

The Legal Risks of Compliance & Ethics Programs

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Compliance & Ethics Institute
September 25, 2016

Legal risks & impediments to C&E programs

- The policy in favor of prevention is compelling
 - But that does not mean the legal system will accept these values
 - Examples where the legal system undercuts compliance programs
 - The topic of an article I am writing for the Rutgers Law Review

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Legal risks & impediments to C&E programs

Joseph E. Murphy, *Policies in conflict: Undermining corporate self-policing*, 69 Rutgers U.L. Rev. 2 (forthcoming 2017).

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Adverse use in litigation

- **Lucky Stores case**
 - Stender v. Lucky Stores, Inc., 803 F. Supp. 259, 330 (N.D. Cal. 1992)
 - Training notes used against company
- **Codes used against companies**
- **Compliance work used against companies:**
 - results of audits, helplines, risk assessments, program evaluations

Adverse use in litigation

A point Jay Sigler and I made 30 years ago in the first book developing the modern approach to compliance programs:

Sigler & Murphy, "Internal Reviews: Self-Evaluation or Self-destruction," in Interactive Corporate Compliance: An Alternative To Regulatory Compulsion 72-77 (Greenwood Press; 1988).

Adverse use in litigation – chilling compliance

- **Dowling v. American Hawaii Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992)**
- "reviews will rarely, if ever, be curtailed simply because they may be subject to discovery".

Adverse use in litigation – chilling compliance

- Joseph E. Murphy, *Compliance on Ice: How Litigation Chills Compliance Programs*, 2 CORP. CONDUCT Q. 36 (1992)
 - Audits/investigations by lawyers only
 - Avoid taking notes in C&E activities
 - Limit spread of valuable lessons learned in audits/investigations
 - Limit circulation of findings/advice
 - Severe edits of reports to board
 - Limit frequency & scope of compliance audits
 - Problems found in one unit not shared across others
 - Results of training quizzes are not retained

Is privilege the remedy?

- Attorney-client privilege
- Work product protection
- Other privilege protections
- Impact of using privilege
- Alternatives:
 - Careful writing
 - No writing?
 - Fixing what you find
 - Finding positives

NLRB – Codes as unfair labor practices

American Electric Power Co., 302 N.L.R.B. 1021 (1991)

Company had not shown “that the subject matter of their Corporate Codes of Ethics is necessary for the protection of the core purposes of the Respondents’ enterprise – the generation and transmission of electricity.”

“evidence does not demonstrate that integrity goes to the protection of the *core purposes* of the Respondents’ enterprise.”

Board ordered the code “be rescinded in its entirety.”

NLRB – Codes as unfair labor practices

- Report of the General Counsel Concerning Employer Rules (Mar. 18, 2015), available at <http://www.nlr.gov/reports-guidance/general-counsel-memos> .
- Addresses “employee handbook rules”
- Focuses on exact language used
- Murphy, “The NLRB attacks codes of conduct,” *Compliance And Ethics Professional* 72 (July 2015).

NLRB – Codes as unfair labor practices

These all violate US labor law:

- Do not discuss “customer or employee information” outside of work, including “phone numbers [and] addresses.”
- “Be respectful to the company, other employees, customers, partners, and competitors.”

NLRB – Codes as unfair labor practices

- Do not make “insulting, embarrassing, hurtful, or abusive comments about other company employees online,” and “avoid the use of offensive, derogatory, or prejudicial comments.”
- “[A]ssociates are not authorized to answer questions from the news media. ...When approached for information, you should refer the person to [the Employer’s] Media Relations Department.”

NLRB – Codes as unfair labor practices

- **Attacking codes of conduct**
 - Standards that are undecipherable
 - “Context” as a factor
- **Undercutting privacy in investigations**
- **Assigning little value to self-policing**
- **As if compliance & ethics does not exist**

NLRB & Codes: Possible alternatives

- **NLRB provides its favored language from Wendy’s handbook**
- **Add additional context & examples?**
- **Have labor lawyers review or write everything?**
- **Have codes just recite the law?**
- **Negotiate with unions where they exist?**
- **Include National Labor Relations Act language?**

Privacy: Converting helplines to data processing

- **Helplines required under SOX**
- **La Commission Nationale de l’Informatique et des Libertés (CNIL) – France’s privacy regulator**
- **McDonald’s France, La Commission Nationale de l’Informatique et des Libertés, Decision No 2005-110 of 26 May 2005; Exide Technologies, La Commission Nationale de l’Informatique et des Libertés, Decision No 2005-111 of 26 May 2005.**

Privacy: Converting helplines to data processing

- “[T]he commission considers that this system is disproportionate to the objective sought and risks of slanderous denunciations and the stigmatization of employees who were the subjects of an “ethics alert.” . . . other legal means exist to guaranty compliance with legal provisions and company rules (programs of consciousness raising through information and training, audits and alerts by the statutory auditors of financial and accounting matters, bringing matters before the Labour Inspector or the competent Courts.)”

Privacy: Converting helplines to data processing

- **EU attack on helplines**
 - Privacy used to prevent workers from reporting on abusive bosses
 - Murphy, “Things that don’t make sense: EU privacy laws impairing compliance calls,” Compliance and Ethics Professional 80 (Apr. 2015).
- **Some ban anonymous calls**
- **Limits on audits, monitoring, investigations, etc.**

Privacy: Possible alternatives

- **What communication is covered & not covered?**
- **Worst common denominator?**
- **Carve-outs for Spain & Portugal?**
- **Use of ombuds?**
- **Mail, suggestion boxes, no “data processing”?**
- **A creative European lawyer?**

EU: Undercutting in-house counsel

- No protection for in-house lawyers' communications because they are not "independent"
- Akzo Nobel Chemicals and Akros Chemicals v. EC. (European Court of Justice, Sept. 14, 2010) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0550:EN:HTML>

EU: Undercutting in-house counsel

Compare:

- US Supreme Court: absence of strong protection "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." Upjohn Co. v. United States, 449 US 383, 392 (1981).

EU & in-house counsel: Possible alternatives

- Use outside counsel for everything?
- In-house counsel acting only for outside counsel?
- Minimize use of writing?
- No matter what the law, it is still DG Comp's decision on how to investigate

DG Comp: Using your program against you

- Directorate General Competition (DG Comp) enforces EU competition law
- Compliance programs are not considered favorably
 - You had a “failed” program
- Your program may be used against you
 - British Sugar - James Budgett Sugars Ltd OJ [1999], L 76/1, [1999] 4 CMLR 1316.

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DG Comp: Using your program against you

- Parent company liability for subsidiary's violations
 - El DuPont de Nemours et Cie v. Commission (T-76/08 2 Feb. 2012)(sharing of compliance program between parent and subsidiary as evidence of subsidiary's lack of autonomy and basis for holding parent liable in subsidiary's violation)
- Multiples in penalty determinations - 10% of global turnover

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Defamation

- Disciplining wrongdoers
- Publicizing disciplinary cases
- EF Hutton case
 - Suit for defamation
 - Privacy an issue today
- United Way case
- Statutes in some states provide degree of immunity for this

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Defamation - Possible alternatives

- Let criminals go, pay them lots of money & keep quiet about it? Or . . .
- Review draft of publicity with labor counsel
- Works best in large organizations
- Prune out identifying information
- Use care in language & conclusions
- Keep to the facts
- Leave time between the event & publication

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Open records access to helpline data

- State open records laws used to expose compliance helpline calls and cases at a state university.
 - Andy Guess, Anonymity (Almost) Guaranteed, Inside Higher Ed (Sept 4, 2007), available at <https://www.insidehighered.com/news/2007/09/04/ethics>
 - Editor of student newspaper requests helpline records under open records law
 - University shuts down helpline, warns those who called
- If you are in a government C&E program, know the law
 - May have to use counsel

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Labor laws outside US

- Wal-Mart and codes of conduct
 - Case in Germany
 - Limits on substance
 - Limits on process
- Limits on testing in training
- Negotiating/consulting with works councils

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Making unintended contracts

- Codes, employee manuals, etc., can be interpreted as binding obligations against the company
- Only promise what you can deliver
- Be careful in promising “confidentiality,” “due process,” “fairness,” a “hearing,” etc.
- Using disclaimers (makes the code appear legalistic, but deals with risk)

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Care in hiring

- Risk of negligent hiring
- Item 3 of USSGs – use care in delegating authority
- Could your chair of the board have engaged in armed robbery in the past?
- “Ban the box”
- EEOC attacks controls on hiring those with criminal records

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Care in hiring

- Equal Employment Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, EEOC Enforcement Guidance, No. 915.002 (Apr. 25, 2012)
- https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

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Care in hiring

Commentary on USSGs item 3

an organization shall consider the relatedness of the individual's illegal activities and other misconduct (i.e., other conduct inconsistent with an effective compliance and ethics program) to the specific responsibilities the individual is anticipated to be assigned and other factors such as: (i) the recency of the individual's illegal activities and other misconduct; and (ii) whether the individual has engaged in other such illegal activities and other such misconduct.

Third parties

- Trying to prevent 3rd parties from illegal conduct/causing harm
- Risk of creating employment relationship
- Risk of direct liability
- Third party as joint employer
- Contract provisions or active oversight?
- Imposing own program? or
- Requiring third party to have a program?

Holding the C&E person responsible

- Will the compliance officer be the fall guy?
- So far, only for actual misconduct?
- Securities law – will aggressive C&E make you a “supervisor”?
- Risk, if “on your watch” liability for CECOs

Protections for C&E people

- D&O insurance
- Indemnification
- Employment contract
- Legal counsel – access, company pays
- Board resolution
- Position description
 - You lead the C&E program
 - You are NOT responsible for compliance – that must be management’s job
- Stay networked & connected

Impact of these legal impediments

- No anonymous calls allowed in some places – facilitates retaliation
- Discourages use of helplines
- Delays in implementing helplines pending bureaucrats’ ok
- Codes written in legalistic terms
- No note-taking in training
- Dumb down, or not even do, written reports on investigations, risk assessment, program assessments

Impact of these legal impediments

- Time spent on wasted bureaucracy is time not spent preventing crime & misconduct
- Important lessons not shared in companies
- Communications rendered less effective
- C&E professionals deterred from taking effective action
- Programs handicapped in ways that make them less effective

Don't accept harmful policies!

- Privacy, labor law, etc. as smoke screens
 - wrong to use them to inhibit compliance & ethics
- Don't accept the worst common denominator
- Don't accept bad governmental policies
- Efforts to prevent crime & misconduct should not be sacrificed
- Prevention should be valued & protected

Legal Risks of Compliance & Ethics Programs

Questions?
