

Nonprofits Must Comply with the Whistleblower Rule in Sarbanes-Oxley

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The Sarbanes-Oxley Act of 2002 addressed the issue of corporate governance in the business community. With very few exceptions, the act applies only to for-profit, publicly-traded companies -- those that issue securities registered under the Securities Exchange Act of 1934. One such exception, the so-called "whistleblower" provision found in Section 1107 of Sarbanes-Oxley, applies to nonprofit organizations as well.

SECTION 1107 PROVIDES:

Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any federal offense, shall be fined under this title [Title 18 of the United States Code] or imprisoned not more than 10 years, or both (emphasis added).

Simply stated, Section 1107 provides that it is illegal for any person or entity to punish in any way anyone who reports "truthful information" in the manner described in that section.

To ensure compliance with the requirements of Section

1107, nonprofits should develop, adopt and disclose a clear, written policy regarding the receipt of complaints - a "whistleblower policy."

TO WHOM SHOULD THE POLICY APPLY?

As a general rule, the policy should apply to all directors, officers and employees of the organization, since those individuals should be most familiar with the organization and its operations. It is advisable to document the distribution of the policy by having each director, officer and employee sign an acknowledgement stating that he or she has received and read the policy, understands it, and agrees to comply with its terms.

WHAT SHOULD THE POLICY SAY?

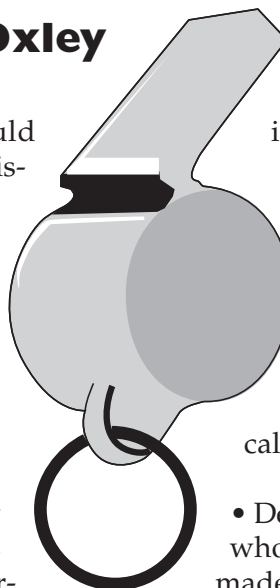
Whistleblower policies should be brief and easy to understand. A policy that is too complicated or lengthy may intimidate or confuse those who are meant to comply with it. The policy should:

- State that a person should report certain concerns to specifically designated individuals. Concerns that should be reported are those consisting of: (1) good faith questions regarding the legality or propri-

ety of any action taken or to be taken by the organization, or on its behalf by one of its officers, directors, employees or agents; or (2) a good faith belief that some action needs to be taken for the organization to be in compliance with laws, policies, or ethical standards.

- Designate the persons to whom reports should be made. Such persons should be easy to contact and capable of being trusted. An agency's in-house legal counsel, if there is one, would be a likely choice for this responsibility since an attorney would be in a good position to evaluate and act on complaints of potential illegality. Some organizations have a Chief Compliance Officer to oversee their quality assurance and adherence to regulatory requirements. The Director of Human Resources is another possible position to take on this role. Two organizationally-separate contact persons should be designated to ensure that complainants are not required to go through their own chain of command in reporting potential violations.

- Specify the mechanisms through which a whistleblower can report concerns. These should allow for the possibility



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that an individual might request confidentiality or anonymity. For example, the policy may provide that complaints can be communicated in writing, in person, by phone, or by email.

- Provide examples of what constitutes a reportable incident, such as the following:
 - Supplying false or misleading information in the organization's financials or other public documents, including its annual information return; or
 - Providing false information to, or withholding material information from, the organization's auditors.
- Describe the procedures for investigating and evaluating complaints.
- Clearly state that whistleblowers will not face retaliation in any form so long as they make their reports in good faith.
- List the types of disciplinary measures that the organization will impose against anyone who threatens or retaliates against a whistleblower who makes a good faith report. Such disciplinary measures may include the issuance of a warning or letter of reprimand, demotion, loss of merit increase, suspension without pay, or termination of employment.

HOW SHOULD THE POLICY BE ADOPTED?

Once a whistleblower policy is drafted, it should be approved

in accordance with the procedures set forth by law in the state in which the organization is incorporated, as well as the organization's By-laws and Certificate of Incorporation. This is generally accomplished by having the whistleblower policy reviewed and approved by the board of directors. As with all matters considered by the board, the directors should take care to discuss and review the policy before voting in order to make an informed decision. The date the board grants its approval should be specified on the policy.

HOW SHOULD THE POLICY BE DISCLOSED?

A whistleblower policy should be easily located and reviewed by those who are meant to read it. To ensure that the organization's directors, officers and employees can easily locate the policy, it may be posted on the organization's website, intranet or in a common workplace area. It is generally advisable to include a copy of the policy in the employee handbook.

WHISTLEBLOWER POLICY CREATING AN INADVERTENT CONTRACT OF EMPLOYMENT

When drafting a whistleblower policy, care should be taken so that the policy is not misconstrued as having created a contract of employment between the organization and its employees. If the policy makes definite promises about the terms and conditions of an individual's employment, a court might find that it is, in fact, an employment contract. Accord-

ingly, the policy should state clearly that the organization reserves the right, in its discretion, to interpret and amend the policy. In addition, the policy should include a disclaimer stating that: (1) the policy should not be interpreted as creating a contract of employment, and (2) unless and until the parties have expressly contracted otherwise in writing, employment with the organization is at will.

CONCLUSION

Good management requires that all legitimate, good faith concerns be treated seriously, regardless of whether the organization has adopted a written policy to that effect. By developing, adopting and disclosing a whistleblower policy, however, an organization increases the likelihood that all complaints are received appropriately and investigated fully. Moreover, the adoption and implementation of a whistleblower policy should help an organization ensure that it does not find itself subjected to the very serious penalties imposed for violating the whistleblower provision of Sarbanes-Oxley.

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