

International Whistleblower Hotlines: Implementation and Investigations



Speakers



Norbert A.N. van den Berg
Chief Operations Excellence
and Compliance Officer
nvandenberg@gategroup.com

gategroup
Zurich, Switzerland



Lisa R. Fine
Director, Global Compliance
lfine@gategroup.com

gategroup
Reston, VA, USA



Brendan LeMoult
Vice President
Anti-Illicit Trade
brendan.lemoult@jti.com

JT International SA
Geneva, Switzerland

Agenda

- Introduction
- Implementing and Embedding the Whistleblower Hotline
 - Benefits of Whistleblower Hotlines
 - Misconduct Reporting --Why a Hotline?
 - Practical Considerations
 - Geographically-Specific Concerns
 - Lessons Learned During Implementation
- Investigations of Whistleblower's Report
 - Addressing a Whistleblower's Complaint
 - Protecting the Reporting Employee
 - Conducting a Quality Investigation
 - Protecting the Rights of Accused Employees

2

Introduction

Why hotlines?

- Whistleblower hotlines have become more prevalent since the early 2000s, as a result of various international requirements, such as the UK's Public Interest Disclosure Act ("PIDA") and the US Sarbanes Oxley Act ("SOX").
 - Specifically, SOX required companies to provide a reporting channel for issues related to financial, accounting and auditing matters.
 - While the regulatory intent of the hotlines was to address financial fraud and related issues, many companies have extended the use of whistleblower hotlines for employees to raise concerns.
 - At the same time, the European Union provided guidelines for whistleblower opinions to address protection of data privacy and employees. These limitations include:
 - Restricted scope of hotline to financial and accounting matters
 - Timely data retention and destruction
 - Discouragement of anonymous reporting
- Implementation of whistleblower hotlines and investigations are impacted by these regulations and balancing the company's need for a reporting program with the protections of employees.

3

Choosing the right type of program

- Who will provide the hotline:
 - Internal Program: developed and maintained in-house
 - 3rd Party Provider: external vendor with standard, semi-custom or bespoke program
- How can people make reports:
 - Online only/web-based program: written reports using computers or smartphones
 - Web-based and telephone reporting: people can make reports online or using a local telephone call
- What type of program is best for your company:
 - One program for all countries:
 - Can be limited to financial and accounting issues for entire company
 - Can allow all reports to come from any country (no limitations)
 - Program tailored to regions/countries: Countries with limitations are under on program, rest of world allows for any report
 - 3rd party providers often have this set up
 - Local program: each country has its own line so issues and information remain in country

6

Europe considerations for global companies

"One size fits all" doesn't work with a multi-national corporation

- Works Councils – Inform or consult
- Data Protection Authorities filings
- Increased sensitivity to employee data and right to privacy in Europe
- Country-specific limitations, such as:
 - Some countries (Spain, Portugal) prohibit anonymous reports
 - Data retention time frame
 - France: expansion under Sapin II

7

Some items to remember as you implement and embed a hotline

....any hotline requires ongoing care and maintenance to be successful



8

Addressing a Whistleblower's Complaint

Preliminary Considerations

- *Is the allegation "in scope" of your whistleblower program?*
 - If yes, in most cases, the company should commence a complete and fair investigation
- *Should the investigation be conducted by internal personnel or an external partner?*
 - Does your company have an internal investigation team?
 - Should the allegation be handled by a function such as internal audit?
 - If not, are there other personnel trained to conduct investigations (e.g., Human Resources)?
 - When do you need to hire outside counsel or another external partner (e.g., a lawyer, private investigator, accountant, etc.)?
 - Are the allegations sensitive or serious?
 - Who are the accused, and can an internal investigation be truly "independent"?
 - Is the subject matter so complicated that you need an expert (e.g., forensic accounting firm)?

9

Protecting the Reporting Employee

Preliminary Considerations

- You cannot “guarantee” confidentiality or anonymity to reporting employees
- You must advise reporting employees, up front, that the accused will have a right to be heard
- The accused employee may also have disclosure rights in a subsequent litigation
- Some data protection laws provide a presumption that the accused has a right to see the company’s internal investigation file, but allow for exceptions if there is an overriding interest of a third party. Factors that help a court determine if there is an overriding interest include:
 - If disclosure of the internal investigation file would allow the accused to identify the reporting employee, based on the evidence in the file alone
 - If there is a danger to the physical or mental health of the reporting employee
 - If the reporting employee had a good faith reliance that her/his identity would remain confidential
- Reporting employees tend to suffer the most and the company needs to avoid retaliation against the reporting employee. How far can you go to help?

10

Commencing a Quality Investigation

Best Practices Before You Start the Investigation

- Check applicable local laws and company policy before commencing investigation (e.g., can you video record an interview?)
- If termination of the accused is a potential penalty, some courts require a complete and fair investigation of the whistleblower allegations. If not, it will hold the termination was unlawful
- Follow your company’s investigation manual or guidelines (if applicable)
- Create an “investigation plan” with a clear schedule
- *Ensure the investigation is timely*

11

Conducting a Quality Investigation

Best Practices to Conduct a Robust, Unbiased and Proportionate Investigation

- Maintain an investigation file and secure all evidence (e.g., documents, recordings, e-mails, backup files, etc.) in a manner that is proportional to the allegations
- Review best practices for interviewing witnesses and recording statements (e.g., two investigators present at all times, take careful minutes, witnesses should be heard in local language, etc.)
- Ensure witnesses, including the accused, sign or acknowledge the accuracy of their statements
- Prepare a conclusion report and be sure that you can defend your investigation in court – meaning that you can withstand a cross-examination of your investigation processes, procedures and decision making.
 - Bad investigations can create legal liability for your company

12

Protecting the Rights of Accused Employees

Companies Have an Obligation to Protect the Accused's Rights During Investigations

- The accused has a right to defend his/herself
- Will the accused have a right to confront his/her accusers (balancing test?)
- Does the accused have a right to ask for additional witnesses or evidence?
- Carefully review the company's strategy for interviewing the accused employee:
 - Should you interview the accused first, or wait until you have gathered all the evidence?
 - Is the accused likely to tamper with evidence if he/she knows an investigation is ongoing?
 - Ensure you provide the accused with sufficient notice of an interview under local laws
- Check your policy and local law to determine if an accused has a right to be accompanied in the interview by third party (e.g., a co-worker, a friend, a lawyer)
- Does the accused have a right to refuse to attend the interview and/or cooperate with the investigation under local law?

13

Q&A

14