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A Practical Guide to Handling Whistleblower Complaints for In-House Counsel

Last week, the Ontario Securities Commission (OSC) announced that it had awarded $7.5 million to three whistleblowers who provided tips that led to OSC enforcement actions. The awards were the first ever made by a Canadian securities regulator and garnered significant press coverage due to their size.

Despite the publicity surrounding large whistleblower awards, statistics show that the vast majority of employee whistleblowers choose to first report misconduct internally within their organization before deciding whether to approach regulators. As a result, in-house counsel's decisions about how to handle an internal whistleblower complaint can often make the difference between a complaint that is addressed internally and one that leads to regulatory investigation or litigation. This article provides a practical step-by-step guide for in-house counsel to follow in the immediate aftermath of a whistleblower complaint.

1. Triage

The first step in responding to a whistleblower complaint is assessing the potential impact of the complaint on the company. The potential impact of a complaint depends on two factors: (1) the financial, legal, and reputational risk to the company; and (2) the credibility of the complaint.

At one end of the spectrum will be non-material/low-credibility reports, such as a vague allegation of an employee pilfering petty cash. At the other end of the spectrum will be material/high-credibility reports, such as a specific and detailed allegation of widespread accounting fraud two weeks before a company's fiscal year close.

Often, in order to fully understand the materiality or credibility of a whistleblower report, you will need additional information beyond the report itself. For example, if a complaint alleges a corporate tax evasion scheme, you will need to understand whether the tax evasion scheme is feasible and, if true, what impact it would have on the company's financial statements. In cases where you seek additional information from others at the company, you should consult as few people as possible and divulge details of the allegations on a need-to-know basis only. Taking these steps will ensure that the subject of the report does not learn of its existence and preserve the integrity and credibility of a later investigation.

2. Determining Who Will Investigate the Complaint

Once you have assessed the potential impact of the complaint, the next step is to determine whether it should be investigated by the company or by outside counsel. To make this determination, you should ask two questions.

First, what was the outcome of the triage analysis? Whistleblower reports that have a minimal potential impact can typically be investigated by human resources, compliance, or legal. For whistleblower reports that present a significant potential impact, it will often be more appropriate to rely on the greater expertise and resources of outside counsel. Using outside counsel in such cases also ensures that in the event of litigation the company has built the strongest case possible for solicitor-client privilege over the investigation of the complaint.

Second, is there a need for independence? In cases where senior management or in-house counsel are implicated in the complaint, the company should generally engage outside counsel to avoid the appearance of a conflict of interest. A whistleblower who believes that an investigator has a personal stake in the outcome is more likely to pass his or her information along to regulators regardless of the findings of the investigation. Similarly, a regulator or court is likely to find an investigation to be less credible if it is performed by company personnel who are afflicted with a conflict of interest.

A middle ground that companies may consider is having in-house counsel investigate the complaint with outside counsel providing advice or assistance as requested. In cases where independence is less important, this option ensures that the company is able to leverage the expertise and resources of outside counsel while keeping costs down.

3. Responding to the Whistleblower

A company's initial response to a whistleblower will set the tone for the relationship between the parties going forward. While whistleblower reports can often be vague or ambiguous, it is a mistake to automatically assume that the allegations do not have merit. In your first communication with the whistleblower, you should assure him or her that the company takes the complaint seriously and plans to look into it expeditiously (providing a timeline for a substantive response, if possible). The overriding goal with the first communication is to convey to the whistleblower that he or she can trust the company to handle his or her complaint with diligence and respect.

You should encourage the whistleblower to provide as much detailed information as possible about the allegations and, where appropriate, you should ask specific questions that will help you fully understand the complaint. If the company has any policies in place for handling whistleblower complaints, you should assure the whistleblower that those policies will be followed. You should also assure the whistleblower that the company has zero tolerance for retaliation against whistleblowers and encourage him or her to report any instances of retaliation to the company.

While encouraging the whistleblower to communicate with the company is important, you must be careful not to say or do anything that could be construed as preventing the whistleblower from taking his or her information to regulators. Apart from poor optics in a later enforcement action or litigation, such conduct may violate the *Securities Act* for whistleblower tips relating to securities law misconduct. The *Securities Act* also prohibits the use of employment agreements to prevent whistleblowers from providing information about securities law misconduct to regulators.

4. Informing Others at the Company

The decision about who at the company to inform about the whistleblower report and how much to tell them is fraught with difficulty. On the one hand, certain employees of the company may need to know about the report in order to ensure that the company fulfils its legal obligations. On the other hand, disclosure of the report to others at the company could compromise the integrity of the investigation.

Companies have an obligation when litigation is reasonably anticipated to ensure that they have taken reasonable and good faith steps to preserve potentially relevant information and records. For any whistleblower report where litigation is reasonably anticipated, you must instruct IT to implement a litigation hold over any potentially relevant electronically stored information. You must also circulate a document preservation notice to any employees that may have potentially relevant electronically stored information or hard copy records. In taking these steps, you should endeavour to protect the integrity of the investigation by describing the information being preserved in general terms and not disclosing the fact of the whistleblower complaint unless necessary.

Companies also have an obligation to ensure that they do not take any form of reprisal against whistleblowers. Whistleblower protection rules define reprisal broadly to include everything from intimidation to adverse employment action. If the whistleblower has chosen to self-identify, you should instruct company personnel that the whistleblower should be treated no differently than if he or she had not made the report. You should vigilantly supervise the whistleblower's employment situation going forward to ensure your instruction is being followed.

Whistleblowers sometimes choose not to self-identify and instead submit their complaint anonymously through a company hotline or via email. It is critical that you put in place safeguards to ensure that the whistleblower's anonymity is protected. Although the fact of the whistleblower report will typically be disclosed to company personnel that are interviewed as part of the investigation, you should instruct company personnel that they must not speculate about the identity of the whistleblower. Apart from creating a hostile work environment, such speculation could lead to a claim of reprisal if the whistleblower feels intimidated by colleagues.

5. Informing Third Parties

An often overlooked aspect of dealing with a whistleblower complaint is the need in certain circumstances to report the complaint to third parties. Prompt reporting to third parties where appropriate can avoid significant negative consequences for the company in the future.

For example, any allegations of misconduct that could have a material impact on financial statements should immediately be disclosed to the company's auditor. Failure to promptly disclose the report to the auditor may result in delayed filing of the company's financial statements if the auditor does not have sufficient time to perform procedures to issue an unqualified audit report. In addition, if the auditor learns of the whistleblower report after the affected financial statements are issued, it may insist on a historical restatement of financial statements and/or refuse to act for the company in the future.

Similarly, when a whistleblower report alleges misconduct involving government funds, you should consider whether to disclose the report to the government funder. Failure to promptly disclose the report to the government funder can harm the company's relationship with the government and may even jeopardize the continued availability of government funds.

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