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How DOJ Compliance Guide Affects Employer Best Practices

By **Steven Pearlman and Pinchos Goldberg** (May 17, 2019, 12:08 PM EDT)

On April 30, 2019, the Criminal Division of the U.S. Department of Justice released guidance titled "The Evaluation of Corporate Compliance Programs." [1] This guidance sets forth a framework for designing, implementing and evaluating compliance programs, providing practical steps companies should take to ensure that their compliance programs are effective. It touches on the intersection of employment law, particularly with respect to encouraging employee reports of misconduct and preventing whistleblower retaliation; human resources best practices focused on creating appropriate incentive structures; and the management and minimization of risk related to compliance issues. The following analysis focuses on those aspects of the guidance.



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General Features of the Guidance

The DOJ's guidance updates and expands upon a prior document of the same name that was issued by the Fraud Section in February 2017. It is intended "to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations)."



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The 2017 guidance consisted of a series of questions prosecutors might ask in evaluating compliance programs, and in some respects the new guidance expands upon those questions and addresses the hallmarks of effective compliance programs companies can use to evaluate their own regimes, with a particular focus on a program's design, implementation and effectiveness.

The guidance centers on three overarching issues.

First, it discusses the key elements of a well-designed compliance program, including risk-assessment processes, policies and procedures that foster a "culture of compliance," training and communications, and due diligence practices for relationships with third parties and acquisition targets.

Second, it instructs prosecutors to probe whether a compliance program is a "paper

program” or is being implemented effectively through a high-level commitment by senior and middle management, the provision of sufficient autonomy and resources to the compliance function, and the establishment of incentives for compliance and disincentives for noncompliance.

Third, it reinforces an expectation that compliance programs actually work in practice through continuous adjustment and improvement of policies and procedures to reflect lessons learned from experience, an effective structure for investigating misconduct, and mechanisms for analyzing and remediating the root causes of misconduct.

Employment Aspects of the Guidance

The DOJ’s guidance addresses the following issues related to employment law and human resources best practices:

Culture of Compliance

Companies should create and foster a “culture of compliance” throughout day-to-day operations. This culture begins with the company’s top leaders — namely, the board of directors and senior executives — and must be reinforced by middle management. Senior leaders’ words and actions will be considered to determine whether they encourage or discourage compliance.

Consistent with this pronouncement, companies can foster cultures of compliance through messaging from leaders regarding core values and how they are applied in a practical sense, conducting practical training on the code of conduct and compliance issues at appropriate intervals and ensuring the workforce is aware of how ethical conduct is valued and that employees will be held accountable for misconduct. There are myriad other creative ways to foster a culture of compliance, such as designating an “ethics and compliance day” with messaging from leaders and educational sessions.

Also, the guidance invites questions as to how often a company measures its culture of compliance, whether the company seeks input from all levels of employees to determine if they perceive senior and middle management’s commitment to compliance and what steps the company has taken in response to its measurement of the compliance culture. While the guidance does not identify a specific tool companies should use in this regard, there are various types of surveys and focus groups that companies could use to elicit this type of feedback.

Policies

The guidance notes the importance of maintaining a code of conduct and other policies that reflect and address the spectrum of risks the company faces. Companies should continuously review and evolve their policies and procedures to ensure that they keep pace with developments in the business, legal and regulatory landscape.

Training

Another hallmark of an effective compliance program is appropriately tailored training to ensure that the culture of compliance is integrated at all levels of the company, giving consideration to the audience’s size, sophistication or subject matter expertise. In this regard, the DOJ favorably acknowledges that some companies offer employees practical advice or provide case studies to address “real-life scenarios” and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise.

Notably, through a series of questions, the guidance suggests that senior management communicate to the workforce when an employee has been discharged or otherwise

disciplined for failing to comply with the company's policies, procedures and controls:

Communications about Misconduct – What has senior management done to let employees know the company's position concerning misconduct? What communications have there been generally when an employee is terminated or otherwise disciplined for failure to comply with the company's policies, procedures, and controls (e.g., anonymized descriptions of the type of misconduct that leads to discipline)?

While it behooves employers to give serious consideration to all aspects of the DOJ's guidance, they should carefully consider and minimize the risk of claims by affected employees this could potentially engender, as well as any potential cultural implications of this approach.

Confidential Reporting Structure

The guidance provides that a compliance program should utilize a "trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct." The government will focus on "the company's processes for handling investigations of ... complaints, including the routing of complaints to proper personnel, timely completion of thorough investigations, and appropriate follow-up and discipline."

The guidance also stresses that the company's complaint-handling process should include proactive measures to create a workplace atmosphere without fear of retaliation and processes to protect whistleblowers.

Incentives and Disciplinary Measures

Referencing what it calls the "human resources process," the guidance provides that to effectively implement a compliance program, companies should maintain clear, consistent and fair disciplinary procedures. In addition, the DOJ suggests that the reasons for discipline should be communicated to employees and instructs prosecutors to ask the following question when the reasons are not communicated: "Are there legal or investigation-related reasons for restricting information, or have pre-textual reasons been provided to protect the company from whistleblowing or outside scrutiny?"

The guidance also discusses the concept of publicizing disciplinary actions internally, observing that "some companies have found that publicizing disciplinary actions internally, where appropriate, can have valuable deterrent effects." Again, however, it's important to be mindful of the risk that this approach could result in claims by affected employees.

In further evaluating human resources issues, the guidance provides the DOJ's perspective that the carrot can sometimes be as effective as the stick and thus encourages companies to provide positive incentives for demonstrating leadership in ethics and compliance, such as promotions and bonuses. In this vein, the DOJ notes that "some companies have even made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement."

Conclusion

As whistleblower retaliation actions continue to proliferate under the Sarbanes-Oxley Act, the Dodd-Frank Act, the False Claims Act and common law theories, and as whistleblower complaints continue to spark government investigations, the DOJ's guidance serves as a reminder of the value of breaking down silos among a company's human resources, legal and compliance functions. These functions can work together with the aims of ensuring that: (1) complaints are properly fielded, escalated and investigated; (2) good-faith

complaints do not result in retaliation; (3) policies and codes of conduct are modernized and thorough and (4) appropriate training and incentives for lawful and productive behavior is provided and employees are held accountable for misconduct.

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[1] <https://www.justice.gov/criminal-fraud/page/file/937501/download>

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