Inside 1Q2023

ACC Association of Corporate Counsel
BALTIMORE

FOCUS

President's Message

Taren Butcher

Happy 2023 ACC Baltimore Chapter members, sponsors and colleagues! I'm excited and honored to serve as President of this amazing Chapter the next year. First, let me thank and recognize our members for your engagement and participation and our law firm sponsors for the continued support. It is because of you that we can continue to serve the local in-house community with educational programming, professional development, and networking opportunities.

As I reflect on 2022, I want to thank our dedicated Board and the outgoing President, Kimberly Neal, for her hard work, positive energy and strong leadership last year. The beginning of the year started off rocky as the pandemic continued to have a tight grip on the world and stall our efforts to return to in-person events; however, by the Spring we were able to return to in-person lunches and social events, including hosting our annual Golf and Wine event for the first time in two years. The event was well attended by members and sponsors alike and served as a great way to kick off our return to in-person events. We also hosted social events at several wonderful venues in the Baltimore area and a sponsor social in the Fall at Guilford Brewery. In short, the year ended much stronger than it started, and we are thankful for that! Nonetheless, we recognize that the pandemic has reshaped the workplace environment and the legal profession, and we are prepared to remain agile to ensure we identify the best way to engage with our members in an ever evolving world.

This coming year, we look forward to hosting lunches, webinars and networking events that are engaging, substantive and entertaining for members and offering opportunities to give back to our community. We want to meet the needs of our members. To that end, I took time earlier this year (along with our Chapter Administrator) to meet with each of the sponsors to kick off the new year and discuss ways we can partner to deliver educational programs that are relevant, practical, and timely for our members. The calls left me enthusiastic about the learning opportunities that will be made available to our members this year. I encourage everyone to maximize the benefits of belonging to ACC Baltimore by attending our events and getting involved. We also welcome your feedback, questions, and ideas for how we can improve the Chapter. We cannot go from good to great without your help!

On behalf of the Board, we look forward to an exciting year ahead, to continuing to serve our members and sponsors and further engagement within the Baltimore Chapter.

All the best,
Taren Butcher

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

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Career Path: Persuade Like Aristotle

By James Bellerjeau, Lecturer at University of Zurich

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If you want to know which students will become successful lawyers, it turns out the law school admissions test is not the best predictor. A few years ago professors Marjorie Schultz and Sheldon Zedeck identified *26 lawyer effectiveness factors* that serve as better predictors of career success.

The whole list makes for interesting reading. Today, I want to focus on one set of skills the professors grouped under the "Communications" heading:

Influencing and advocating. Persuades others of position and wins support.

Writing. Writes clearly, efficiently, and persuasively.

Speaking. Orally communicates issues in an articulate matter consistent with issue and audience being addressed.

Listening. Accurately perceives what is being said both directly and subtly.

Master Skills to be Effective In-house Counsel

- *Why It's So Hard Being a Good In-house Lawyer* (the challenge);
- *The Day You Became Smarter* (writing plainly and clearly);
- *Write Better Emails Today* (taming the email monster);
- *Maybe Don't Go to that Meeting* (avoiding time-wasting meetings);
- Influencing others (this article); and
- *Listen Up Already!* (engaging with others).

You can be well-liked, rigorous in your legal analysis, and correct in your conclusions. But inevitably, someone whose pay depends on disagreeing with you is going to challenge your views. It thus will come as no surprise to all of you practicing law in the real world that being persuasive is pretty important.

With all this in mind, I was annoyed that no one told me the secret to effective persuasion is no secret at all. That, in fact, it has been known for over 2,000 years thanks to Aristotle's *Rhetoric*. I spent the better part of 20 years watching, teasing out best practices, and honing my own skills at being the *Gary Spence* of the boardroom.

Time-tested advice with modern tweaks

One of the things I learned is that no matter how strong your persuasion skills, you can get better. Although I bet you're already pretty good, today I will give you a condensed version of time-tested advice on how to persuade, together with a few modern tweaks. I personally put the lessons here into practice every time I have to teach or present.

> You build credibility by never lying or shading the truth, even when it hurts your case.

Here are five elements Aristotle believed were critical to effective persuasion,* to which I will add a few observations:

1. Ethos (Credibility)

Ethos is that part of your talk where you give the audience insight as to why you are credible. This can come by virtue of your position or from your specific experience. I find you build credibility by never lying or shading the truth, even when it hurts your case. Admitting a weakness up front is a great way to show you can be trusted. It also helps to be transparent about your interests. People know you are representing a position, so go ahead and tell them what you want.

2. Logos (Appeal to reason)

Having set the stage about your credentials as a person, this is where you use facts and data to form a rational argument. Everyone likes to think they are logical, rational thinkers. So help them see a clear path to your point of view. Think of it as a fact-based hook for people to hang their hat on, something that allows them to agree with you.

3. Pathos (Human emotion)

Notwithstanding what we just said about the appeal to reason, the most powerful persuasion is carried on the wings of emotion. And the single best vehicle for arousing emotions is the story. The bulk of your presentation therefore comes in the form of storytelling. This doesn't have to be a fully fledged plotline. You do well to call upon a simple anecdote or episode from your life.

> People know you are representing a position, so go ahead and tell them what you want.

4. Be tangible

Particularly when you are trying to get your audience to accept or understand a new idea, analogies and metaphors are great tools. They give the impression that the new thing is really just something the audience already understands. And they make otherwise abstract ideas tangible and vivid.

5. Be concise

People have short attention spans, now more than ever. Don't fight it. Instead, make your argument short and simple. Start strong and end strong.

In the business context, I assume your audience knows you and knows why you are there. Don't waste time and valuable attention on introductions, background, or other unimportant topics. I say jump right in to the heart of your story and grab the audience's curiosity. Storytelling is so important to persuasion that I start with it always, even when I have to take pains to later build credibility and the logical argument.

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Practiced prepared remarks enough so that you can speak fluidly. Speak written remarks out loud at least once, even if only to yourself. This will help you catch awkward phrases that don't sound right.

Be animated, speak with energy, and show interest and enthusiasm in your subject. Your excitement shines through to your listeners. But don't let your enthusiasm carry you away. Speak clearly and pace yourself. Get a friend to point out your "ums" and "ahs" and similar empty words.

Watch your audience carefully for clues as to how you're doing. Help them keep the thread of your story by stepping back on significant transitions: "This is where we are. I just discussed X, and now I am going to move on to Y."

I hope the law and the facts will always be on your side. When they are not, you need to be the best persuader in the room. And that is more a matter of preparation than anything else. I hope today's discussion arms you well for the battles ahead.

Be well.

* I was inspired in the discussion of Aristotle's Rhetoric by *The Art of Persuasion Hasn't Changed in 2,000 Years*.

Question, comment? Contact Career Path columnist James Bellerjeau.

Learning, networking, and growing. Join us. Become an ACC member now.

ACC News

ACC CLO Survey – Download Today

The ***2023 ACC Chief Legal Officers Survey***, conducted in partnership with Exterro, seeks to better understand the role of the CLO in the modern business environment. The survey covers four general topics: the role and reach of the CLO, the value of the legal department to the company, the political and regulatory landscape, and the outlook for the legal department in the coming year. This report provides unparalleled insights directly from CLOs as they share the trends, challenges, and opportunities for the year ahead.

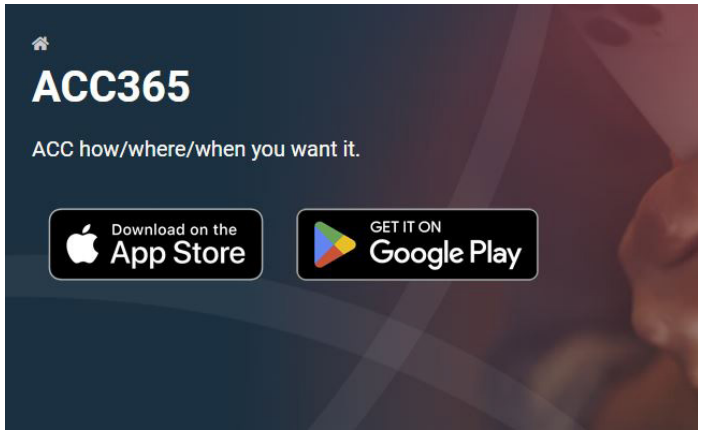
Almost 900 general counsel and chief legal officers from 35 countries representing 20 industry sectors participated in the survey. The results continue to bring focus to the immense value that Legal brings to the business, the growing influence of the CLO within the company's leadership, and the increase in CLO oversight of various corporate functions.

Professional Development Opportunities with your ACC Membership

Do you have goals for professional growth this year? ACC has resources to help you achieve them. Visit ACC's *Career Development Portal* to gain insight into improving your in-house career, upload your résumé to ACC's Jobline, or schedule a session with one of the coaches in ACC's Directory of Career Coaches. All in-house counsel are eligible to receive a complimentary 30-minute session with one of ACC's established coaches.

ACC365 App Now Available to Download

Your work goes beyond your desktop and now so does the ACC member experience. The brand-new ACC365 app is now available to *download*. Stay connected and get the ACC experience in the palm of your hand. With one tap, you are plugged into the people, resources, and knowledge that accelerate your career.



Implications of NLRB General Counsel Memorandum on Electronic Monitoring of Employees

By Louis J. Cannon, Jr. and Cassandra L. Horton, Jackson Lewis P.C.

Introduction

With the rise of remote and hybrid work, employers are turning to technologies like tracking employee keystrokes, capturing screenshots, and on-camera requirements for employees during work hours to manage and monitor performance and productivity. On October 3, 2022, the National Labor Relations Board ("Board") General Counsel, Jennifer Abruzzo, released a memorandum outlining her intention to challenge current Board law relating to employers' use of electronic monitoring and automated management practices in the workplace. Specifically, General Counsel Abruzzo shared her plans to "zealously enforce" current Board law and precedents under the National Labor Relations Act (the "Act") regarding employers' use of technology in the workplace to monitor employees for various purposes, as well as to expand the law to increase union organizing.

Since the beginning of the Biden administration, the Board has undertaken an agenda that is decidedly favorable to organized labor and to employees. The agency's General Counsel plays a very important part in setting the Board's agenda and has the authority to direct the Board's regional directors to pursue novel legal theories in order to change the law. General Counsel Abruzzo has made clear her intent to change Board law in significant ways that will chiefly affect nonunion employers, making it easier for their employees to unionize and engage in other protected, concerted activities.

The Current State of the Law

Current Board precedent prohibits employers from unlawfully preventing employees from having discussions related to union organizing or other concerted activity which is intended to improve or change working conditions. For example, employees have the right under federal labor law to discuss with each other (or even with customers) their complaints about wages, work rules, management style, and a host of other workplace issues. This is true whether or not a union is involved. Employers are also prohibited from retaliating against employees for exercising their rights under the Act. For example, Section 7 of the Act protects employees' right to engage in concerted organizing activities. Furthermore, Section 8 prohibits employers from interfering with, restraining, or coercing employees exercising their Section 7 rights. The Act currently prohibits certain surveillance practices, such as photographing employees engaging in protected activities, surveilling employee discussions about workplace protests, or disciplining employees for speaking up about workplace issues.

The Board has held that an employer violates Section 8(a)(1) of the Act if it overtly or covertly surveils employees engaging in Section 7 protected activities, including by reviewing security camera footage or reviewing employees social media accounts.[1] The Board has held that this is a violation even if the employer's action is not actually surveillance, but would give the "reasonable" employee the impression that the employer is surveilling employees who are engaged in protected activities.[2] Notably, the Board has never held that an employer runs afoul of the law by tracking its employees' whereabouts or business-related activity using electronic means.

The GC Memorandum's Stated Intention to Limit Electronic Surveillance of Employees and Expand the Scope of the National Labor Relations Act

Under Board precedent, an employer violates the Act by conduct that, taken as a whole, has a tendency to interfere with or restrain employees' concerted activity that is itself designed to improve working conditions (such as organizing or joining a union). General Counsel Abruzzo has instructed regional directors to scrutinize employers' use of electronic devices to monitor employees. This will assuredly lead to complaints issued against employers which employ such devices. And even if the employer's business needs outweigh employees' rights under the Act, General Counsel Abruzzo intends to ask the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains.

Employers monitoring employees at work is not new, and indeed is becoming ever-present in our post-pandemic reality where remote work has become the norm.[3] General Counsel Abruzzo's memorandum identified several common management tools that may run afoul of the law under this expanded view of the Act : (1) recording workers' conversations and tracking their movements using employer-provided devices, security cameras, and radio frequency identification badges; (2) keeping tabs on drivers using GPS tracking devices and cameras; and (3) monitoring employees who work on computers using keyloggers and software that takes screenshots, webcam photos, or audio recordings throughout the day, (4) tracking employees outside of work hours using employer-issued devices."

Employers have legitimate business reasons to use these technologies and use them not to surveil employees in their exercise of Section 7 activities, but to monitor productivity, employee engagement, for security purposes in terms of security camera use, to allow employees to conduct business in the case of employer-provide devices, and to monitor deliveries in the cases of GPS use for drivers. However, General Counsel Abruzzo also takes the position that new technologies and management tools used by employers "are already unlawful."[4]

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The Proposed New Framework

In the memo, General Counsel Abruzzo states that she will urge the Board to adopt a new framework for addressing employer use of what the memorandum terms "intrusive" or "abusive" electronic surveillance and algorithmic management tools that interfere with an employee's exercise of Section 7 rights. She urges the Board to find a balance between management's business interests that guarantee employees "a meaningful opportunity to organize." Abruzzo's proposed framework focuses on principles that (1) employees have a right to self-organize and collectively bargain, which includes the right to communicate with others at work; (2) for employees, the workplace is a space where they share common interests and have an opportunity to persuade coworkers regarding unionizing and status as an employee; (e) employers cannot lawfully prevent employees from discussing matters such as union organizing if they allow other non-work discussions; and (4) employees can use time where they are not working as they wish and without restraint, even while at work. The proposed framework purports to protect employees Section 7 "right to privacy" regarding their organizing efforts. In summary, Abruzzo takes the position that employees should be able to organize at work without being under surveillance of their employers, no matter the true or legitimate purpose of that surveillance. According to Abruzzo, an employer's monitoring of its employees threatens the employees' ability to organize, and therefore should be limited to allow for increased organizing.

According to the memorandum, complaints issued against employers relating to electronic surveillance tools will urge the Board to find such tools unlawful "where the employer's surveillance and management practices, viewed as a whole, would tend to interfere with or prevent a reasonable employee from engaging in activated protected by the Act."

General Counsel Abruzzo suggests that employers establish "narrowly tailored" practices to address "legitimate business needs" as to whether the practices outweigh employees' Section 7 interests. If the employer establishes that its narrowly tailored business needs outweigh the employees' Section 7 rights, Abruzzo will still "urge the Board to require the employer to disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains," unless the employer can establish special circumstances.

An example of a special circumstance may be in cases where an employer has a facially neutral work rule that has the potential to interfere with the employee's exercise of Section 7 rights. In these cases, Abruzzo urges the Board to evaluate the effect of the rule on a reasonable employee who is in an economic vulnerability, considering the totality of the circumstances such that the Board considers the employers' business needs and to allow employers to maintain narrowly tailored rules that infringe on employees Section 7 rights in instances where conflicting legitimate business interest outweigh the employee's rights.

In special circumstances such as those regarding investigative-confidentiality rules, Abruzzo urges the Board to allow restrictions on statutorily protected employee communications only when legitimate and substantial justifications outweigh employee's Section 7 rights.

Lastly, Abruzzo urges the Board's Regions to enforce existing Board law in cases involving workplace technologies, and to submit to the Board's Division of Advice any cases involving intrusive or abusive electronic surveillance and algorithmic management that interferes with employees' exercise of Section 7 rights.

This initiative comes as the Board is expected to return to a rule providing that employees have the affirmative right to use their company email for purposes of protected, concerted activity, such as union organizing.[5] If this happens, technology will become a sword and shield for employees and unions seeking to organize a workplace, leaving employers unable to use technology to monitor productivity on the one hand but forcing them to allow their employees to use technology in order to engage in union organizing on the other.

What Does This Mean for Employers?

The Act applies to employers with non-union and unionized work forces. Although the memorandum only represents the agency's priorities, it will have an immediate effect on all employers – regardless of whether the Board ultimately accepts the invitation to expand the Act's scope. The Board's regional directors across the country now have a mandate to pursue cases against employers who utilize electronic surveillance to track productivity and employee behavior. Thus, employers should be mindful of the Board's intention to regulate an area that traditionally has not been within the purview of the Board or the Act.

This isn't to suggest that employers should stop using electronic surveillance tools – but all employers – particularly those *without* unionized workforces – must be mindful going forward of the possibility of an unfair labor practice complaint that might be lodged as a result of a perfectly legitimate productivity tool. An employer, as an initial matter, should look at any electronic surveillance method it intends to implement and ask: What are the business reasons that this tool is needed? Are there other means by which we might achieve this objective? Is it at all possible that employees could perceive our use of this tool as surveillance or interference with union organizing (or other protected) conduct? Would the inclusion of an NLRA disclaimer constitute a valid defense against an unfair labor practice charge? The challenges are compounded here by the fact that the applicable legal precedents serve as a guide only indirectly, as the Act has never been construed as applying to electronic surveillance tools.

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Employers should review any current electronic surveillance tools and related polices and conduct an audit for potential violations of the Act in connection with those tools and policies. Before implementing any new electronic monitoring tools, such as apps, GPS trackers, and keylogging software, a legal review should also be undertaken.

Authors:

Cassandra L. Horton

Cassandra L. Horton is an associate in the Baltimore, Maryland, office of Jackson Lewis P.C. Her practice focuses on traditional labor law and occupational safety and health issues in the workplace. Cassandra's labor practice involves advising and representing clients in labor arbitrations, union organizing attempts and corporate campaigns.

Cassandra became interested in the law while attending graduate school in the evenings and working full-time in a juvenile and domestic relations court during the day. Cassandra was inspired by witnessing lawyers advocate for their clients through challenging experiences. She was also intrigued by gaining insights from working closely with the district court judges.

Prior to joining Jackson Lewis, Cassandra worked as a paralegal for a trade association in the Washington D.C. metro area that advocated for the retail industry through public policy and in the judiciary by filing amicus briefs. In her role, Cassandra was uniquely positioned to engage with general counsel – she heard firsthand what keeps them up at night, as well as what issues were top of mind. Through this experience, Cassandra became passionate about management-side labor and employment and recognized the importance fostering trust and professional relationships with clients.

Cassandra worked full-time at the trade association and attended law school in the evening. While in law school, Cassandra was the senior articles editor of the Federal Communications Law Journal. She was also the evening student representative for the Black Law Students Association. After her third year of law school, Cassandra worked as a summer law clerk in the Jackson Lewis Summer Clerk Program for the Washington, D.C. region and Orange County offices.

While in undergraduate school, Cassandra was editor-in-chief of the university newspaper, the Clarion.

Louis J. Cannon, Jr.

Louis J. Cannon is a principal in the Baltimore, Maryland, office of Jackson Lewis P.C. He has over fifteen years of experience representing companies, public sector employers, and institutions of higher learning in all aspects of labor relations, including collective bargaining, contract administration and advice. He also has significant experience first-chairing NLRB and state labor board hearings, including witness preparation and examination.

With a focus on institutions of higher education and healthcare facilities, his experience includes leading collective bargaining negotiations for first contracts and successor contracts; routinely first-chairing NLRB hearings, including all witness preparation and examination; routinely first-chairing labor arbitrations involving discharge and contract interpretation issues; conducting union avoidance programs for clients whose operations are vulnerable to union organizing, including individual employee assessments; and independently running representation election campaigns, including advice and drafting of campaign materials and speeches.

Beyond traditional labor matters, Louis offers general advice and counsel on employment matters, including experience investigating and responding to Equal Employment Opportunity Commission (EEOC) charges and discrimination charges filed with state human relations agencies. He also has represented clients in Title VII and wage and hour cases in federal and state court, as well as in on- site investigations conducted by the Department of Labor (DOL) and Office of Federal Contract Compliance Programs (OFCCP).

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[1] *See, e.g., National Captioning Institute*, 368 NLRB No. 105, slip op.. 5 (2019) ("It is well settled that an employer commits unlawful surveillance if it acts in a way that is out of the ordinary in order to observe union activity.")

[2] *Frontier Telephone of Rochester, Inc*., 344 NLRB 1270, 1276 (2005) ("In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance."), *enf'd*, 181 F. App'x 85 (2d Cir. 2006).

[3] *See* Office of the General Counsel Memorandum GC 23-02 (Oct. 21, 2022).

[4] *Id*.

[5] In 2014, the board held in *Purple Communications*, 361 NLRB No. 126 (Dec. 11, 2014) that employees had the legal right to use employer email accounts to engage in protected, concerted activity. The Board reversed this rule in *Caesars Entertainment d/b/a Rio All-Suites Hotel and Casino and International Union of Painters and Allied Trades, District Council 16, Local 159,AFL–CIO*, 368 NLRB No. 143 (Dec. 17, 2019). The Board is expected to return to the Purple Communications rule.

5 Resolutions That Could Help Cos. Pass A DOJ Checkup

By Holly Butler, Tom Zeno, Rebecca Fallk, Miles & Stockbridge

Certain New Year's resolutions are worth keeping. As we enter 2023, we can expect the U.S. Department of Justice to make good on its announced intention to increase white collar enforcement efforts. The five resolutions below may help your company receive a clean bill of health in the event of an examination by the DOJ.

1. Update your document preservation practices to address third-party messaging platforms.

In 2022, the DOJ released two separate forms of guidance related to the use of personal messaging devices. First, DOJ Deputy Attorney General Lisa Monaco released a memorandum on Sept. 15 instructing prosecutors to consider whether a company "has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms."[1]

This includes a corporation's ability to preserve, collect and provide to the government all nonprivileged, responsive documentation relevant to the investigation, including that which is stored on personal devices such as an employee's cell phone, tablet or computer.

Subsequently, on Dec. 1, the DOJ's Criminal Division doubled down on the Monaco memo. The division discussed how the use of third-party and secret messaging apps can hinder government investigations and can compromise an otherwise well-functioning compliance program.

Companies should consider data mapping their work-related communications, evaluating permissible apps and determining mechanisms to capture data.

2. Evaluate your need to conduct due diligence before and after acquisitions.

In that same Sept. 15 memorandum, Monaco provided two enforcement policies that may have practical implications for how companies conduct acquisition due diligence.[2]

First, the DOJ advised that it will evaluate the prior compliance record of acquired companies. Second, the DOJ directed prosecutors to assess a company's compliance program both at the time of offense and at the time of the charging decision.

This suggests that the DOJ may consider that post-acquisition conduct could mitigate or exacerbate preacquisition conduct, and an acquirer may want to consider extending its preclosing compliance review and risk assessments to the post-closing integration of the target company.

3. Check your hotlines.

Of course, it is preferable for a company to hear about possible concerns from employees directly, rather than learning about them through a government investigation of a whistleblower tip.

Many companies maintain hotlines that allow employees to anonymously report potential ethics and compliance issues. Below are questions to consider when evaluating the effectiveness of your hotline:

- Does your hotline work? When is the last time it was tested?
- Is your hotline anonymous? If not, consider the hesitation of employees to report when their name is tied to the complaint.
- Is your hotline actually used? A lack of complaints does not mean an absence of problems.
- When is the last time that employees were reminded of the hotline resource? Is it time for a refresher?

4. Conduct a tabletop exercise to confirm your cyber readiness.

If your systems are hacked tomorrow, would you be prepared? Fortunately, the adverse impacts of hacks can be mitigated by thoughtful preparation and readiness. Three primary elements to effective cyber readiness are: protection, response and continuous training.

Protection

Companies should identify their company's most critical cyber assets and risks and evaluate how to protect them.

Companies should implement training and auditing protocols, as well as an incident response plan and written information security program that defines security practices and exposures.

Response

Companies should be prepared in the event of a hack. They should follow protocol as laid out in the aforementioned incident response plan.

Continuous Training

All employees should receive continuous training as to the type of cyber risks that exist and the need to report any suspicious communications.

In addition to implementing this training, companies should consider the use of reporting initiatives and consequences for failure to report.

5. Assess your compliance programs.

When is the last time you checked your compliance program? A culture of compliance is the best way to avoid the DOJ. However, in a situation when a company finds itself under government investigation, a vigorous compliance program is of the utmost importance.

While this may seem like rudimentary advice, almost 90% of organizational offenders since fiscal year 1992 did not have a compliance or ethics program.[3]

The robust nature of a compliance program will affect the direction of a government investigation, including any penalty

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imposed. More specifically, the government considers, among other factors, whether or not the compliance program is tailored to the risks the company actually faces.[4]

Regular risk assessments are needed in order to reevaluate risks and understand where the company's time and money is best spent.

Additionally, periodic assessments of the company's entire compliance program are necessary to effectively compare the company to its benchmarks, identify program strengths and program enhancement opportunities, and assess the overall current state of the compliance program. This preemptive and continual assessment can be important to success in the case of an unexpected government investigation.

Remember: Corporate fitness does not end in January. Repeat these exercises throughout the year.

Note: This article originally ran in Law360 on January 11, 2023 and is reprinted with permission. ughout the year.

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Rebecca Fallk

[1] https://www.justice.gov/opa/speech/file/1535301/download.
[2] https://www.justice.gov/opa/speech/file/1535301/download.
[3] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf.
[4] https://www.justice.gov/criminal-fraud/page/file/937501/download.

DOJ Raises Stakes on Corporate Compliance: How to Respond

By Claire Rauscher & Mark Henriques, Womble Bond Dickinson (US) LLP

Even at companies with separate legal and compliance departments, Department of Justice-enforced compliance is a key concern for in-house counsel. Those pressures only will increase in the near future and are rapidly changing. WBD Partner Claire Rauscher, a veteran white-collar defense and government investigations attorney, discussed the latest developments in DOJ as part of The Evolving Dance thought leadership series. WBD Partner Mark Henriques moderated the discussion, and this article is based on that presentation.

Make no mistake: There is a new sheriff in town at the U.S. Department of Justice. Two years into the Biden Administration, it is clear the DOJ has made corporate compliance and anti-fraud efforts a top priority.

But in addition to placing greater emphasis on compliance, the DOJ has introduced new methods of measuring and enforcing compliance. More responsibilities are being placed on the shoulders of compliance officers, and Rauscher said in-house counsel and corporate compliance departments need to pay careful attention to these developments.

"You could be stepping into some pretty significant problems," she said. "It's a topic that is becoming more top-of-mind and I'm not sure that's going to change in the near future."

AAG Ken Polite Fires the First Salvo

A March 2022 speech by Assistant Attorney General Ken Polite (at NYU Law's Program on Corporate Compliance and Enforcement) outlines many of these changes. Polite is a former federal prosecutor, defense attorney and Chief Compliance Officer at a Fortune 500 company, so Rauscher says he has a deep understanding of real-world compliance challenges. Having said that, she noted that his current role is on the enforcement side.

In his remarks, Polite said there are three key criteria for corporate compliance programs. They must:

- Be well designed;
- Be adequately resourced and empowered to function effectively; and
- Work in practice.

"This can't be something where a company just puts something out there to check a box. That doesn't work," Rauscher said. These guidelines apply to all companies, public or private.

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So what is a "well designed" compliance program? Polite said in-house compliance officials should start by examining their company's process for assessing risk and asking, "Was the program built and tailored to manage the specific risk profile?"

"One thing the DOJ certainly understands is that you can build the best program in the world, and things will still slip through," Rauscher said.

The next step involves properly training employees, management and third parties on risk areas and responsibilities. What is the process for reporting violations of law or company policy that encourages disclosure without fear of retaliation? Does the company take reported violations seriously, investigating, documenting and, if necessary, remediating them?

Rauscher said the third party training can be particularly difficult, but a good-faith effort will carry weight with federal regulators.

"Compliance is a cost-center within companies," she said, meaning in-house compliance officials may get some pushback within their organizations about spending. But that shouldn't stop a compliance department from making the case for additional resources, if needed. "You have to adequately resource the compliance people," she said.

Rauscher also said that "adequately resourced" compliance goes beyond simply dollars, reporting lines and headcount. "The DOJ is going to look at the company's commitment to compliance at all levels," she said.

For example, regulators will review the qualifications and expertise of key personnel and gatekeeper roles. "You can't just put anybody in these roles," Rauscher said. They also will make sure that compliance officers have direct access to corporate management and the organization's board of directors.

"The chief compliance officer (CCO) needs to be at the table during the board of directors meetings. The DOJ has spelled that out," she said. This can be a difficult ask in some corporate cultures, but Rauscher said it is essential to mitigate compliance risks.

Crafting a Compliance Program for the New Reality

Likewise, how does the DOJ measure "works in practice?" Rauscher said the company should ask the following questions:

- Is the company constantly testing the effectiveness of its compliance program?
- Is the company improving and updating the program to adapt to changing risks?
- Can the company identify gaps or violation of law and/or policy?
- How does the company address root causes of gaps/violations and find ways to improve and prevent recurrences?
- How does a company measure and test its culture through all levels and throughout operations?

"A CCO has to have a direct line to the boardroom," Rauscher said. "If not, that's going to be a problem under these new guidelines."

Also, she said it is good to be able to demonstrate how good behavior was rewarded, bad behavior was punished and processes were adapted to meet changing compliance needs. Companies should document their compliance activities carefully, in part to show a pattern of diligence.

"You've got to keep improving and updating your program to adapt to changing risks," Rauscher said. "The DOJ wants to see evidence of that."

In addition, Rauscher said the DOJ wants the company's CCO to be the point person for compliance, not outside counsel. The CCO should be the point person in the company's communications with the DOJ. Likewise, the CCO needs to have true independence, as well as the authority and stature within the organization to make meaningful decisions.

Polite also emphasized that corporate monitors will be imposed when a determination is made that the company is not living up to its compliance and disclosure obligations.

The DOJ renamed its Fraud Section the Corporate Enforcement, Compliance and Policy Unit (CECP). The Department hired prosecutors, former compliance officers and defense attorneys with experience in compliance, monitorships and corporate enforcement matters to lead the CECP.

"It's very different than it was before," Rauscher said. "You now have experienced compliance professionals asking tough and probing questions during compliance presentations." The CECP should provide a greater degree of consistency to the review process and will supervise enforcement agreements from start to finish.

DOJ Introduces Certification Requirements

Assistant Attorney General Lauren Kootman in the CECP unit stated that companies can expect a requirement in enforcement agreements that chief compliance officers must certify that compliance programs have been "reasonably designed and implemented to prevent and detect future violations of law." Her comments were made at the June 2022 Women's White Collar Defense Association Conference.

These certifications parallel those required by Sarbanes-Oxley (Sections 302 and 906) for CFOs and CEOs regarding the accuracy of financial statements. They only will be required in plea agreements, deferred prosecution agreements, and pre-trial diversion agreements.

"This is huge," Rauscher said. Although the DOJ says the certification process is designed to empower CCOs by ensuring "adequate visibility and access to information" before being comfortable about signing off, Rauscher said she could understand why CCOs might see it as punitive.

"Think about that: You're certifying that these programs are going to detect future violations of law—that's frightening," she said. "Financial statements are numbers—they're fairly concrete. But this is asking you to place your confidence in a compli-

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ance program. Those are two completely different things."

On one hand, she said CCOs could face intense pressure from their organizations to certify the compliance program. On the other, CCOs face potential perjury or false statement/obstruction charges should they sign off on a program without having full confidence in it.

What can companies do to help ensure that their compliance programs meet this high standard? The DOJ has offered some guidance.

Again, it starts with the CCO having a full role in developing the compliance program by having a seat at the decision table. Kootman also recommended conducting regular employee surveys with a full analysis of those results, tying compensation to compliance incentives, and creating a thorough and effective process to deal with misconduct or violations.

If a problem does arise, the DOJ says companies should conduct a full investigation, including collecting and preserving information with a focus on employee communications and personal devices. This opens up an entirely new set of problems for compliance officers and in-house counsel, as another panel in WBD's The Evolving Dance series discussed.

The DOJ already is using these certification requirements. When Glencore International AG and Glencore Ltd. reached a May 2022 plea agreement with federal prosecutors on market manipulation and bribery (FCPA) charges, the CEO and CCO had to submit a document certifying that the company has met its compliance obligations under penalty of perjury and criminal obstruction. Certifications will clearly become more prevalent in large scale fraud schemes.

The Impact of the "Monaco Memo"

On Sept. 15, 2022, Deputy Attorney General Lisa Monaco released a 15-page memo covering a wide range of areas, including:

- Cooperation credit and timely disclosure;
- Clarifying the benefits of voluntary disclosure;
- Clarifying how to earn maximum cooperation credit;
- The consequences of delayed notification to the DOJ;
- Guidance when prior misconduct exists;
- Dealing with global documents;
- Guidelines for the corporate monitoring process; and
- Scrutiny of executive compensation when assessing compliance programs.

Rauscher said the final point—enhanced scrutiny of executive compensation packages—bears particular attention. She said the DOJ will be looking closely at how companies reward compliant conduct and penalize misconduct.

Compensation always has been a factor when evaluating corporate compliance programs, she said, but now is a point of greater emphasis. This enhanced scrutiny requires companies to build compensation packages that reward compliance and penalize non-compliance.

The initial question company leaders should ask is, "Is compliance performance part of the company's performance-appraisal system (for salary, promotion, stock awards, etc.)?"

Related questions for CCOs and in-house counsel include:

- Can you create metrics in performance plans/evaluations regarding adherence to regulations, policies and the law?
- Are there specific financial consequences in compensation policies for compliance failures for executive level employees?
- Are there financial incentives rewarding compliance or reporting violations?

"You can offer a carrot-and-stick approach when making these programs," Rauscher said.

She also said Monaco's goal is to shift the financial burdens of misconduct from the shareholders and place it on company personnel involved in the misconduct. Monaco also stated that further clarification of the announced policy priorities will be forthcoming.

How Data will Reshape Compliance

In addition to setting expanding priorities for compliance, the DOJ also is adding new roles and hiring highly credentialed attorneys to bolster its compliance enforcement efforts.

One of these new team members is Matt Galvin, hired to fill the DOJ Fraud Division's newly created Compliance and Data Analytics Counsel position. Galvin is the former Global VP of Ethics and Compliance for Anheuser-Busch InBev, where he received a great deal of attention for implementing a data-driven compliance program.

"Galvin believes that aggregated transaction data can help companies and regulators combat corruption," Rauscher said.

She also said that advanced analytics applies not just to FCPA compliance, but also across an entire compliance department. This likely will involve reaching outside of compliance to collect data and bringing in experts to assist on the technical side.

"You need to embrace data. Figure out where you can get data and decide how you can use it," Rauscher said. "The DOJ is going to expect this from bigger companies."

"Higher expectations" is the overall trend from the DOJ. Companies now face a greater compliance burden, with added personal responsibilities and potential consequences for C-suite executives. Companies would be well advised to take proactive steps now to ensure compliance, rather than wait until the DOJ knocks on the door.

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Claire Rauscher protects her clients from the long reach of the government (both state and federal). Her 25+ years of experience fighting in the trenches of the criminal justice system has honed her litigation and negotiation skills. She has tried numerous cases, negotiated favorable resolutions and obtained dismissals. Several of her most complex matters have been resolved favorably without publicity or reputational damage to the client. She represents companies in grand jury investigations and related enforcement proceedings as well as witnesses and individual targets.

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Mark Henriques focuses on complex commercial cases, including the defense of class actions. He has served as lead counsel on four $5M+ class actions filed in North Carolina federal courts since 2016, each of which was resolved successfully. Mark litigates and arbitrates cases involving construction, real estate, fraud, unfair trade practices, class actions, non-compete, non-solicit and non-disclosure agreements, and breach of contract. Mark has served as first chair in more than nine jury trials, five of which lasted a week or longer. He has won cases before the Fourth Circuit Court of Appeals and the North Carolina Supreme Court. Mark is also a trained mediator and AAA Arbitrator.

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