

Lessons from the trenches

Taking a consistent approach to internal investigations at public companies

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Agenda

- ▶ The challenges
- ▶ Taking a consistent approach: a hypothetical case study
- ▶ Lessons learned

The challenges



The Federal Sentencing Guidelines' mandate

“The organization’s compliance and ethics program shall be promoted and enforced consistently throughout the organization through . . . appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.”

- *United States Sentencing Commission, Guidelines Manual, §8B2.1.(b)(6)*

Stakeholders

- ▶ The person who is disciplined
 - ▶ Loss of employment
- ▶ Management
 - ▶ Employ only those people who share the company's values
- ▶ Other employees
 - ▶ Confidence in company's ethics program; expectation of fairness
- ▶ Investigator
 - ▶ Get all the evidence; provide judgment to management
- ▶ Prosecutors and regulators
 - ▶ Expect company governance; disclosure and cooperation
- ▶ The public
 - ▶ Expect the company to confront and correct problems

A hypothetical case study



An internal audit findings

- ▶ An internal audit of a branch office finds:
 - ▶ Returned goods are missing from the storeroom
 - ▶ An eyewitness confides that the storeroom attendant sold returned items to scrap dealers
 - ▶ The storeroom attendant is confronted - and evasive
 - ▶ Scrap sales receipts are handwritten
- ▶ Zero tolerance for fraud
 - ▶ The storeroom attendant is fired
 - ▶ Dollar amount too small to interest the district attorney
- ▶ Union files grievance
 - ▶ Challenges eye-witness credibility
 - ▶ Cites failure to take action against managers

The case proceeds to arbitration

- ▶ Union claims that “law of the shop” requires a reprimand for inventory shortfall
 - ▶ Is the evidence strong enough to demonstrate theft?
 - ▶ Will the investigation record demonstrate rigor and objectivity?
 - ▶ Are there prior cases of termination for missing inventory?
 - ▶ Will the arbitrator uphold the termination: “the capital punishment of labor relations”?

Internal audit findings - continued

- ▶ The internal audit also finds:
 - ▶ The branch manager used a local advertising agency
 - ▶ Agency has same address as manager's brother
 - ▶ Manager demonstrates services were performed
 - ▶ Agency provided rebates that manager used for customer entertainment
 - ▶ Transactions are on a spreadsheet – but not in company accounts
 - ▶ Manager claims this is common practice in other branches; “everyone knows”
- ▶ Zero tolerance for fraud
 - ▶ “If you fire me, you have to fire everybody”
 - ▶ Threatens age discrimination lawsuit

What does “zero tolerance” now require?

- ▶ Do you launch a company-wide investigation?
- ▶ Do you further investigate branch activities?
- ▶ Suppose that:
 - ▶ Preliminary inquiries indicate that other branch managers probably have created similar “slush funds”
 - ▶ The rumor mill is active; other branch managers caution management not to create a scapegoat
 - ▶ The region manager tells the CEO that the investigation is a witch hunt
 - ▶ The legal department states that an age discrimination case will be expensive, and difficult to defend
 - ▶ The CEO asks whether terminating the branch manager is really the right thing to do

The branch manager is re-interviewed

- ▶ He confirms the audit report findings, but . . .
 - ▶ He cannot demonstrate that his brother charged market rates
 - ▶ He is evasive when confronted about whether he skimmed any of the rebates
- ▶ And then the conversation gets heated . . .

You decide to re-interview the branch manager

- ▶ The branch manager says . . .
 - ▶ “If I do not entertain customers, how do you think I can get last look at my competitors’ bids?”
- ▶ Some of his customers are state and federal agencies

What does your process now require?

- ▶ Should there be immediate termination of the branch manager?
- ▶ Should the investigator continue with the interview?
- ▶ Should the investigator seek legal advice?
- ▶ Should the investigation be re-scoped to consider other issues?

Who will be reading the investigation record now?

- ▶ U.S. Department of Justice policy
“Individual Accountability for Corporate Wrongdoing” (Yates Memorandum):

“... in order to qualify for any cooperation credit, corporations must provide to the Department **all relevant facts relating to the individuals responsible for the misconduct . . .**”

Lessons learned



Lessons learned

- ▶ Communicate policies and consequences consistently and clearly
 - ▶ Codes of conduct typically provide for discipline “up to and including discharge”
 - ▶ Emphasize that this includes standards of ethical behavior as described in the code of conduct
 - ▶ Check to see if specific policies might have different penalties
 - ▶ Communicate discipline decisions (even if aggregated)
- ▶ Reviewing written communications is not enough
 - ▶ Do you really know what messages have been communicated, through years of practice?
 - ▶ Do you know the ethics climate in all of your operations?
 - ▶ Do you know what’s said in the rumor mill (social media)?

Lessons learned

- ▶ Review the discipline process
 - ▶ Who makes discipline decisions in various business units?
 - ▶ Do they follow consistent policies?
 - ▶ Who reviews discipline decisions and appeals?
- ▶ If your company has a collective bargaining agreement, consider its requirements in your discipline process

Lessons learned

- ▶ Investigation and discipline should demonstrate consistency in consideration of:
 - ▶ Collective bargaining agreements
 - ▶ Alternative dispute resolution procedures
 - ▶ Employee challenges under anti-retaliation laws, and anti-discrimination laws
 - ▶ Employee whistleblower reports to regulators
 - ▶ The ethics principles of the company's code of conduct
 - ▶ Public review of your actions
 - ▶ Newspapers
 - ▶ Social media

Lessons learned

- ▶ The investigation and discipline process needs contingency plans
 - ▶ Promptly reviewing hotline calls, audit reports and other complaints for potentially serious issues
 - ▶ Escalating of issues to senior management
 - ▶ Managing communications
 - ▶ Preventing interference into the investigation
 - ▶ Ability to respond to new issues
 - ▶ Legal advice
 - ▶ Securing evidence
 - ▶ Remediating systemic issues

Lessons learned

- ▶ Expect the investigation record to be dissected
 - ▶ Is the investigation report objective and thorough?
 - ▶ Is the “independent” investigator really independent?
 - ▶ Are factual conclusions adequately supported by the evidence?
 - ▶ Are work papers and interview notes available if subpoenaed?
 - ▶ Has all relevant information been gathered and assessed?
- ▶ Establish a clear “chain of custody” all evidence
 - ▶ Email, books records,
 - ▶ Interview notes
- ▶ The investigation record can lead to prosecutions
 - ▶ Referring a fraudster for prosecution
 - ▶ Internal investigations of crimes

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