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To Blow the Whistle or Not Is a Tough Decision!

Whistleblowers continue to be in the news, but their stories don't always end with favorable consequences. According to an August 1, 2005, *USA Today* article, only two of the hundreds of whistleblowers who thought they were protected by the Sarbanes-Oxley Act (SOX) have actually reached agreement with their employer to go back to work. Others are still waiting for resolution or have settled out of court because their former employers balked at rehiring them—even after courts ordered that to happen. According to *USA Today*, the Labor Department reports that although only 15% of SOX whistleblower grievances are found to have merit, this experience is in line with the complaints received by the Department under other statutes, such as those dealing with federal civil rights, environmental, public health, and workplace safety issues.

The portion of SOX dealing with protecting whistleblowers is known as the Corporate and Criminal Fraud Accountability Act of 2002. Designed to provide employment protection, it was hailed as a safety net for employees who step forward and reveal wrongdoing at their companies. The thinking behind the provision is that protecting employees at public companies who become aware of and report financial abuses may help prevent future corporate collapses and securities frauds that injure innocent shareholders. It supplements the traditional "gatekeeper" oversight of the governance of public corporations that's provided by independent audit committees and the external audit firms they employ on their behalf.

But under SOX, there's no penalty motivating employers to comply. Nor is any compensation awarded to complainants for the family stress, emotional trauma, or additional living expenses needed to put their future professional and personal lives in order, even when they are successful in achieving job reinstatement and back pay.

Experiences in the first three years of the law have proved rocky for those who have had the courage to go out on a limb to pursue their convictions. One drawback is that complaints are heard before Labor Department administrative judges. They are well versed in matters of discrimination and other occupational issues, but they may not have a similar background in finance and accounting. Another problem with the SOX provisions is that while they deal with criminal intent—fraud—they require only a "reasonable belief" that fraud is being committed. This appears to many employers to be too close to a description of a disgruntled employee. Employers have been successful in avoiding rehiring people they no longer want to have as a part of their workforce.

In the first SOX case to be decided, the CFO of the Bank of Floyd in Virginia was ordered reinstated. Yet the bank expended hundreds of thousands of dollars of legal fees to clear itself of any wrongdoing raised by the whistleblower. Since no penalties are exacted of employers for failing to reinstate protected employees, a legal stalemate can ensue where the employee has far fewer financial resources to make costly appeals to continue a legal fight than the em-

ployer. In the Bank of Floyd case, both sides pledge to take the case all the way to the U.S. Supreme Court.

The former controller of Trane Corporation, the well-known heating and cooling company, was fired a month after he complained that managers were fraudulently recording expenses in the financial statements. This was only a month after he was promoted. Being out of work, maxing out credit cards, borrowing from family, and barely able to sleep, he was fortunate to get a temporary accounting job at a food service company.

Brian Martin, a professor at the University of Woolongong in Australia and author of *The Whistleblower's Handbook: How to Be an Effective Resister*, has widely publicized a definition of whistleblowing:

> "*Whistleblowing is an open disclosure about significant wrongdoing made by a concerned citizen totally or predominantly motivated by notions of public interest, who has perceived the wrongdoing in a particular role and initiates the disclosure of her or his own free will, to a person or agency capable of investigating the complaint and facilitating the correction of wrongdoing.*"

It should be noted that only disclosures of "significant" wrongdoing should be considered whistleblowing, not legitimate differences of opinion or minor concerns. Also important is that the motivation for disclosure shouldn't be personal but rather reflect the interests of the public. The language describing the whistleblower as a concerned citizen reflects the fact that issues of whistleblowing in the past were limited largely to the government sector and didn't include shareholders, as reflected in SOX.

Daniel P. Westman and Nancy M. Modesitt provide a more legalistic definition of whistleblowers in the U.S. in their book, *Whistleblowing: The Law of Retaliatory Discharge:* "Employees who oppose, either internally or externally, their employer's conduct." Employee opposition may be based on a number of grounds, including belief that employer conduct is unethical, dangerous, or illegal. The authors also set forth four types of whistleblowers: passive, active-internal, active-external, and embryonic.

In addition to SOX, there are a considerable number of additional federal and state statutes (Westman and Modesitt list 37) that protect whistleblowers in a variety of circumstances to a greater or lesser extent. Westman and Modesitt report that there is a common law protection in 40 U.S. judicial jurisdictions that bans wrongful termination of employment in violation of public policy. Most important of the statutes is the False Claims Act of 1863, most recently amended in 1986. Under this legislation, any citizen is entitled to up to one-half of any damages collected by the federal government for false claims it had previously honored, such as in procurement contracting.

To make whistleblowing or discussion of sensitive issues acceptable and, therefore, most effective requires the creation of an open and trusting organizational culture of always "doing the right thing." First and foremost in importance to accomplish this is that C-level executives and the board must adopt core values or ethical guidelines and put them into practice. Walking the talk and using ethical principles to solve day-to-day problems that arise are critical to establishing the appropriate ethical culture in an organization. Management accountants and financial managers have the most contact with customers, employees, regulators, and taxing authorities. Use of ethical guidelines as one element of decision making goes a long way toward ensuring that unethical or illegal practices don't creep into the organization.

In our society, attitudes toward whistleblowing need to change. Children learn early in life that being a "tattletale" doesn't earn friendships on the play field. Students look the other way when they see someone cheating on an exam or plagiarizing a term paper. Movie scripts have dramatized the code of silence that is enforced by death in underworld organizations. Many shun being a "snitch" out of fear of the consequences, yet most crimes are solved through tips received by the police.

When the decision-making process includes ethical considerations and trust is a key part of the culture so that organizational dynamics are really working as they should, fear of reprisal will go away. Then whistleblowing will be unnecessary. It will be replaced by reasoned consultation where employees see that there are no gaps between professed values and actual processes.

Is the culture in your organization open and trusting, or is there full fear of reprisal if anyone speaks out about doing the right thing? ■

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