

6 Tips For Keeping Whistleblower Complaints In-House

By **Ben James**

Law360, New York (May 06, 2013, 1:33 PM ET) -- Whistleblower claims are surging, and the potential for a worker to reap enormous financial rewards while wreaking havoc on a corporation's reputation has landed whistleblower issues among companies' biggest worries. Lawyers from both sides of the bar gave Law360 six tips for stopping an internal whistleblower complaint from mushrooming into a costly public debacle.

Companies that want to insulate themselves from potential whistleblower liability should encourage employees with concerns to keep their gripes within the company by letting workers know that their complaints will be taken seriously, and by having a trustworthy and robust in-house system for dealing with those complaints.

"It is better for the company and the shareholders alike for complaints to be lodged internally and to be brought to the company's attention promptly, so they can be swiftly investigated and any underlying concerns can be rooted out," said Steven Pearlman, co-head of Proskauer Rose LLP's whistleblowing and retaliation group.

But exactly what it takes to achieve the broad goals of encouraging good-faith complaints and having an effective system for addressing employees' concerns isn't always clear. Having a policy stating that employee complaints should go through a company's internal mechanisms and that workers who raise concerns won't be retaliated against is smart, but that's just a starting point, lawyers say.

"Your actions speak louder than your policies," said Sarah Bouchard, co-leader of the Sarbanes-Oxley Act subpractice at Morgan Lewis & Bockius LLP.

Here are five best practices that lawyers say companies should consider to stave off high-profile whistleblower battles.

Promptly Follow up on Complaints

A worker who feels a complaint has disappeared into a black hole can be a dangerous liability, and may feel the need to take those concerns to another forum. Following up gives the company a chance to find out the employee's concerns and address them, which may stave off a retaliation claim.

“Whistleblowers come to me, in many instances, when they do not know what the company did with their information,” said R. Scott Oswald, managing principal at The Employment Law Group, which represents employees. “Most human resources departments, once they’ve investigated, seem to close a file and never check back with the employee.”

Pearlman says he's seen clients benefit from appointing a “whistleblower liaison” to keep their finger on the pulse of employee complaints.

“Oftentimes somebody from HR fits the bill,” he said. “An employee needs to know that when they blow the whistle, their complaint is being taken seriously and they're not going to suffer retaliation. Appointing a trained HR liaison to give an employee those assurances and work with an employee [on] his or her concerns often pays significant dividends.”

Incentivize Feedback

Ideally, companies should make it clear that voicing sincere concerns will be not only tolerated but appreciated, lawyers say. One way to encourage workers to bring their concerns to light that goes beyond merely saying that complaints are valued is to offer incentives, either monetary or nonmonetary.

“A good-faith complaint can actually save the company a tremendous amount of heartburn and headache,” Pearlman noted.

Companies that feel it's too difficult to quantify how much benefit an internal whistleblower complaint confers on the company, or don't feel they can compete with financial incentives like those available under the U.S. Securities and Exchange Commission's bounty program, can offer perks like formal recognition from an executive or a positive note in a performance evaluation, Pearlman points out.

And according to Oswald, some companies are linking executive compensation to internal compliance complaints — both how many are raised and how the they are dealt with.

“That's the kind of thing that companies can do to send a clear signal to their employees that they believe in compliance and that they are going to put their money where their policy is,” Oswald said.

Integrate HR, Legal and Compliance Teams

A company's HR, legal and compliance personnel can all play critical roles in resolving employee complaints before they find their way to the government or a courtroom.

HR, for example, can be a whistleblower's initial point of contact, while legal brings an expert understanding of applicable company policies and compliance can vet the substance of a given complaint.

But sometimes those three groups don't communicate on their investigations, according to Bouchard.

“What I recommend is that, on a monthly basis, those groups sit and meet and go through their investigations,” she said.

“They all need to work cooperatively to provide a richer and more informed vetting process,” Pearlman added. “Having a compliance committee that is comprised of the right subject matter experts and has adequate representation from the stakeholders in the whistleblower process is a must.”

Take Time to Explain Eyebrow-Raising Decisions

Not only do managers need to be aware of subordinates' concerns, but they also should be prepared to explain decisions thoughtfully if employees ask questions, so rank-and-file workers aren't left with the perception the company is doing something wrong.

“That's not a legal requirement, that's just a management best practice,” Bouchard said. “When managers don't do that, things often fester.”

Busy managers don't need to assume every employee is poised to make a whistleblower complaint. But some telltale signs can tip off managers that an explanation, and perhaps a call to HR or the legal department, might be the right move, according to Bouchard.

If an employee begins communicating in longer emails or starts using more formal language, that can indicate he or she is either changing the workplace conversation or getting coaching from a lawyer, she said.

“The worst thing a manager can do in this situation is be dismissive. The best thing a manager can do is consult HR or legal on how to respond,” she said. “A simple explanation by the manager at the outset can stop things from escalating, because the manager can appropriately explain away any confusion.”

Don't Let Employees Leave Angry

Whether because of mere oversights on an employer's part or genuine acrimony, having an employee leave your company disgruntled can spur them to talk to a plaintiffs lawyer, opening up a Pandora's box of potential legal liability.

Making “general HR mistakes” like failing to advise a departing worker of their COBRA health benefits or furnish a final paycheck in a timely fashion can invite that type of scenario, Oswald notes.

Pearlman says it is in employers' best interests to treat employees with respect and let them leave with dignity, even if they've been fired for cause.

That's particularly true when thinking about potential whistleblower claims, which can have a retaliation element, he says. So it's not a bad idea to ask during exit interviews if a departing worker is aware of any compliance issues.

Even if an unhappy ex-employee isn't thinking about blowing the whistle, a good plaintiffs lawyer will ask a litany of questions geared toward exposing possible causes of action that could include whistleblower claims, Bouchard notes.

“It's much better that the employee doesn't have that negative experience going out the door,” she said.

Encourage Traditional Complaint Avenues

Social media platforms such as Twitter and Facebook have overtaken the proverbial “water cooler” as the venue for discussing workplace concerns. The question of whether anti-retaliation provisions in whistleblower laws will protect social media gripes is still unsettled, attorneys say.

“It's a burgeoning area, and something that we need to look for in the coming year,” Oswald said.

While forbidding employees from complaining about the workplace on social media is a bad idea, there's nothing wrong with emphasizing that the company expects workers to use traditional complaint mechanisms — as opposed to social media — to raise serious concerns, Oswald says.

“I think it's important for employees to understand that the most effective way of raising concerns is to use the compliance channels that are already provided,” Pearlman said.

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