

Analysis

Corporate Ombudsmen

Ombudsmen Are Valuable Supplement to Compliance Efforts

BY CHARLES L. HOWARD

When the U.S. Sentencing Guidelines for organizations were revised in 2004, a concept incorporated in Section 8B.2.1 of the Guidelines was periodic monitoring and auditing of the effectiveness of an organization's compliance and ethics program. The tools that have become the standard for best practices have served organizations well for those who are willing to come forward with compliance issues. Compliance officers are in charge of continuing risk assessment and investigating allegations of misconduct. Hotlines are available for people who wish to remain anonymous or who simply want to file a report, and whistleblower policies are in place to deter and punish any retaliation for good-faith reporting.

These tools, however, have limits to their effectiveness in dealing with a worker who is reluctant to come forward out of lack of knowledge of the process or because of fear of retaliation. They also do not provide an optimal solution for someone who just wants answers without starting an investigative process or who just wants someone with whom to talk about an issue—whether or not it is a compliance issue. While an organizational ombudsman cannot take the place of any of these other tools, it can provide a valuable supplement to them.

Authority Has Drawbacks

The compliance function has become an integral part of organizational management. Compliance officers are the management agents responsible for this important and critical task. Yet, the very fact that

they are in charge and have management responsibility for compliance is what also limits their ability to reach some of the people who might otherwise report but who want to supply information confidentially or to remain anonymous.

Compliance officers have a duty to act on information they learn. While they may wish to provide assurances of confidentiality or can say that they will do their best not to disclose unnecessarily the identity of a reporting employee, they cannot promise confidentiality. Nor can they let an employee's desire for confidentiality keep them from doing their job.

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Consequently, regardless of how effective they are or proactive in publicizing their function, some people will not come forward out of fear that their identity will be revealed, that the information they have is not correct, that they will become involved in an investigation, or that the organization, their boss, or co-workers will retaliate against them.

Hotlines have been widely viewed as an effective tool for those employees who want to make a confidential report by remaining anonymous. Most organizations have hotlines, and they come with robust reporting

and tracking mechanisms. As with compliance officers, hotlines have been considered best practices. However, a closer look at what they do—and what they do not do—reveals that they also have limitations.

Hotlines Are Underutilized

First, even though hotlines have been created almost exclusively because of compliance considerations (the Sarbanes-Oxley Act and the U.S. Sentencing Guidelines), the actual use of hotlines reveals that they are often not used for their intended purpose. First, there is often a very low employee utilization rate. It is not uncommon for it to be in the range of 1 percent to 2 percent of all employees. Of those who do use the hotline, the great preponderance of reported matters relates to HR or workplace conflict issues, not compliance or fraud.

Second, the “report and investigate” model underlying the hotline methodology is not well suited to non-compliance issues that come through the hotline. A better model for those types of issues is one of personal contact, coaching, mediation, and providing information on what options may be available to address the issue.

And third, hotline reports, even if they originate with third-party service providers, go directly to a compliance officer or a formal channel (such as the general counsel) where they are investigated or acted upon if appropriate. It's true that one can make an anonymous report, but for someone concerned about the investigative process or possible retaliation, this channel may be too impersonal. It may not provide the assurance of confidentiality or the explanation of the process that could be important before someone is willing to come forward.

Virtually all organizations have codes of conduct that prohibit retaliation for being a whistleblower or

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reporting misconduct. This is both of critical importance from an ethical perspective and enshrined in law. There are more than 250 whistleblower protection laws in the United States. While we must have these policies, data on their effectiveness strongly suggest that we should not put too much reliance on them to really protect whistleblowers. That's because the protection they promise runs counter to human nature and the way most people have been acculturated.

Retaliation Is Insidious

First, these policies do not speak to the problem faced by most employees: While their paycheck may come from the organization, they work for a boss, and the ways in which the boss may express displeasure can be too fleeting, subtle, or insidious to be dissuaded by a policy.

Second, these policies are particularly ineffective in dealing with peer retaliation, which can be as intimidating, if not more so, than possible retaliation by one's supervisors.

Third, they cannot alter a lifetime of socialization that occurs in virtually all societies—and in some cultures much more than others—that one should not be a “rat.” In parts of Europe and in some former Communist bloc countries, for example, the effects of the 20th century are still being felt in this regard.

And finally, whistleblower laws and policies almost always involve procedural processes that strongly fa-

vor an organization, to the detriment of an employee. They often involve protracted periods of time before a matter is resolved.

Whistleblowers Pay High Price

The available data strongly suggest that employees who brave these obstacles to become whistleblowers pay a high price in terms of their employment, the impact on their families, their health, and ultimately, financially. Even if this were not the case, surveys reveal that an overwhelming percentage of people believe that whistleblowers suffer adverse consequences as a result of their activity all or some of the time. This perception alone inhibits reporting.

While the False Claims Act may help those who report financial misconduct that might result in a windfall for them, many types of misconduct that may be of concern do not meet that standard. In short, a key question that has often been overlooked is not how to protect a whistleblower; it is how an issue can be surfaced without requiring someone to become a whistleblower.

Ombudsmen Can Clarify Issues

One solution to address the gap arising from these compliance tools is an organizational ombudsman. If designed to be an independent, neutral, informal, and confidential resource, an organizational ombudsman office supplements but does not replace any of the formal reporting channels. Indeed, much of the effectiveness of an

organizational ombudsman is lost if it is a reporting channel, because the ombudsman cannot promise the confidentiality that is so critical to reaching the workers who otherwise would not come forward.

If designed properly, however, an organizational ombudsman office can be a confidential source of information about either the compliance or the conflict-resolution process and assist people in identifying a reporting channel or mechanism with which they are comfortable. Moreover, these offices often provide employees with coaching on how to sort through a jumble of concerns. The aim is to figure out how to best express a concern, which makes it more understandable and easier to act upon when it reaches a formal channel.

Because organizational ombudsmen are trained listeners and mediators, they are able to help people identify their issues and the means to resolve them, regardless of whether they are compliance or workplace conflict. In other words, an employee does not have to first decide what kind of issue it is before going to the ombudsman for information or guidance. In this sense, organizational ombudsmen are ideally suited to the increasingly diverse workforce of our organizations, often characterized by large numbers of people working remotely, as consultants rather than employees, or who are part time. In light of the limitations in the other best practices for compliance and ethical cultures, it may be time to consider adding an organizational ombudsman program to the toolbox.

Journal

Calendar

Human Resources: The Society for Human Resource Management presents its 2010 “Annual Conference and Exposition,” June 27-30 in San Diego. Information is at <http://annual.shrm.org/>.

Compliance and Ethics: The Society of Corporate Compliance and Ethics presents its “Compliance & Ethics Academy,” Aug. 9-12 in Chicago. Information is at <http://www.corporatecompliance.org>.

Compliance and Ethics: The Society of Corporate Compliance and Ethics presents its “Compliance & Ethics In-

stitute,” Sept. 12-15 in Chicago. Information is at <http://www.complianceethicsinstitute.org/>.

Ethics and Compliance: The Ethics & Compliance Officer Association presents its “18th Annual Ethics and Compliance Conference,” Sept. 22-24 in Anaheim, Calif. Information is at <http://www.theecoa.org>.