308:Whistle While You Work: Ethical, Fiduciary, & Other Dilemmas Facing Over-SOX'ed In-house Lawyers

Lisa E. Chang
Counsel, Labor & Employment
Jones, Day, Reavis & Pogue

Selena L. LaCroix
Senior Counsel
Texas Instruments Incorporated

Don H. Liu
Senior Vice President, General Counsel & Secretary
IKON Office Solutions, Inc.

Lu Pham
Managing Partner
Lynn Pham Moore & Ross, PC

Bettina W. Yip
Counsel, Labor & Human Resources
Cingular Wireless LLC

Faculty Biographies

Lisa E. Chang

Lisa E. Chang is counsel with the labor & employment group in the Atlanta office of Jones Day. She has managed various aspects of defending employment class actions across the country, as well as led the defense throughout the southeast in a wide variety of single-plaintiff cases.

Prior to joining Jones Day, Ms. Chang was a partner at Knapp & Street, an Atlanta-based firm, where she practiced a combination of employment and commercial litigation. She also taught legal writing at Georgia State University College of Law.

Ms. Chang currently serves as vice president and chair of the finance committee for the Georgia Legal Services Program, as a board member of the YWCA of Greater Atlanta, as secretary/treasurer and newsletter editor for the labor and employment law section of the Atlanta Bar Association, and as a member of the Georgia Supreme Court Commission on Access and Fairness in the Courts. She is a past president of the National Asian Pacific American Bar Association and a graduate of Leadership Atlanta.

Ms. Chang received her BA from Amherst College and her JD from Columbia University School of Law.

Selena L. LaCroix

Selena L. LaCroix is an international specialist in technology related law. As senior counsel for Texas Instruments, Ms. LaCroix heads the worldwide manufacturing, research and development legal teams for TI's multi-billion dollar semiconductor operations with particular emphasis on the development and execution of TI's manufacturing outsourcing legal strategy. She previously headed TI's Asia-Pacific legal department, covering countries including China, India, Australia, and South-East Asia with a legal focus on technology licensing, compliance and corporate governance, litigation management, and strategic alliances. She has also held the lead legal position for the company's semiconductor, broadband & imaging group. As legal counsel for TI's mergers and acquisitions practice group, Ms. LaCroix was active in structuring and negotiating numerous TI acquisitions, joint ventures, strategic alliances, divestitures, and minority equity participations in the U.S. and Asia. She was also responsible for the creation of the $160 million TI Venture Fund, a strategic investment vehicle created in partnership originally with Hambrecht & Quist and currently with Granite Ventures.

Before joining TI, Ms. LaCroix practiced law with Gray Cary Ware & Freidenrich in San Diego and Palo Alto. She worked in the firm's products, technology, and multimedia section. She began her practice of law in Singapore and specialized in intellectual property, admiralty, and general corporate law.

She is a member of the California State Bar, the Law Society of Singapore, and a solicitor of the Supreme Court of the United Kingdom.

Ms. LaCroix received her LLB Hons from the National University of Singapore and completed the Graduate Program in American Law at University of Berkeley/Davis.

Don H. Liu

Don H. Liu is senior vice president, general counsel, and secretary for IKON Office Solutions. In this role, he is responsible for the supervision of IKON's legal and regulatory affairs. He is also IKON's corporate compliance officer and former chair of IKON Diversity Council, which promotes diversity within IKON and the community at large.

Prior to joining IKON, Mr. Liu was vice president and deputy chief legal office of Aetna U.S. Healthcare (and its predecessor entity, U.S. Healthcare). Before switching to an in-house counsel position, he worked as an associate at two New York City law firms, specializing in securities and mergers and acquisitions; first at Simpson Thacher & Bartlett and then at Richards & O'Neil. Prior to this, he served as a law clerk to Justice Stewart G. Pollock at the Supreme Court of New Jersey.

His professional affiliations include being a member of board of directors of ACC, a member of the American Law Institute, a member of the Pennsylvania Business Roundtable Policy Committee, a former member of the board of directors of the Asian American Legal Defense and Education Fund, a member of the board of directors of the Minority Corporate Counsel Association, chair of the in-house counsel committee of the National Asian Pacific American Bar Association, a member of the negotiated acquisitions committee of the ABA's business law section, a member of the board of trustees of Dunwoody Village, and a member of the board of trustees of Emmanuel Church in Philadelphia. He is also the recipient of the MCCA/America Lawyer Media Diversity 2000 Award.

Mr. Liu received his BA from Haverford College with magna cum laude and Phi Beta Kappa honors. He earned his JD from Columbia University School of Law, where he was a Harlan Fiske Stone Scholar.

Lu Pham

Lu Pham is the managing shareholder of Lynn Pham Moore & Ross, PC. He practices exclusively in management labor and employment law and represents employers in both public and private sectors. Mr. Pham's practice is focused on employment litigation, and he has been involved in the defense of several class actions concerning employment disputes. His practice includes representing clients in court and before administrative agencies against claims of employment discrimination, wrongful discharge, sexual harassment, and whistle blowing. Mr. Pham regularly trains employers on effective employment practices, litigation avoidance, and compliance with anti-discrimination statutes.

Prior to joining his current firm, Mr. Pham practiced law with Vinson & Elkins, L.L.P., and Haynes & Boone, L.L.P. in Texas.

He is a member of the ABA, State Bar of Texas, and Tarrant County Bar Association. He is a current member of the board of directors for the National Asian American Bar Association. Mr. Pham has donated his time working for the United Way and the YMCA. He has taught as an adjunct professor at Texas Wesleyan School of Law, and has served as a municipal judge for the City of Grand Prairie, Texas.

Mr. Pham graduated from the University of Texas Law School.

Bettina W. Yip

Bettina Yip is counsel-labor & human resources at Cingular Wireless located in Atlanta.

Before joining Cingular, Ms. Yip was an associate in the litigation section at Meadows, Ichter & Bowers and an associate in the Atlanta office of King & Spalding in the labor and employment law department. She concentrated primarily on labor and employment law.

Ms. Yip currently serves on the State Bar of Georgia board of governors, the advisory committee on legislation, the women and minorities in the profession committee, the Georgia Supreme Court commission on professionalism, the unauthorized practice of law District 4 committee, and the executive committee of the Georgia Law Related Education Consortium. She is currently a fellow of the Lawyers Foundation of Georgia and has served on the Atlanta Bar Association's nominating committee. She also served on the Georgia commission on Asian American affairs, the board of directors of the Anti-Prejudice Consortium, and was chairperson of the Multi-Bar Leadership Council. She is a graduate of the Diversity Leadership Academy. She is a member of the State Bar of Georgia, ABA, Atlanta Bar Association, Georgia Asian Pacific American Bar Association, and Georgia Association for Women Lawyers. Ms. Yip has served as president and vice president of the Georgia Asian Pacific American Bar Association. She was also the southeast regional governor for the National Asian Pacific American Bar Association. She founded the People's Law School for the Asian Community program in which volunteer attorneys teach basic law classes to lay people in the Asian community.

Ms. Yip graduated, magna cum laude, from Wellesley College, and received her JD from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar. She was a notes editor on the *Journal of Asian Law* at Columbia and was the recipient of the Florence N. Shientag Award from the New York Women's Bar Association.

CHECKLIST FOR CONDUCTING AN EFFECTIVE INTERNAL INVESTIGATION

A. MEET WITH THE COMPLAINANT.

1. Make sure that the complainant is comfortable with who is handling the investigation.

2. Meet with complainant at a location that allows for privacy and security.

3. Reiterate the company's commitment to neutrality and impartiality in the investigation.

4. Do not promise confidentiality, but state that the information will be divulged only on a need-to-know basis.

5. Advise the complainant to complete a complaint form. Make sure it is signed and dated.

    - Request that complainant complete the form at work.

    - Should the complainant not complete the form, the supervisor or manager responsible for coordinating the investigation can use the form as a tool to record the initial information about the complaint. The supervisor/manager should sign the form and state why the complainant did not complete it.

6. Get a detailed account of the events surrounding the claim: (get as much information as possible with open ended questions)

    - What happened?

    - When did it happen?

    - Who did it?

    - Where did it happen?

    - Who were the witnesses or possible witnesses?

    - What exactly was said or done?

    - What was the claimant's reaction?

    - What did the claimant do about it?

    - Who did the claimant tell about it?

    - Is this the first time that something like this happened?

- Do you know or have you heard if this has ever happened to anyone else?
- Are there any notes, recordings, pictures, or anything else that might corroborate claim?
- Did any of it take place on a taped phone, company-owned computer system or in an area that is in covered by a security camera?

7. Clarify what the complainant expects from the investigative process but promise nothing.
8. Repeat the story to confirm understanding.
9. Document facts, not speculation or opinions.
10. Advise the employee that the matter will be promptly investigated under the complaint policy, and explain what the procedures are.
11. Advise the employee that there will be no retaliation for coming forward with a complaint made in good faith. Encourage the employee to report any perceived retaliation for filing the complaint.

B. DETERMINING IF A FORMAL INVESTIGATION IS NECESSARY.

1. Will a single answer resolve the issue?
2. Are other employees involved?
3. Do you need more facts than the complainant is able to provide?
4. Do you need the help of any other resource in order to reach a conclusion?

C. UTILIZING AND CONSULTING WITH COUNSEL.

1. Should in-house counsel conduct the investigation?
2. Will in-house counsel's role be as counselor or active investigator?
3. Should outside counsel be consulted?
4. Make a decision on attorney-client privilege and work product ahead of time.

D. DETERMINING THE NATURE OF THE COMPLAINT BEFORE INITIATING A FORMAL INVESTIGATION.

1. Identify what the complainant is complaining about (e.g., which Company policy, guideline or procedure).

2. Determine what the Company's obligation is with respect to resolving the issue.

3. Decide who else is necessary to assist you in resolving the issue.

E. PLANNING THE INVESTIGATION.

1. Determine what policies, guidelines, or practices apply to this situation. If applicable, consult union or arbitration agreements for possible restrictions or specific procedures.

2. Obtain all relevant documents that will assist you in conducting your investigation.

   a. Are there any other documented reports of related activity?

   b. Review personnel files of the accused.

3. Choose the investigator(s) most suitable to conduct this investigation.

   a. Consider someone from outside of the involved department.

   b. The investigator selected must be neutral, objective, and have a reputation for trustworthiness.

   c. The investigator selected should have knowledge of company policies.

4. Identify potential witnesses.

   a. Decide who you should interview.

   b. Decide the order of your interviewees.

5. Determine if any interim actions are necessary ***before*** you initiate the investigation. (e.g., place accused on immediate leave, temporarily transfer employees, or change supervisory responsibilities).

6. Outline the questions you will ask.

7. Maintain a separate confidential investigation file pertaining to this matter so that only the investigator has access to it.

   - Preserve documents that may be collected, including notes, memos and witness statements.

   - Protect e-mail messages and computer disks.

   - Do not store any investigation notes in the employee's personnel file.

F. CONDUCTING THE INVESTIGATION.

1. Anticipate the questions that each interviewee will ask.

2. Consider including an investigator's witness in all interviews to corroborate impartiality and noncoerciveness.

3. Before beginning the interviews:

   a. Explain the reason for the investigation,

   b. Explain why the interviewee is being interviewed,

   c. Explain how the information obtained will be used.

   d. Explain the Company's obligation to investigate and gather information.

   e. Explain how the interviewee is free to leave at any time.

   f. Explain how an interviewee's refusal to participate in the interview may result in disciplinary action, up to and including discharge.

   g. Stress that no conclusion has yet been reached.

   h. Emphasize Company's policy regarding confidentiality and retaliation.

G. CONDUCTING AN EFFECTIVE INTERVIEW.

1. Effective interviewing techniques:

   a. Do not begin with hostile or tough questions. Save unfriendly or embarrassing questions until rapport has been established.

   b. Start with "broad" questions and then use follow-up questions.

   c. Use active listening skills.

   d. Do not put words into the interviewee's mouth.

   e. Ask the tough questions.

   f. Use fact-based questions to get back on track if you suspect the witness is lying.

   g. Be flexible. Go beyond your pre-planned questions.

h. Ask questions designed to elicit relevant facts.

i. Ask *who, what, when, where, why, and how* type questions.

2. Interviewing the Witnesses.

   a. Advise witness that this is an internal investigation and explain the purpose of the investigation.

   b. Obtain as much information as possible from the interviewee.

   c. Obtain a written, signed statement.

   d. Do not promise confidentiality but assure the witness that confidentiality will be maintained on a business need-to-know basis.

   e. Advise the witness that no retaliation will be taken against them because of their participation in the investigation.

   f. Tell the witness not to discuss the interview with others.

   g. You may choose to keep complainant's name confidential.

3. Interviewing the Accused.

   a. Keep in mind that some employees may be entitled to have a representative present during the interview.

   b. State that this is an internal investigation and explain the purpose of the investigation.

   c. Advise the accused that he or she is suspected of misconduct and give the accused a detailed account of the misconduct alleged.

   d. Give accused full opportunity for a response to each accusation.

      - Let time pass before encouraging a response to questions if the accused expresses anger.

   e. Obtain a written statement, if possible.

   f. Never prevent the accused from leaving the room if the accused wants to leave.

   g. Ask for the accused's consent prior to searching personal effects, vehicles, locked storage facilities, or any other area that is not generally considered accessible to others in the workplace. You may warn the accused of the possible consequences of

his or her refusal to cooperate, but do not suggest that a refusal to comply implies any wrongdoing by the accused.

H. BEFORE CLOSING THE INTERVIEW.

1. Relate the seriousness of the investigation.
2. Remind interviewees they are not to discuss about the investigation with others.
3. Review the interviewee's answers with him or her.
4. Encourage the interviewee to come back with any additional information.

I. CLOSING THE INVESTIGATION.

1. Analyze Information.
    a. Review all documents that might be relevant to the complaint.
    b. Review the accused's history at the company regarding prior complaints and/or problems.
2. Assessing Credibility.
    a. Make notes that will help assess credibility as soon as the interviewee leaves.
    b. Review the interviewee's chronology of events.
    c. Note the interviewee's demeanor.
    d. What, if any, admissions were made during the interview?
    e. Did the interviewee deny anything?
    f. Were conflicting statements made?
    g. Was the interviewee's explanation plausible?
3. Determine the Outcome and Make Recommendation.
    a. When alleged offense is substantiated, take action.
        - State the supporting evidence within the recommendation (e.g., witness stated that the accused made inappropriate jokes).
        - Assess appropriate discipline.

→ Assess the severity. Is the violation serious or minor?

→ Do any local, state, or federal laws require certain actions?

→ What is the employee's history at the company regarding length of employment and performance?

→ What factors, if any, mitigate against instituting discipline in this case?

- Ensure that the discipline chosen is consistent with past company practices.
- Follow labor agreements and policy handbooks.
- Document the disciplinary action taken.

b. When alleged offense is not substantiated:

- Tell the accused that the results do not substantiate the complaint/suspicion.
- Reiterate company policy (if applicable).
- Remind the accused that retaliation against the complainant or witness is prohibited.
- Take action against the complainant only if there is *clear proof* that the complainant fabricated the complaint or made the complaint in bad faith. Otherwise, there is a risk that action taken will be deemed retaliatory.

c. When investigative results are inconclusive:

- Follow the steps of unsubstantiated claims.
- Consider a second level of investigation (e.g., law enforcement or private investigators,) if appropriate.
- Consider discussing the general topic at a staff meeting or distributing a memo reminding employees of company policy. Do NOT disclose specifics of the complaint.
- Continue to monitor the workplace.

J. COMPLYING WITH THE EMPLOYER'S POLICIES REGARDING DOCUMENTATION.

1. Review the documentation guidelines to be sure the investigation was documented properly.

2. Distribute findings and conclusions to appropriate personnel pursuant to the company's guidelines.

3. Appropriately document the "personnel files" of the complainant and the accused.

4. Keep in mind that your written remarks may have to be revealed if a lawsuit is filed over the dispute.

K. FOLLOWING UP.

1. Follow up with the complainant and the accused about the outcome of the investigation.

2. Advise other employees of the outcome only to the extent they have a legitimate business reason to know. Individuals without a legitimate business reason should not be told of the reason(s) for the internal investigation.

3. Advise the complainant to notify employer if there are further problems.

4. Take proactive steps to prevent retaliation.

    - Train supervisors and managers that regardless of the outcome of an investigation, they should not do anything that could be construed as retaliatory.

L. PREPARING INVESTIGATION REPORT.

1. Provide a basis for the solution of the complaint.

2. Provide sufficient information so that the document could stand alone as a permanent record of the investigation.

3. Produce a concise, specific, and factual report to include the following:

    - The context of the complaint, highlighting the undisputed facts and the issues raised for determination.

    - Summary of the process and steps followed in the course of the investigation.

    - Review of the relevant information and documents obtained.

    - Description of the issues raised and the positions taken by the parties on each of these issues.

- An account of how witnesses were chosen for interviews.
- A summary of evidence relevant to the allegation provided by witnesses.
- An assessment of credibility issues including consistency of interviews with documentation, other witnesses, etc.
- An outline of the investigator's findings and reasons based on the evidence.

M. AVOIDING DEFAMATION CLAIMS.

1. Do not publicly reprimand an employee for alleged wrongdoing.
    - All communication regarding the discipline of an employee should be in private with the employee so there will be no "publication" of the employer's statements.
2. Do not give prospective employers information regarding the reasons for terminating the employee.
    - Even if the discharged employee signs a waiver authorizing the release of such information, an employer should always be cautious and decline to provide any information.
3. All responses to requests for reference information should be handled through a centralized department, such as the Human Resources Department.
    - Individual supervisors should *never* give reference information to prospective employers.

OTHER STRATEGIES TO MINIMIZE LIABILITY IN CONNECTION WITH WORKPLACE INVESTIGATIONS

A. MAINTAIN PROPER WRITTEN POLICIES.

1. Establish a written complaint policy detailing effective procedures for reporting, receiving, and investigating complaints.
    - Ensure that the policy provides employees with effective reporting mechanisms, including reasonable avenues to bring complaints forward.
        → Allow employees to bypass their immediate supervisors, and report claims to other company officials, the Human Resources Department, or the President.
2. Specifically prohibit retaliation against an employee for a making a good faith claim of misconduct, including harassment.

3. Establish a written "open door" policy.

    - Encourage employees to discuss concerns with their supervisor, department head, general manager, or human resources.

4. Guarantee that all unlawful harassment claims will be investigated promptly.

5. Utilize language conveying ZERO TOLERANCE.

6. Guarantee that confidentiality will be maintained on a business need-to know basis.

7. Require employees to report any misconduct, including harassment, **immediately** and note that their failure to do so may lead to disciplinary action.

8. Require all employees to cooperate with any investigation.

B. COMMUNICATE POLICIES.

1. Incorporate policies in employee handbook or policy manual.

2. Disseminate handbook or policy manual to all employees.

3. Obtain a written confirmation and acknowledgment form from each employee indicating they have received, read, and understand the written policies.

    - Maintain form in each employee's personnel file so that it will be available in case of future litigation.

4. Post anti-harassment and discrimination policy in conspicuous places and employee gathering areas (i.e., lunch or break rooms and water coolers).

5. Discuss anti-harassment and discrimination policies in staff meetings and orientation meetings.

    - Record and Save dates and names of persons attending those meetings.

C. TRAIN EMPLOYEES, INCLUDING SUPERVISORS.

1. Increase employee awareness and understanding of company policies, including anti-harassment and discrimination policy.

2. Clarify misconceptions about what constitutes harassment.

3. Train supervisors/managers how to make hiring, discipline, and termination decisions that comply with laws and that will survive legal challenge.

4. Train employees on behaviors that are considered to be unacceptable in the workplace and what consequences are for engaging in prohibited behavior.

5. Provide training to employees based on their obligation to the company. Specifically take into consideration whether the employee is a co-worker, supervisor, or a human resources/personnel representative.

6. Train supervisors/managers to immediately route complaints to high-level individuals who have been designated to handle them.

7. Train employees on the procedures for filing a complaint, as well as the procedures for receiving and investigating complaints.

8. Enforce policies, such as by counseling or disciplining supervisors/managers who do not comply with policy.

9. Assure employees that they will not be retaliated against and should immediately report any additional inappropriate behavior.

10. Provide specific training to individuals who may carry out internal investigations so that the investigations are conducted properly.

11. Keep a training log for each employee.

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Up The Ladder and Other Reporting Requirements

- Sarbanes-Oxley Act: Section 205
- New Jersey Conscientious Employee Protection Act, 34:19-3
- ABA Model Rules 1.6, 4.1(b)
- New Jersey Rules of Professional Conduct 1.6, 4.1

17 C.F.R. Part 205
STANDARDS OF PROFESSIONAL CONDUCT FOR ATTORNEYS APPEARING AND PRACTICING BEFORE THE COMMISSION IN THE REPRESENTATION OF AN ISSUER

Sec.
205.1 Purpose and scope.
205.2 Definitions.
205.3 Issuer as client.
205.4 Responsibilities of supervisory attorneys.
205.5 Responsibilities of a subordinate attorney.
205.6 Sanctions and discipline.
205.7 No private right of action.

Authority: 15 U.S.C. 77s, 78d-3, 78w, 80a-37, 80a-38, 80b-11, 7202, 7245, and 7262.

§205.1 Purpose and scope.

This part sets forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in the representation of an issuer. These standards supplement applicable standards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

§205.2 Definitions.

For purposes of this part, the following definitions apply:

(a) Appearing and practicing before the Commission:

(1) Means:

(I) Transacting any business with the Commission, including communications in any form;

(ii) Representing an issuer in a Commission administrative proceeding or in connection with any Commission investigation, inquiry, information request, or subpoena;

(iii) Providing advice in respect of the United States securities laws or the Commission's rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document; or

(iv) Advising an issuer as to whether information or a statement, opinion, or other writing is required under the United States securities laws or the Commission's rules or regulations thereunder to be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission; but

(2) Does not include an attorney who:

(i) Conducts the activities in paragraphs (a)(1)(i) through (a)(1)(iv) of this section other than in the context of providing legal services to an issuer with whom the attorney has an attorney-client relationship; or

(ii) Is a non-appearing foreign attorney.

(b) Appropriate response means a response to an attorney regarding reported evidence of a material violation as a result of which the attorney reasonably believes:

(1) That no material violation, as defined in paragraph (i) of this section, has occurred, is ongoing, or is about to occur;

(2) That the issuer has, as necessary, adopted appropriate remedial measures, including appropriate steps or sanctions to stop any material violations that are ongoing, to prevent any material violation that has yet to occur, and to remedy or otherwise appropriately address any material violation that has already occurred and to minimize the likelihood of its recurrence; or

(3) That the issuer, with the consent of the issuer's board of directors, a committee thereof to whom a report could be made pursuant to §205.3(b)(3), or a qualified legal compliance committee, has retained or directed an attorney to review the reported evidence of a material violation and either:

(i) Has substantially implemented any remedial recommendations made by such attorney after a reasonable investigation and evaluation of the reported evidence; or

(ii) Has been advised that such attorney may, consistent with his or her professional obligations, assert a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to the reported evidence of a material violation.

(c) Attorney means any person who is admitted, licensed, or otherwise qualified to practice law in any jurisdiction, domestic or foreign, or who holds himself or herself out as admitted, licensed, or otherwise qualified to practice law.

(d) Breach of fiduciary duty refers to any breach of fiduciary or similar duty to the issuer recognized under an applicable federal or state statute or at common law, including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.

(e) Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

(f) Foreign government issuer means a foreign issuer as defined in 17 CFR 230.405 eligible to register securities on Schedule B of the Securities Act of 1933 (15 U.S.C. 77a et seq., Schedule B).

(g) In the representation of an issuer means providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer.

(h) Issuer means an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under section 12 of that Act (15 U.S.C. 78l), or that is required to file reports under section 15(d) of that Act (15 U.S.C. 78o(d)), or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 (15 U.S.C. 77a et seq.), and that it has not withdrawn, but does not include a foreign government issuer. For purposes of paragraphs (a) and (g) of this section, the term "issuer" includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer.

(i) Material violation means a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law.

(j) Non-appearing foreign attorney means an attorney:

(1) Who is admitted to practice law in a jurisdiction outside the United States;

(2) Who does not hold himself or herself out as practicing, and does not give legal advice regarding, United States federal or state securities or other laws (except as provided in paragraph (j)(3)(ii) of this section); and

(3) Who:

(i) Conducts activities that would constitute appearing and practicing before the Commission only incidentally to, and in the ordinary course of, the practice of law in a jurisdiction outside the United States; or

(ii) Is appearing and practicing before the Commission only in consultation with counsel, other than a non-appearing foreign attorney, admitted or licensed to practice in a state or other United States jurisdiction.

(k) Qualified legal compliance committee means a committee of an issuer (which also may be an audit or other committee of the issuer) that:

(1) Consists of at least one member of the issuer's audit committee (or, if the issuer has no audit committee, one member from an equivalent committee of independent directors) and two or more members of the issuer's board of directors who are not employed, directly or indirectly, by the issuer and who are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19));

(2) Has adopted written procedures for the confidential receipt, retention, and consideration of any report of evidence of a material violation under §205.3;

(3) Has been duly established by the issuer's board of directors, with the authority and responsibility:

(i) To inform the issuer's chief legal officer and chief executive officer (or the equivalents thereof) of any report of evidence of a material violation (except in the circumstances described in §205.3(b)(4));

(ii) To determine whether an investigation is necessary regarding any report of evidence of a material violation by the issuer, its officers, directors, employees or agents and, if it determines an investigation is necessary or appropriate, to:

(A) Notify the audit committee or the full board of directors;

(B) Initiate an investigation, which may be conducted either by the chief legal officer (or the equivalent thereof) or by outside attorneys; and

(C) Retain such additional expert personnel as the committee deems necessary; and

(iii) At the conclusion of any such investigation, to:

(A) Recommend, by majority vote, that the issuer implement an appropriate response to evidence of a material violation; and

(B) Inform the chief legal officer and the chief executive officer (or the equivalents thereof) and the board of directors of the results of any such investigation under this section and the appropriate remedial measures to be adopted; and

(4) Has the authority and responsibility, acting by majority vote, to take all other appropriate action, including the authority to notify the Commission in the event that the issuer fails in any material respect to implement an appropriate response that the qualified legal compliance committee has recommended the issuer to take.

(l) Reasonable or reasonably denotes, with respect to the actions of an attorney, conduct that would not be unreasonable for a prudent and competent attorney.

(m) Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

(n) Report means to make known to directly, either in person, by telephone, by e-mail, electronically, or in writing.

§205.3 Issuer as client.

(a) Representing an issuer. An attorney appearing and practicing before the Commission in the representation of an issuer owes his or her professional and ethical duties to the issuer as an organization. That the attorney may work with and advise the issuer's officers, directors, or employees in the course of representing the issuer does not make such individuals the attorney's clients.

(b) Duty to report evidence of a material violation. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or to both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith. By communicating such information to the issuer's officers or directors, an attorney does not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney's representation of an issuer.

(2) The chief legal officer (or the equivalent thereof) shall cause such inquiry into the evidence of a material violation as he or she reasonably believes is appropriate to determine whether the material violation described in the report has occurred, is ongoing, or is about to occur. If the chief legal officer (or the equivalent thereof) determines no material violation has occurred, is ongoing, or is about to occur, he or she shall notify the reporting attorney and advise the reporting attorney of the basis for such determination. Unless the chief legal officer (or the equivalent thereof) reasonably believes that no material violation has occurred, is ongoing, or is about to occur, he or she shall take all reasonable steps to cause the issuer to adopt an appropriate response, and shall advise the reporting attorney thereof. In lieu of causing an inquiry under this paragraph (b), a chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a qualified legal compliance committee under paragraph (c)(2) of this section if the issuer has duly established a qualified legal compliance committee prior to the report of evidence of a material violation.

(3) Unless an attorney who has made a report under paragraph (b)(1) of this section reasonably believes that the chief legal officer or the chief executive officer of the issuer (or the equivalent thereof) has provided an appropriate response within a reasonable time, the attorney shall report the evidence of a material violation to:

(i) The audit committee of the issuer's board of directors;

(ii) Another committee of the issuer's board of directors consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19)) (if the issuer's board of directors has no audit committee); or

(iii) The issuer's board of directors (if the issuer's board of directors has no committee consisting solely of directors who are not employed, directly or indirectly, by the issuer and are not, in the case of a registered investment company, "interested persons" as defined in section 2(a)(19) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(19))).

(4) If an attorney reasonably believes that it would be futile to report evidence of a material violation to the issuer's chief legal officer and chief executive officer (or the equivalents thereof) under paragraph (b)(1) of this section, the attorney may report such evidence as provided under paragraph (b)(3) of this section.

(5) An attorney retained or directed by an issuer to investigate evidence of a material violation reported under paragraph (b)(1), (b)(3), or (b)(4) of this section shall be deemed to be appearing and practicing before the Commission. Directing or retaining an attorney to investigate reported evidence of a material violation does not relieve an officer or director of the issuer to whom such evidence has been reported under paragraph (b)(1), (b)(3), or (b)(4) of this section from a duty to respond to the reporting attorney.

(6) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if:

(i) The attorney was retained or directed by the issuer's chief legal officer (or the equivalent thereof) to investigate such evidence of a material violation and:

(A) The attorney reports the results of such investigation to the chief legal officer (or the equivalent thereof); and

(B) Except where the attorney and the chief legal officer (or the equivalent thereof) each reasonably believes that no material violation has occurred, is ongoing, or is about to occur, the chief legal officer (or the equivalent thereof) reports the results of the investigation to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee; or

(ii) The attorney was retained or directed by the chief legal officer (or the equivalent thereof) to assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation, and the chief legal officer (or the equivalent thereof) provides reasonable and timely reports on the progress and outcome of such proceeding to the issuer's board of directors, a committee thereof to whom a report could be made pursuant to paragraph (b)(3) of this section, or a qualified legal compliance committee.

(7) An attorney shall not have any obligation to report evidence of a material violation under this paragraph (b) if such attorney was retained or directed by a qualified legal compliance committee:

(i) To investigate such evidence of a material violation; or

(ii) To assert, consistent with his or her professional obligations, a colorable defense on behalf of the issuer (or the issuer's officer, director, employee, or agent, as the case may be) in any investigation or judicial or administrative proceeding relating to such evidence of a material violation.

(8) An attorney who receives what he or she reasonably believes is an appropriate and timely response to a report he or she has made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section need do nothing more under this section with respect to his or her report.

(9) An attorney who does not reasonably believe that the issuer has made an appropriate response within a reasonable time to the report or reports made pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section shall explain his or her reasons therefor to the chief legal officer (or the equivalent thereof), the chief executive officer (or the equivalent thereof), and directors to whom the attorney reported the evidence of a material violation pursuant to paragraph (b)(1), (b)(3), or (b)(4) of this section.

(10) An attorney formerly employed or retained by an issuer who has reported evidence of a material violation under this part and reasonably believes that he or she has been discharged for so doing may notify the issuer's board of directors or any committee thereof that he or she believes that he or she has been discharged for reporting evidence of a material violation under this section.

(c) Alternative reporting procedures for attorneys retained or employed by an issuer that has established a qualified legal compliance committee. (1) If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or by any officer, director, employee, or agent of the issuer, the attorney may, as an alternative to the reporting requirements of paragraph (b) of this section, report such evidence to a qualified legal compliance committee, if the issuer has previously formed such a committee. An attorney who reports evidence of a material violation to such a qualified legal compliance committee has satisfied his or her obligation to report such evidence and is not required to assess the issuer's response to the reported evidence of a material violation.

(2) A chief legal officer (or the equivalent thereof) may refer a report of evidence of a material violation to a previously established qualified legal compliance committee in lieu of causing an inquiry to be conducted under paragraph (b)(2) of this section. The chief legal officer (or the equivalent thereof) shall inform the reporting attorney that the report has been referred to a qualified legal compliance committee. Thereafter, pursuant to the requirements under §205.2(k), the qualified legal compliance committee shall be responsible for responding to the evidence of a material violation reported to it under this paragraph (c).

(d) Issuer confidences. (1) Any report under this section (or the contemporaneous record thereof) or any response thereto (or the contemporaneous record thereof) may be used by an attorney in connection with any investigation, proceeding, or litigation in which the attorney's compliance with this part is in issue.

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1621; suborning perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

§205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in §205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

(c) A supervisory attorney is responsible for complying with the reporting requirements in §205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.

(d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under §205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

§205.5 Responsibilities of a subordinate attorney.

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.

(c) A subordinate attorney complies with §205.3 if the subordinate attorney reports to his or her supervising attorney under §205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

(d) A subordinate attorney may take the steps permitted or required by §205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under §205.3(b) has failed to comply with §205.3.

§205.6 Sanctions and discipline.

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

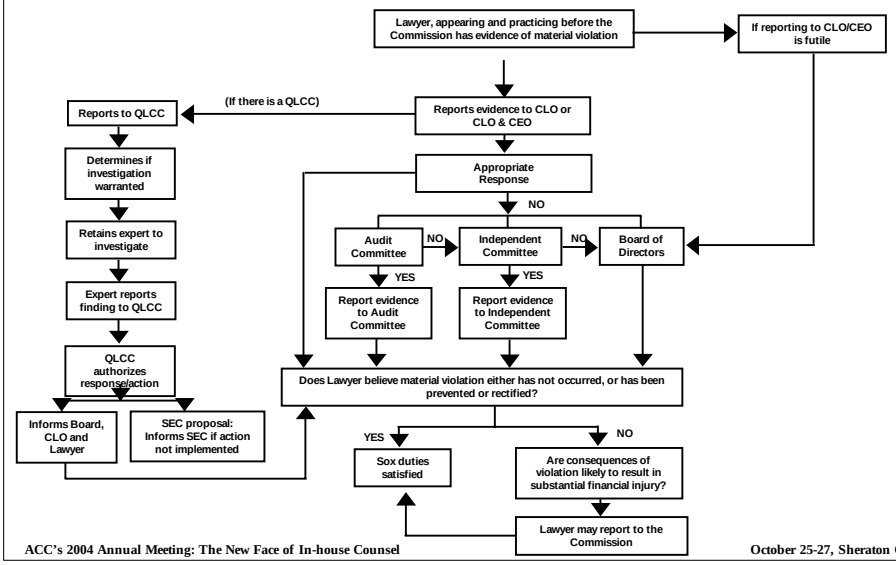
§205.7 No private right of action.

(a) Nothing in this part is intended to, or does, create a private right of action against any attorney, law firm, or issuer based upon compliance or noncompliance with its provisions.

(b) Authority to enforce compliance with this part is vested exclusively in the Commission.

ACC Association of Corporate Counsel

Up the Ladder Reporting Under Sarbanes-Oxley



ACC Association of Corporate Counsel

NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT, 34:19-3

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer or another employer, with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;

b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer, with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of patient care; or

c. Objects to, or refuses to participate in any activity, policy or practice which the employee reasonably believes:

(1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;

(2) is fraudulent or criminal; or

(3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.

ABA MODEL RULES

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

NEW JERSEY RULES OF PROFESSIONAL CONDUCT

RPC 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to comply with other law.

(d) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b) or (c).

RPC 4.1 Truthfulness in Statements to Others

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

WHISTLEBLOWER PROTECTION: FEDERAL STATUTES

Examples of Federal Statutes with Whistleblower Protection

- Civil Rights Act of 1964 (Title VII)
- 31 U.S.C. § 3730(h) – The False Claims Act
- 29 U.S.C § § 1132(a), 1140 - Employee Retirement Income Security Act (ERISA)
- 5 U.S.C. § § 2302 (b)(8), (9) – Protecting government employees
- 42 U.S.C. § 7622 – Air Pollution and Control Act
- 42 U.S.C. § 5851 – Energy Reorganization Act
- 33 U.S.C. § 948 – Longshoremen's and Harborworker's Act
- 30 U.S.C. § 815 – Mine Safety Act
- 29 U.S.C. § 660 – Occupational Safety and Health Act
- 45 U.S.C. § 441 – Railroad Safety Act
- 42 U.S.C. § 300 – Safe Drinking Water Act
- 38 U.S.C. § 2021 – Selective Service Act
- 42 U.S.C. § 6971 – Solid Waste Disposal Act
- 49 U.S.C. § 2305 – Surface Transportation Assistance Act of 1982
- 15 U.S.C. § 2622 – Toxic Substances Control Act
- 29 U.S.C. § 793 – Vocational Rehabilitation Act
- 33 U.S.C. § 1397 – Water Pollution Control Act
- 49 U.S.C. § 42121 – Aviation Whistleblower Protection Procedures

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INCREASED SCOPE OF WHISTLEBLOWER PROTECTION UNDER SOX

- Civil penalties for public companies.
- Criminal penalties for public and private companies (up to 10 years imprisonment).
- Wide range of "protected activity".
- Burden of proof on company to show "clear and convincing evidence" that there was no retaliation.

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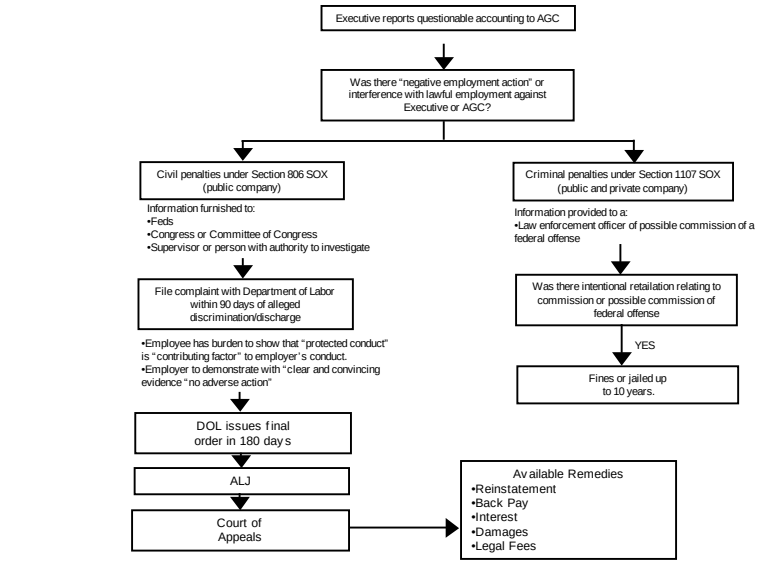
PROTECTION OF WHISTLEBLOWER UNDER SARBANES-OXLEY



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Limiting Liability from Whistleblower Lawsuits

- ✓ Develop a written code of business conduct which reflects your company's ethics and values. Make sure it is periodically distributed (either in hard copy or electronically) to employees. You may also want to require signed employee acknowledgements of understanding.
- ✓ Management must demonstrate its commitment to this code by its actions. (This means consistent application of the code – no "exceptions" made for certain individuals.)
- ✓ Ethical behavior needs to be communicated from the top down. (Messages of this significance are best sent from the very top – CEO, etc.)
- ✓ Listen to employees and take their concerns seriously. Investigate every claim, regardless of how insignificant or far-fetched it may seem.
- ✓ Create mechanisms, such as an ombudsperson, open door policy, suggestion box, or anonymous hotline, which allow employees to raise concerns outside of their normal reporting chain.
- ✓ Always investigate and provide feedback.
- ✓ Establish regular internal auditing procedures to detect fraud or other misdeeds early, and deal promptly and harshly with anything uncovered.
- ✓ Inform employees that the company has a zero-tolerance policy for fraud and other code of business conduct violations, as well as other violations of the law.
- ✓ Engage in on-going communication with employees about what is and is not acceptable and how to report inappropriate conduct.
- ✓ Train managers to ensure that all complaints are appropriately directed and investigated and employees who do blow the whistle are not retaliated against.
- ✓ Consider training lower-level employees as well.

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