

## WHY YOUR WHISTLEBLOWER POLICY SHOULD NOT BE CALLED THAT

11.01.2006

### Introduction

Do you want your employees to “blow the whistle” on corporate wrongdoing? The answer to the good corporate citizen in all likelihood is “yes.”

On the other hand, is that how you would phrase the question?

What a company desire is for its employees to feel free to raise concerns about workplace wrongdoing. When employees do, they give the company the opportunity to address issues before they become problems. Yet, is that really “blowing the whistle?”

Recent years have brought a sharpened focus on the need for corporations to have policies that provide guidance to employees on reporting corporate wrongdoing. These policies typically describe the types of concerns that employees should report and to whom they should make their concerns known, such as to a corporate compliance officer. This new focus primarily results from the enactment of the Sarbanes-Oxley Act, which, among other things, required audit committees of public companies to establish employee concern reporting programs. Following suit, many smaller, private companies and nonprofits similarly developed these types of programs — even though not required by law.

For many companies and industries, internal employee concern reporting policies are nothing new. Long before there was Sarbanes-Oxley, for example, government contractors addressed concerns about potential claims of fraudulent government billing by implementing policies designed to assure compliance with contracting requirements and to minimize the risk of fraud.

### PRACTICES

Labor and Employment

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Healthcare organizations operate under explicit federal expectations that employees be able to “ask questions and report problems” as part of a compliance program. Compliance hotlines, of course, have been around for years. As a final example, companies in the transportation and energy industries, such as those that operate nuclear reactors, for decades have had programs and policies designed to encourage employees to raise safety concerns.

Organizations that have recently adopted or are considering adopting these types of policies — which in short-hand are frequently referred to as whistleblower policies — stand to learn from organizations that have years of experience in implementing and refining them.

In designing a policy, many important questions need to be addressed. For example, what types of potential company wrongdoing should be covered in a policy? How should the “whistleblower policy” be integrated with other employment policies? Should employees be covered by non-retaliation provisions in the policy only if they report wrongdoing in “good faith?” The answers to these and other questions about internal reporting policies are too extensive to be covered here. But, one important point involves the terminology used in company policies.

### **Policy terminology**

Start at the beginning: the name of the policy. Run a Google™ search on “whistleblower policy,” and you will find a frighteningly large number of organizations that have christened their employee concern reporting policies just that. One reason they may have chosen that label is that no one really knew what else to call the policy. However, “whistleblower policy” is not a recommended title — and it certainly is not a “best practice.” In fact, it is unwise for a number of reasons:

- The term “whistleblower” conjures up certain negative images. Whistles are shrill, after all. Years ago, one government regulator instructed a company to stop referring to employees who reported safety concerns as whistleblowers because the term was perceived as derogatory. Sherron Watkins, the well-know Enron “whistleblower,” has said she dislikes the term because it has a pejorative ring to it. Therefore, a company that wants employees to report concerns does not foster that objective by promising employees who follow the policy that they will be assigned a pejorative label: “whistleblower.”
- “Whistleblowing” does not aptly describe conduct that the policies should encourage. For example, company policies in most cases will encourage employees to raise concerns even if they are minor. Most policies also encourage employees to deal directly with their immediate superior in reporting concerns, unless the supervisor is implicated in the problem. Placing the title “whistleblower policy” atop this workplace guidance inaptly labels day-to-day conversations with immediate supervisors about workplace concerns as whistleblowing. This is not only inaccurate but also is not beneficial.

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- The term “whistleblower” is instinctively divisive. To tag an employee with that label — which can be an effect of entitling the policy as a whistleblower policy — suggests that the employee has had to “call” or “out” his superiors on some type of wrongdoing. The result is an instant “us v. them” perception.
- The label “whistleblower” offers an employee potentially undeserved credence. In a dispute between “Whistleblower” and “The Big Corporation,” who gains the upper hand merely by virtue of the label? The “whistleblower,” of course. Judging by no more than the classification assigned to him, the inference is that the employee (good guy) has identified and exposed corporate (bad guy) evil-mongering. The result is a readymade David v. Goliath paradigm, but there is no reason to assume that the employee is the white knight in every case.

Another unfortunately misused term in the context of corporate policies is “complaint.” When an employee speaks up on a matter that concerns her, she is expressing, well ... a concern. If the company’s goal is to encourage those types of communications, the policy should not label the employee as a “complainer.” “Report concerns” should be the message, not “Be a complainer.” If your company has a “Whistleblower Complaint Policy,” it’s starting with two strikes against it.

The benefits of using best-practices terminology extend beyond workplace perceptions. For example, when managers respond to employee concerns, it is preferable that the terminology they use (even behind closed doors) is respectful of the fact that the employee followed company policy in raising the concern. There is no need for managers in discussing an issue to refer to the employee who raised it as a “whistleblower” — much less as a complainer. In addition, in the event the employment relationship between the concerned employee and the company sours and, potentially, leads to a whistleblower retaliation claim, the company will be better positioned to defend itself before a jury if the exhibits and testimony are phrased in non-pejorative terms. A jury is less likely to believe the manager-witness who says he wants employees to “complain” (and would not retaliate against one for doing so) than one who testifies that he appreciates employees who express “concerns.”

If it’s not a Whistleblower Policy, what do we call it? There are many options, and the policy name can be selected to correspond with the company’s culture or existing policies, as well as with the nature of the program described in the policy. Some companies assign their policies colorful titles, such as the Speak-Up policy. Others stick to the point, with an “Employee Concern Policy” or “Reporting Policy.” Others focus on the end goal of the program, such as an “Issue Resolution Policy.” Whatever the name, the goal should be to focus on the positive and to literally start the policy off right — with a proper title.