

LAW PRACTICE MANAGEMENT

Preventing misconduct and reducing liability risk in organizations

By Danielle Bruno

Organizations need to be ever vigilant in identifying liability risks. From corporations to non-profits to universities, a growing concern involves the potential for criminal and civil liability arising from the conduct of employees or other agents of the organization. There are plenty of recent examples where an organization has been pulled into a criminal prosecution as a result of employee or official misconduct, or has been the target of a civil lawsuit for failing to react appropriately to reports of harassment or other improper actions by an employee. While many of these cases involve sexual harassment or abuse, the conduct of an employee does not need to be so egregious to result in liability, criminal or otherwise, for an organization and its officials. For example, healthcare systems and hospitals have seen an uptick in investigations and prosecutions for fraud and false billing by their employees, and this conduct, although not directed nor sanctioned by the business, often results in serious liability and costs.

Failure to recognize risks and warning signs can be devastating for an otherwise well-run business or non-profit organization. In order to prevent scandal and protect from liability, there are important steps that must be taken. Prevention is key; instead of reacting to a scandal, the best practice is to avoid it from happening in the first place by establishing proper systems and policies. These include ethics policies, employee handbooks, employee and managerial training, and codes of conduct, as well as internal systems for reporting improper behavior. In most instances, a corporation is first informed of an employee's wrongdoing from a report or complaint from within – it is rare that the first sign of a problem occurs when a subpoena



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or call from an investigator is received.

Being able to recognize the significance of an issue when it arises is likewise important. Certain behavior is relatively easy to spot, such as a particular employee known for saying inappropriate things to others, or rumored to have “done something” that caused the last intern to quit. Certainly, a stray comment may not always be cause for concern, but these days an organization cannot be too careful. Simply having a mechanism for reporting complaints, and being able to show that all complaints are documented, reviewed, and necessary follow up steps are taken, will discourage misconduct and help to limit liability.

However, simply creating standards and mechanisms to allow for reporting of misconduct is not enough. There also must be enforcement procedures, as well as designated individuals responsible for following up on reports, documenting complaints and investigations, and taking appropriate action or bringing recommendations to a decision-maker. In fact, complaints against a problem employee that were

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never investigated or were not taken seriously could be problematic in the event of a lawsuit or other proceeding. Thus, in addition to having policies and encouraging reporting, including protections for those that file reports, the organization must be able to determine whether complaints have merit and then enforce ethics rules and consider disciplinary measures.

This proactive approach may seem straightforward, but many corporations and organizations, large and small, do not adequately execute these necessary steps. For example, employee policies are often not read or understood, let alone revisited or revised from time to time by qualified professionals. Systems for filing reports or complaints are not always perceived as legitimate, and thus may be ineffective or underutilized because employees feel that they will not be believed or reports will not be investigated. On the enforcement side, there may be discrepancies in how policies are employed and inquiries are pursued, often due to cognitive bias, inter-office relationships, hierarchical dynamics, understaffing, or other administrative difficulties.

These failures can have serious consequences even when inadvertent or benign. The failure to identify a problem employee (or employees) has the potential to lead to a host of issues. Legal costs are likely to be incurred in the event of a criminal case, civil complaint, or administrative proceeding, even if the organization is not the main target. Not to mention, such occurrences carry the threat of negative publicity and media reports.

Such problems could be avoided by creating and implementing policies

and systems to prevent misconduct. In the long run, the cost of hiring an attorney or human resources expert to periodically review a company's policies, reporting mechanisms, and overall ethical culture may be minimal compared to the potential cost of legal counsel when prosecutors or governmental agencies become involved. This is important for all organizations, regardless of industry or size. In addition, a business that is aware of a potential issue – via rumors around the water cooler, financial irregularities, or reports of misconduct received by management – would be doing itself and its employees a disservice by not reacting appropriately. Organizations can best protect against harm by giving adequate attention to preventing misconduct and reducing liability risk. ■

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