

LAW

Whistleblower Policy Safeguards Company

A good corporate whistleblower or non-retaliation policy is now more than ever a must for nonprofit as well as for-profit organizations. Such a policy should be a central piece of the employee handbook and a component of any corporate compliance program.

A whistleblower policy is not to be confused with an organization's basic human resources mechanisms for internal reporting of general grievances or personal complaints.

Instead, the purpose of a whistleblower policy is to bring to light potential legal/ethical issues affecting the organization as a whole.

These issues at best could affect the organization's reputation and pull staff away from their normal duties and, at worst, could subject the organization to serious liability.

Types of suspected misconduct that should be reported under a whistleblower policy include financial improprieties or misuse of corporate resources, violations of internal policies, failure to comply with legal requirements and breaches of ethical obligations.

Examples are questionable accounting or auditing practices, failure to comply with federal legal requirements applicable to tax exempt organizations, and even substantive failures in carrying out the mission or work of the organization.

Whistleblower policies have three basic components:

1. An expectation that staff report internally and in good faith suspected legal/ethical violations regarding the organization's operational and substantive business practices;
2. A description of the process for confidential and anonymous reporting (which may include the establishment of a hotline); and
3. A guaranty of protection for the



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reporter against reprisals, victimization or retaliation by the organization, to encourage and enable this process.

In addition, a corporate code of ethics is the flip side of the coin of a whistleblower policy: The code of ethics is the principal means of communicating to all staff a strong culture of legal compliance and ethical integrity, while the whistleblower policy is a way to implement such values.

Legal precedent for enacting a whistleblower policy is strong and recently is getting even stronger. Under Sarbanes Oxley (SOX), enacted in 2002, criminal penalties apply to both nonprofits and for-profits alike for taking retaliatory action against an employee who reports suspected illegal activity; the existence of a whistleblower policy evidences an intent to comply with SOX.

In addition, various federal and state laws include protections for whistleblowers. For example, pursuant to the federal Deficit Reduction Act, organizations receiving at least \$5 million in Medicaid payments annually commencing in 2007 must educate their employees about the

whistleblower protections provided under the federal and state false claims acts.

In addition, the IRS provides whistleblowers with up to a 30 percent reward for reporting suspected tax code violations, and recently has established a special Whistleblower Office to handle such allegations.

With respect to nonprofits in particular, the Panel on the Nonprofit Sector issued a report to Congress in 2005, entitled "Strengthening Transparency and Governance Accountability of Charitable Organizations," encouraging the adoption and enforcement of policies and procedures that facilitate reporting of suspected malfeasance and misconduct by organization managers.

In response, this past winter, the IRS released its "Good Governance Practices for 501(c)(3) Organizations," including a recommendation for a whistleblower policy.

And most recently, the new Form 990 (Return of Organizations Exempt From Income Tax) released by the Internal Revenue Service in December 2007 incorporates governance provisions including disclosure of whether an organization has a written whistleblower policy. The IRS does not state that it is legally mandating such a policy. But by requesting this information, it is suggesting that such policies are necessary for good governance, management and accountability.

Adverse consequences to not having a whistleblower policy from a liability perspective are that the media, public interest groups and private litigants are likely to compare an organization's practices with the noted legal standards and challenge those that fall short. For example, a whistleblower policy demonstrates some degree of adequacy of internal controls or at least provides evidence that safeguards exist.

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Conversely, the lack of such a basic policy can suggest corporate mismanagement or at least a general lack of interest in preventing and responding to corporate abuses. A properly implemented whistleblower policy can only reflect well on the organization.

From a risk management perspective, there are also compelling practical reasons for adopting a whistleblower policy. Internal reporting should produce more effective management and governance and ultimately provide better protection to the organization, its directors and officers against future liability.

If the organization's culture promotes such reporting, problems can be addressed before they escalate, can be handled proactively, and external reporting and qui tam filings might be avoided.

Such a policy dissuades rather than encourages external whistle blowing by encouraging proactive, internal reporting before things deteriorate. A strong whistleblower policy should help prevent

claims from disgruntled employees.

The benefits of having a whistleblower policy, however, are only realized to the extent the policy is implemented effectively.

Organizations should make sure that the policy is disseminated, that staff are trained and that the policy is in fact in operation by documenting all activities evidencing implementation. Ignoring a policy is potentially more damning to an organization than not having one at all.

Both nonprofit and for-profit organizations alike should consider undertaking the following steps:

- Boards should develop and adopt a code of ethics tailored to their organization, and the organization should develop and implement a corresponding whistleblower policy;

- The existence of such a policy should be reflected consistently in all applicable policies and procedures of the corporation, including the personnel handbook, any compliance plan and staff training

materials;

- Such a policy should be disseminated throughout the organization, ensuring standards are clearly articulated and understood through adequate training;

- Training should take place on both a regular and periodic basis (e.g. new hires and on a logical schedule for existing employees);

- Organizations should document the preceding efforts systematically and preserve such documentation in accordance with the organization's document retention policy (also required by SOX);

- Reports under the policy should be investigated and tracked systematically – preferably through a compliance program; and

- Organizations should make use of reports made under the policy to address problems within the organization early on.

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