



Whistle-Blower Protection Programs for Associations

One of the outcomes of the recent financial scandals at Enron, WorldCom, and a number of other large corporations is a recognition of the value of whistle-blowers in exposing fraud, corruption, and other wrongdoing within organizations. Indeed, congressional investigations of the companies revealed that if management had heeded the warnings of whistle-blowers, some of these crises may have been averted. Congress responded by enacting robust whistle-blower provisions in the Sarbanes-Oxley Act of 2002. The whistle-blower features of the act—as well as those prohibiting the destruction of documents to thwart a federal government investigation—apply to all individuals and entities. In this column, Jason Zuckerman recommends measures that associations can take to comply with the whistle-blower provisions of the Sarbanes-Oxley Act.

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Section 1107 of the Sarbanes-Oxley Act of 2002 makes it a crime for any individual to retaliate against a whistle-blower for providing truthful information to a law enforcement officer relating to the commission or possible commission of any federal offense. The penalties for violating Section 1107 include imprisonment for up to 10 years and substantial fines.

In addition, Section 806 of the act provides a private right of action for employees of publicly traded companies who may be subject to retaliation for reporting what they “reasonably believe” to be a violation of federal regulations or accounting laws. Although Section 806 does not apply to associations, many states provide similar protections for association employees. Hence, association leaders would be wise to pay attention to the provisions of this section as well. Under Section 806, a successful plaintiff is entitled to substantial remedies, including back pay, emotional distress damages, job reinstatement, and attorney’s fees. And the burden of proof favors the employee. While the plaintiff must demonstrate that his or her whistle-blowing activity was a *contributing factor* in the employer’s decision to take an adverse personnel action, the employer must demonstrate by *clear and convincing evidence* that it would have taken the same personnel action absent the plaintiff’s whistle-blowing.

Whistle-blower retaliation claims have become increasingly popular, in part because of the post-Enron shift in the public’s perception of whistle-blowers, who are now perceived as heroes taking on unscrupulous corporations. This enhanced public perception, coupled with the substantial remedies available to successful whistle-blowers,

provides a strong incentive for employees to bring retaliation claims.

The consequences of retaliating against a whistle-blower or ignoring his or her concerns, however, are much greater than defending a civil lawsuit. When whistle-blowers feel that their concerns are being ignored or that they have suffered retaliation as a result of their activities, they will often take those concerns to law enforcement officers, regulatory agencies, or the media. This can result in increased regulatory scrutiny of an association and can harm the organization’s reputation. Therefore, it is worthwhile to ensure that employees do not suffer retaliation and that employee concerns are investigated and acted upon. Here are some measures to do so:

Create a policy prohibiting retaliation. Adopt a policy affirming the association’s commitment to maintaining a workplace where employees and contractors feel free to raise questions and concerns about the organization’s activities. Make it clear that the association will not tolerate reprisals against employees for raising such concerns.

Train managers and supervisors. Educate managers and supervisors about the ramifications of retaliating against whistle-blowers and about procedures for handling employee concerns. In addition, inform employees of the avenues available for such communication, and encourage them to raise concerns when appropriate.

Establish an employee concerns program. Internal whistle-blowing can often benefit an organization by alerting management to alleged violations in a timely manner,

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thereby providing an opportunity to take corrective actions and prevent further damage. When establishing an effective means of resolving employee concerns, include a procedure for prompt investigation. And have the person or department designated to handle such matters report directly to senior management. This minimizes the opportunity for managers whose conduct is being challenged to suppress a concern, while strengthening the credibility of the program and increasing the likelihood that employees will raise concerns internally.


While the reported issue is being investigated, periodically update the concerned employee on the status of the investigation. If the employee suspects that his or her concern is not being taken seriously, he or she may go directly to law enforcement officers or a regulatory agency before the association has had an opportunity to take corrective actions.

Once the investigation is complete, document the findings in a written report, giving careful attention to its wording, as the report may become subject to subpoena from a regulatory agency or to discovery requests in litigation. If an employee's concern is substantiated, take prompt corrective actions. In addition, if the investigation uncovers regulatory violations or serious misconduct, inform the board of directors of the findings, and consult with directors regarding the association's response.

Establish procedures for anonymous reporting. Section 301 of the Sarbanes-Oxley Act requires board audit committees to establish procedures for the anonymous submission of employee concerns regarding questionable accounting or auditing matters. Though not mandatory for associations as yet, the prudent association will provide avenues for anonymous reporting.

Take disciplinary action against those who engage in retaliation. Put all employees on notice (e.g., through training and the employee handbook) that if they harass or discriminate against another employee for raising a concern, they will be subject to disciplinary action.

Document performance issues. If an employer must defend a retaliation claim in a civil or criminal context, it will need strong evidence to demonstrate that it would have taken the same unfavorable personnel action against an employee in the absence of the plaintiff's whistle-blowing. To ensure that such evidence is available, require managers to thoroughly document performance issues on a routine basis.

By following these guidelines, associations stand to gain important information about potential internal fraud, while reducing the risk of employee claims of retaliation for whistle-blowing activities. 

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