

TOP TAKEAWAYS

Investigating Whistleblower Allegations Reported to the Board

1. Take all whistleblowers seriously and treat them with respect.

By showing the whistleblower that you are taking their allegation seriously, you may be able to prevent a bad situation from becoming worse. A whistleblower that feels disrespected is more likely to file further complaints, including with the SEC. The majority of the whistleblowers who have received whistleblower awards under the Dodd-Frank provisions first reported to their allegations internally at their companies.

2. Resist knee-jerk reaction to punish a whistleblower for “poor judgment” in the manner in which issues were raised.

Management may want to dismiss a whistleblower, especially one that uses poor judgment and ignores company policies in making its allegations known. The way in which a whistleblower raises a complaint will rarely justify a negative employment action. Such a response will almost always be seen as retaliation. If it seems impossible to continue having the whistleblower work for the Company, consider negotiating an agreeable severance arrangement. Be very careful in negotiating a mutually acceptable departure for a whistleblower; SEC rules preclude impeding a whistleblower from going to the SEC as part of a severance package.

3. Assume the SEC is watching.

Mishandling the whistleblower can lead to worse consequences than any alleged misconduct. The best practice is to assume that the whistleblower has already reported its allegation to the SEC as this will minimize any impact of the whistleblower actually going to the SEC.

4. Take precautions early to be as independent as possible.

There can be pushback against engaging new, independent counsel to guide the investigation, both because of costs and because the primary counsel has better knowledge of the Company. Remember that, at the end of the investigation, its optics will sometimes be nearly as important as the report's substance. Maintaining independence extends beyond independent counsel; that goal should also drive the investigation in its entirety.

5. Wall off individuals implicated in the allegations from the investigation.

As described above, it is important to maintain independence and keep all individuals involved with the allegations walled off from the investigation. The extent of such individuals' involvement should generally be limited to an interview to determine what information they can provide as part of the investigation and to apprise them of timing, if requested.

6. Don't be afraid to get the directors involved.

Directors may have to step up and be directly involved in an investigation by working with internal personnel or outside counsel. Depending on the circumstances, the Director of Internal Audit or HR Manager may be in the best position to run the day-to-day minutiae of the investigation on behalf of management. However, the directors should remain in close contact and guide the investigation.

7. Lock down the data.

Depending on the facts of the whistleblower allegation, the investigation may warrant forensic work. In such a scenario, it is important to lock down the data as soon as possible. This may mean taking an image of the workplace server or capturing hard drives. Time is of the essence, and the team handling the investigation should make a decision regarding data very early in the process.

8. Keep your auditor in the loop.

This is a critical relationship and being at odds with your auditor can have significant consequences. If you are facing a deadline to make such a filing, consider scheduling daily status update calls with the auditor. The auditor will need to know at some point, so inspire trust by bringing them in the loop early on. An experienced auditor should be willing to help balance the auditor's need for information with the need to protect against waiver of the company's attorney-client privilege.

9. Have a plan.

The Company needs to have an existing protocol in place, and the directors need to know it. If you are in a high-scrutiny business, you should have a team ready to go for internal investigations. The Company should document the investigation and how it is going to be handled.

10. Learn from these experiences.

A whistleblower allegation and investigation can be viewed as a learning experience for all of the parties involved. Take time to improve your Company, whether it be by remedying the concerns that led to the complaint, revising the process for reporting whistleblower complaints or improving the internal protocols for dealing with a whistleblower complaint. There is always room for improvement.

For more information

For more information on Investigating Whistleblower Allegations Reported to the Board, please feel free to contact the moderator directly:

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