



***WHISTLEBLOWER
SYSTEMS:
1-800-RAT FINK OR
EFFECTIVE
COMPLIANCE TOOL?***

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A HOTLINE? WHAT A GREAT IDEA!

“Could lead to an organized system of professional denunciation”

“an ‘ethics alert’ in an anonymous manner could only re-enforce the risk of slanderous denunciations”

“this system is disproportionate to the objectives sought and the risks of slanderous denunciations and the stigmatization of employees”

“other legal means exist to guaranty compliance with legal provisions and company rules”

the union local said it is “thoroughly outraged” by the “rat line” and called it a “despicable and unnecessary attack on the privacy of . . . employees.”



WHAT COULD POSSIBLY GO WRONG?

“CANADIAN AUTO WORKERS PROTEST GM PHONE LINE”

A Canadian Auto Workers union local said it is “thoroughly outraged” by the “rat line” and called it a “despicable and unnecessary attack on the privacy of GM employees.”

Wall Street Journal Sept. 21, 1995



WHISTLEBLOWER SYSTEMS

WHY HAVE A REPORTING SYSTEM?

- **GOVERNMENT REASONS**
- **PRACTICAL REASONS**



USSGs ITEM 5

(5) The organization shall take reasonable steps—

. . .

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.



USSGs STANDARDS

- **EMPLOYEES & AGENTS CAN SEEK ADVICE/REPORT CRIMINAL CONDUCT**

- DOES “JUST CALL KEN LAY” WORK?

- **PUBLICIZE**

- DO EMPLOYEES KNOW IT'S THERE?

- **WITHOUT FEAR OF RETALIATION**



FEDERAL ACQUISITION REGULATION

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.



SOX 301

Each audit committee shall establish procedures for

(A) the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters so that they reach the audit committee; and



SOX 301

Each audit committee shall establish procedures for

(B) the confidential, anonymous submission by employees . . . of concerns regarding questionable accounting or auditing matters.



THE SHORT VERSION

**You need a way for people to
report problems & raise
questions without retaliation**



WHISTLEBLOWER SYSTEMS

PRACTICAL REASONS

They can call others – press, government, lawyers

The feds will pay: Qui Tam

It gives permission to be open – even if best reports do not come through the helpline

Proving the value: If you stop/prevent one crime, one injury, one lawsuit, it pays for itself

It is a source for advice



WHAT ARE THE SYSTEMS FOR REPORTING?

Helplines/Hotlines

Ombuds

Web sites

Email

Suggestion boxes?

Open door?

Easy to say, but do employees believe it?

Are supervisors actually trained?

Are there any standards?

What if the boss *is* the problem?



WHO HANDLES THE CALLS?

What about lawyers?

Who else inside? – C&E office, HR, internal audit

Inside vs. outside?

24/7

Translations

Accommodations for disabled

Anonymity and confidence

Who gives advice?



WHO DO YOU WANT TO HEAR FROM?

Employees

Anonymous callers?

Repeat callers?

Agents & third parties

What about

students/applicants/customers?

What about the public?

The CECO who used the helpline



NUTS & BOLTS

Log/tracking system

No caller ID

System for prioritizing calls, e.g., 1, 2 & 3, urgent, serious, routine

Benchmarks for timeliness

Escalation monitoring system

Someone assigned to monitor progress – “that persistent voice”

Investigations- professional, standards, train

Separate courses on this separate topic

Do test calls occasionally



HOW DO YOU GET PEOPLE TO CALL?

USSGs want you to publicize the system

Road shows

Include in training – code & each risk area

Other vehicles – Tchatchkas, posters, cards, brochures, phone stickers, etc.

Feedback to callers

Publish results

Local contacts in business units & locations

Rewards for calls/reports?



HOW DO YOU PROTECT THE WHISTLEBLOWER SYSTEM?

HOW CALLS CAN GO OFF TRACK (ACTUAL CASES):

- Investigator lacks training/expertise
- Delay in assigning the case
- Senior manager with an interest interferes
- Audit committee sends to general counsel who has a conflict
- Another department demands ownership & sits on it
- HR VP hears of it and talks openly about it at a company dinner
- Business unit leader discourages employee cooperation
- Needs outside expertise but no budget

**Donna Boehme, “About that Confidential Employee Hotline . . .”
Compliance Week (May 5, 2009)**



HOW DO YOU PROTECT THE WHISTLEBLOWER SYSTEM?

**What if the next call is about the
President, Dean and/or General
Counsel?**



MANDATORY BOARD REPORTS

- **Mandatory board reports.** Have mandatory reporting by the compliance officer to the board on key points, including any allegations about senior officers or rejection of the compliance officer's advice. (See Singer, "An Ethics Officer of Olympian Proportions," *ethikos* 18 no. 2 (Sept./Oct. 2004): 6, 8.)

Murphy, 501 Ideas For Your Compliance and Ethics Program (SCCE; 2008)



MANDATORY ESCALATION IN THE ORGANIZATION

- **Escalation guidelines.** Establish and publicize guidelines throughout the company, describing the types of allegations that must be centrally reported to the chief compliance officer, so that this officer can ensure appropriate matters are reported to the board.

Murphy, 501 Ideas For Your Compliance and Ethics Program
(SCCE; 2008)



BE SURE THE BOARD KNOWS WHAT TO DO

- **Compliance officer on board.** Have the board recruit a compliance officer from another company to be a board member. (See Murphy & Roach, “Compliance Officer on Board: What Your Audit Committee is Missing,” *ethikos* 20 no. 3 (Nov/Dec 2006): 12.)

Murphy, 501 Ideas For Your Compliance and Ethics Program (SCCE; 2008)



HOW DO YOU PROTECT THE WHISTLEBLOWER SYSTEM?

Securing records – computer & paper

Location of office/records

Security starts at the top: You need a chief ethics & compliance officer (“CECO”) who is:

Independent

Connected

Empowered &

Professional

An ICEP CECO



RETALIATION – HOW DO YOU PREVENT IT?

- The usual approach:

SWEAR A MIGHTY OATH!



RETALIATION – HOW DO YOU PREVENT IT?

Something a bit more credible:

Strong policy

**What about requiring “good faith” & that
“frivolous” calls will be punished?**

Credible?

**Tough discipline for threatened or actual
retaliation**

Decision not to punish must go to board

Publicize these disciplinary cases

Follow up with whistleblowers – EEOC’s advice



MURPHY'S LAW

No good deed goes unpunished?

Addressing the risks



ADDRESSING THE RISKS

Culture & privacy

Privacy laws may restrict these systems & records

Culture is used as the most common excuse to resist empowering employees to raise issues

The French example:

CNIL SAID IT IS BAD

**THE FRENCH COMPETITION AUTHORITY
REQUIRED IT**



ADDRESSING THE RISKS

“Caller complained he was discriminated against because could not go to meeting of bidders to decide who will bid on next project – case referred to HR.”

Have a lawyer review the records/call logs to “issue spot”

PS: This is an antitrust felony subject to 10 years in prison, organizational fine of \$100 million



ADDRESSING THE RISKS

Supervisors' possible responses to employees raising issues

- **Ignore it**
- **Discourage it**
- **Retaliate**
- **“Fix it yourself”**

Should be trained, required to get advice



ADDRESSING THE RISKS

FOIA & Discovery

Private entities are subject to having helpline records disclosed in litigation, but

Public entities, like state universities, can have their helpline & investigation records disclosed for use in the university newspaper or to anyone who is curious!

- There are a few state law FOIA exemptions,
- You can *try* privilege, but
- This is something that needs reform



ADDRESSING THE RISKS

- What's wrong with this picture?

“Your call will remain confidential and anonymous”

- Or this one:

“To the maximum extent possible your call will remain confidential and anonymous”



ADDRESSING THE RISKS

Well, it *might* be confidential and anonymous,
unless:

- Everyone guesses who it was during the investigation
- We are sued and have to produce everything
- The government shows up with a search warrant
- We are subject to an open records/FOIA requirement
- We decide to voluntarily disclose a violation to the government
- The government comes after us and we want to cooperate



WHISTLEBLOWER SYSTEMS

QUESTIONS?