information to warrant substantial further inquiry in 2014, and they did not sufficiently pursue it.”

- Yahoo took a $350 million price cut in its planned acquisition by Verizon and has paid $16 million in expenses related to the incidents.

- In response to the committee’s findings, the Board has directed Yahoo to revise its technical and legal information security incident response protocols.

- Annual report filed by Yahoo with the United States Security and Exchange Commission on 03/01/2017.
Yahoo data breach in 2013-2016 (cont.)

Steps for a General Counsel to take before there’s a data breach:

- Clearly communicate and have channels available to escalate the issues within the legal department and within the whole organization
- Ask questions of the board and IT team to figure out what the status is when it comes to data security:
  - What policies are in place?
  - What are vendor relationships like?
  - How engaged is the board?
- Have an incident response plan on what to do when there is a breach and be ready to have the plan triggered
Other case law examples GC and compliance department mishandling
General Counsel disclosed whistleblower’s identity:

Halliburton’s employee sent out an internal memo to colleagues within his department raising concerns that some of the Company’s accounting practices did not satisfy generally accepted accounting principles. He also later contacted the SEC and the company’s confidential whistleblowing hotline to voice his concerns.

After receiving notice of an SEC investigation, the General Counsel of the company inferred from the employee’s previous internal memo that he must have reported his concerns to the SEC. In anticipation of the SEC investigation, the General Counsel sent out legal hold notices that identified the employee whistleblower.

Since the relator was identified by the GC as the whistleblower, his colleagues began treating him differently and refused to work with him.

The court emphasized that Halliburton’s identification of the whistleblower was a “targeted creation of an environment in which the whistleblower is ostracized” and a “potential deprivation of opportunities for future advancement.” Thus, the court affirmed an award to the whistleblower for noneconomic compensatory damages—namely, for emotional distress and reputational harm.
Compliance officer at the company had no real power:

- In 2016, Olympus Corporation of the Americas (OCA) agreed to pay $312.4 million to resolve criminal Anti-Kickback Statute charges and $310.8 million to resolve civil claims under the False Claims Act for providing kickbacks to physicians, hospitals, and other health care providers to induce them to purchase medical and surgical equipment.
- As part of the civil settlement, OCA agreed to pay $51.1 million to John Slowik, the company’s former Chief Compliance Officer who turned whistleblower.
- According to his complaint, Slowik was fired for attempting to implement compliance reforms. As a Chief Compliance Officer of the newly created Compliance Department, he tried to develop and implement a comprehensive compliance program at OCA, but the company resisted his attempts to stop OCA’s unlawful business practices, canceled FCPA compliance trainings he was scheduled to give, stripped him of decision-making authority, and ultimately removed him from his compliance position.
- The whistleblower was told that his role as compliance officer was not so much to ensure ethical corporate behavior but rather to “figure out how to work around the rules” so as to “not impact the business.”
General Counsel assisted in a direct retaliation and badly performed as a witness at trial:

- In 2016, Dr. Perez, a former senior manager of pharmaceutical chemistry at Progenics Pharmaceuticals, recovered $5 million in a SOX whistleblower case. Perez alleged that Progenics terminated his employment in retaliation for his disclosure to Progenics executives that the company was committing fraud against shareholders by making inaccurate representations about the results of a clinical trial. Dr. Perez, a non-native English-speaking chemist, represented himself at trial.

- Perez presented his findings in an internal written memo to the head of his department and GC Baker. After receiving the memo, Baker immediately went to Perez’s office to confront him about how he obtained the confidential report. Perez said he wanted to speak with his lawyer. The next morning Perez was fired.

- At the witness stand, GC Baker showed that he clearly disliked Perez. At one point, Baker responded to a question by saying: “We are English-speaking people. We know how to read.”

- What were the mistakes: 1) the Company never addressed Perez report, although he first reported internally; 2) the Company underestimated a pro se litigant; 3) the Company immediately fired a whistleblower; 4) GC got angry on the witness stand.
Another direct retaliation after a report made to GC and Chief Compliance Officer:

- In 2014, a California jury awarded $6 million to Catherine Zulfer in her SOX whistleblower retaliation action against Playboy, Inc.
- Zulfer, a former accounting executive, alleged that Playboy had terminated her in retaliation for raising concerns about executive bonuses to Playboy’s CFO and CCO. She claimed that she had been instructed by Playboy’s CFO to set aside $1 million for executive bonuses without board’s approval.
- After Zulfer refused to carry out this instruction, she warned Playboy’s General Counsel that the bonuses were contrary to Playboy’s internal controls over financial reporting. Since Zulfer’s disclosure, the CFO retaliated by ostracizing Zulfer, excluding her from meetings, forcing her to take on additional duties, and eventually terminating her employment.
- Following a short trial, the jury awarded Zulfer $6 million in compensatory damages and also ruled that Zulfer was entitled to punitive damages. Zulfer and Playboy reached a settlement before a determination of punitive damages.
Van Asdale v. Int’l Game Tech., 549 F. App’x 611 (9th Cir. Sept. 27, 2013).

Another direct retaliation by the General Counsel:

- In 2013, the Ninth Circuit affirmed a SOX jury verdict awarding $2.2 million in damages, plus $2.4 million in attorney’s fees, to two former in-house counsel, Shawn and Lena Van Asdale.
- Plaintiffs alleged that they had been terminated in retaliation for disclosing shareholder fraud related to IGT’s merger with another game company, Anchor.
- When the Van Asdales discovered the issue, they brought their concerns to their supervisor, General Counsel, who also served as Anchor’s General Counsel prior to the merger. GC told them that the matter warranted investigation and promised to look into it.
- Three days after the meeting and seventeen days after receiving a positive performance review, Shawn was terminated by the GC. Lena was terminated shortly thereafter.
- The court pointed out that “a reasonable fact finder could find that the Van Asdales' alleged disclosures were a contributing factor in their terminations”, because “both Shawn and Lena were removed from their positions within weeks of their alleged protected conduct.”
U.S. ex rel. Hamrick v. GlaxoSmithKline LLC, 814 F.3d 10 (1st Cir. 2016)

No retaliation found where employee was already on the path to discharge for credible reasons, and where employer conducted proper investigations:

- Hamrick brought a retaliation action under the False Claims Act alleging that the pharmaceutical company where he was formerly employed terminated him because of his whistleblowing activities. Another former employee brought a qui tam action against the defendant alleging off-label promotion, and Hamrick joined the suit.

- As part of the internal investigation into the allegations and while still working at GlaxoSmithKline, Hamrick was interviewed and corroborated the allegations. During several meetings with HR regarding his alleged mistreatment and at a conference out of town, he expressed a desire to kill several of his supervisors, co-workers, and his ex-wife. Around the same time the defendant discovered that Hamrick was arrested for driving while intoxicated and did not report it to the defendant as required. He was placed on administrative leave, and the defendant attempted to schedule a meeting to investigate his actions, but Hamrick refused to meet without an attorney. He was eventually terminated.

- The U.S. District Court for the District of Massachusetts found for the employer, ruling that the defendant had legitimate non-retaliatory reasons for terminating the plaintiff. The employee already had been on the path to discharge for at least five months and was fired 13 days after he failed to meet a final deadline for responding to charges of extreme misconduct.
Please do not hesitate to contact us at:

➢ Yvette Ostolaza - yvette.ostolaza@sidley.com
➢ Tracy Preston - Tracy_Preston@neimanmarcus.com
➢ Joyce Slocum - joyce@tpr.org
➢ Sarah Frazier - SFrazier@bafirm.com
Thank You