

DUTY OF CARE

By Tim J. Leech, CA, MBA

Whistleblowing Mechanisms - The Ways and Means

This second column on whistleblowing discusses the ways and means of setting up whistleblowing mechanisms.

For those of you who missed my last column, I am referring to a communication vehicle that provides employees with a means to report known or suspected illegal, unethical or generally unacceptable practices that they become aware of in the workplace.

Whistleblowing mechanisms should be designed to allow employees to report such issues with limited risk to their own career and financial well-being.

Companies cite widely varying reasons for providing a whistleblowing mechanism. Some believe that they have a moral duty to provide an outlet for staff to disclose and discuss serious legal or ethical concerns. Others are more concerned with the impact on the bottom line and/or the liability of officers and directors. Sometimes, parent companies are interested in using staff to monitor activities in their subsidiaries. In the public sector, I understand that the Auditor General recently suggested (without success) establishing a hotline which federal employees could use to report on fraud, mismanagement and waste in the public sector.

Whatever your motivation, once you have decided that a whistleblowing mechanism is right for your company, the next step is to choose the specific vehicle and establish it.

The ways and means

1. Modify exit interviews and exit interview procedures.

This generally involves building into exit interviews a question which queries the employee's views on the conduct of the company and staff. Often employees resolve their discomfort with illegal or unethical practices by resigning, and the company never

asks the questions that may disclose why the employee is really leaving. Frequently HR practitioners are not adequately trained or "street smart" enough to detect the signs that indicate an "ethical" resignation or termination. Additional training or using an outside person experienced in interviewing techniques can help. A typical question that could open the door to a whistleblowing disclosure is:

-- "Fred, while you were with us, were there any instances where you were uncomfortable with the conduct of staff or the company as a whole?" or

-- "Mary, having been with us for some time, how do you feel about the ethics of the people that you worked with at ABC Company and the company's approach to doing business?"

Investigation firms regularly use a "post-employment survey" to obtain valuable information on the behaviour of companies, senior executives and individuals. The obvious disadvantage: by the time it is used, it is too late to salvage the situation and prevent a potentially valuable employee from leaving.

2. Establish an ombudsman position.

Companies who choose this option establish a position independent of line management that employees can call or write to discuss a wide range of concerns. Confidentiality is usually assured. Employee communication programs are designed to advertise the existence of the position to staff and staff are encouraged to call on any issue that they are uncomfortable with, don't know how to deal with and/or have not been successful in addressing themselves.

Where dilemmas can occur with this route is when staff report serious illegal or unethical acts to the ombudsman but are unwilling to come forward. Situations could occur where

the ombudsman would have to balance his or her fiduciary duty to the corporation and personal legal position, against breaching their promise of confidentiality with a whistleblower.

3. *Identify a person or position who/which employees can report issues of concern to and discuss resolution options with.*

This is usually far less specific than the ombudsman option. Typically companies suggest in codes of conduct that if employees have any concerns they should contact the Human Resources or Internal Audit Department. I have never endorsed this route because I believe it is difficult to talk to a "department" and the invitation seems to be more of a window dressing than a sincere desire to enlist feedback. When this option is chosen the contact point should be specified by name or at the least by position title, and ideally by phone number.

4. *Set up a confidential hotline.*

This route is being chosen more and more frequently by companies around the world. The cost is not significant. The phone line can be administered internally or by an outside independent firm experienced in the field.

The London office of the firm I am with currently maintains hotlines for two large international corporations. They publicize the existence of the hotline and encourage staff to call in and discuss or report on any issues where they feel uncomfortable with the legal, ethical or business conduct of other staff or the company. The person responsible for manning the phone and following up on concerns raised should be an experienced interviewer familiar with the company's full range of activities. The existence of the hotline should be explained to staff as a mechanism that is designed to assist employees in maintaining the high standards of conduct expected of them as employees and of the company as a whole. It should also be

explained that the company does not want to see any employee in a position where they have limited options when dealing with a difficult legal or ethical dilemma.

The options outlined above are not mutually exclusive. Some companies choose to offer all four options to employees. Others offer none, perhaps fearing the truth.

Having seen employees who have suffered emotional and physical turmoil attempting to deal with the knowledge of fraud, theft, self-interest, conflicts of interest, rampant waste, pollution violations and other illegal and unethical acts without the aid that a whistleblowing mechanism can provide, I have no hesitation in stating that companies have a duty of care to provide an option to help ethical staff.

Not all companies agree. Unfortunately, many of those who have established communication channels for staff often need them the least. Unethical companies generally will not entertain the idea of a whistleblowing mechanism for fear that employees may choose to be ethical.

How do you measure up in meeting your duty of care in this area? Is your company prepared to deal with the disclosures that may come as a result of an ombudsman or hotline?

In my next column I will discuss how you as an HR practitioner should deal with disclosures which allege illegal or unethical behaviour on the part of an employee or the company.

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