

SECTION 6: ADOPTING A WHISTLEBLOWER POLICY

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A whistleblower policy is a governance policy that encourages an organization’s employees, volunteers, and other stakeholders to notify designated persons within the organization when they have concerns and suspicions regarding fraud, illegal activity, and other wrongdoing and that protects the “whistleblower” from retaliation. It is a policy adopted with increasing frequency by for-profits and nonprofits alike, particularly since the Internal Revenue Service has begun asking about it on the annual information return and auditors have begun asking about it in annual audits. But in order to be effective, the policy needs to be more than a piece of paper. The policy should be just one component of internal controls and communications strategies that inform decisions through open communications channels and a philosophy of rewarding, rather than punishing, those who come forward with information concerning problems in the organizations. This toolkit section addresses how to write and implement an effective policy, who should be covered by the policy, the legal background, tracking and reporting, and the role of legal counsel.

Part I: Reasons to Have a Whistleblower Policy

The board of directors of a Community Action Agency (CAA) is charged with organizational oversight. Its management is responsible for the CAA's day-to-day operations. Both the board and management rely on formal communication channels and reports to obtain the information necessary for decision-making. As everyone knows, there also are informal networks within organizations. Information that should be of interest to the board and management often resides in those networks, but the organization's formal systems aren't designed to capture it.

A whistleblower policy is one tool that both a CAA's board and senior management can use to surface critical information that might otherwise remain hidden until a problem arises or a crisis unfolds. In fact, there is convincing evidence that information received from whistleblowers is one of the most effective tools to do so. Surveys and studies conducted by several well-respected organizations, including the Association of Certified Fraud Examiners, the National Bureau of Economic Research, and PricewaterhouseCoopers, have shown that hotlines and employee and whistleblower reports lead the list of methods that have successfully detected fraud. Although no whistleblower policy can eliminate all risk or surface all information, the following are areas where an effective policy may permit a CAA to take the necessary steps to avert a crisis that would otherwise result in damage to the CAA and its mission:

Problematic Employment Practices

Despite management's best efforts, a supervisor or other employee may be engaging in illegal employment practices. An employee who is subject to discrimination or harassment may not know anyone in upper level management. A whistleblower policy and a culture that supports whistleblowers may result in that employee contacting someone within the organization rather than retaining a lawyer or contacting the Department of Labor.

Neglect of Children

Allegations of child neglect plague a Head Start program over a two year period. State officials threaten to revoke the licenses to operate the program's childcare centers. Ultimately, the federal Office of Head Start defunds the offending program. Given the severe consequences that can follow in the wake of allegations that children have been neglected or abused, every organization that serves children should make sure that those who might know or have inklings about abuse or neglect know how to report it and are encouraged to do so. In addition to inclusion in a whistleblower policy, every CAA with child care or Head Start programs should have a separate well-developed policy and procedure on reporting suspected occurrences of child abuse or neglect that conforms with its state statute(s) related to mandatory reporters of child abuse and neglect.

Financial and Contracting Fraud

Many CAAs rely on government grants and contracts for the vast majority of their funding. Embezzlement, reimbursement irregularities, and other types of financial fraud jeopardize contracts and grants. All too often, members of the accounting staff or other employees know about the wrongdoing or irregularities, but are afraid to voice their concerns. By encouraging individuals to communicate their suspicions, a CAA may be able to address a problem before its auditors or outside reviewers uncover it. By adopting a whistleblower policy, the CAA sets the right "tone at the top," as the auditors refer to it. When a CAA discovers and then addresses financial misconduct, auditors and reviewers are likely to view the organization as well-managed. Auditors and outside reviewers draw just the opposite conclusion when they are the ones who first bring the problems to management's attention.

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Poorly Run Programs

Service recipients may be dissatisfied with programs or employees and volunteers may know that government-funded programs are not in compliance with regulatory requirements. Comments from dissatisfied service recipients and disgruntled employees can prove embarrassing when made to federal and state monitors. More significantly, such comments can result in reduced funding or the non-renewal of grants. Once again, a CAA's best defense will be surfacing concerns before they come up during an audit, review, or in the press.

The recent interest of the Internal Revenue Service in whistleblower policies of tax-exempt organizations is likely another reason for an uptick in the adoption of such policies. Form 990, an informational return that is required to be submitted to the IRS by most, if not all, nonprofit CAAs, now asks whether an organization has adopted a whistleblower policy. The IRS has been clear that a whistleblower policy is not required for tax-exempt organizations; what is unclear is how the IRS plans to use the data collected. The IRS is currently analyzing data to determine how it should use the responses to this and other governance-related questions in determining which organizations it will select for audit. IRS officials have repeatedly said that a "well-governed organization is a tax-compliant organization." That sentiment suggests that the answers to the governance questions could play a significant role in determining whether a CAA is selected for audit. All the more reason a prudent CAA should adopt a whistleblower policy.

CASE SCENARIO:**THE NEED FOR A WHISTLEBLOWER POLICY**

Blue CAA (BCA) has a 28-member board of directors that has yet to adopt a whistleblower policy. Gloria Watson is BCA's hard-charging executive director. Her administrative assistant, Lance Richards suspects that Watson has been diverting funds from a grant to provide HIV/AIDS screening in the community through a reimbursement scheme. Richards, who was released from prison four years ago following completion of a sentence for armed robbery, has four children. He earns \$25,000 a year. With unemployment at 9.6 percent, Richards is very reluctant to "rock the boat" at work, but he is deeply troubled by Watson's scheme. He would like to let someone know about what he has observed,

but he doesn't know whom to contact and isn't sure how any report would be received given Watson's status and power. After months of considering what to do, Richards decides to remain silent, but to look for a new job. Several months later, monitors from HHS conduct a review of the program. During the course of the review, they discover that Watson has stolen \$59,000 in grant funds. They advise their superiors that HHS should not renew the grant.

LESSON: Although implementing a whistleblower policy can be time consuming, short-sighted organizations often pay a heavy price by failing to adopt one.

Part II: Legal Background

Many Laws Protect Whistleblowers

Whistleblower statutes generally do not mandate a policy or its contents. Instead, these statutes focus on whistleblower protections. Several well-known federal laws include provisions providing specific protections to individuals who report violations under those acts. These include the Americans with Disabilities Act, Comprehensive Environmental Response, Compensation and Liability Act, Fair Labor Standards Act, the Family Medical Leave Act, and the Occupational Safety and Health Act. Of particular note is Section 1513(c) of Title 18 to the United States Code, which 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 or imprisoned not more than 10 years, or both.

This provision, which was part of the Sarbanes-Oxley Act Of 2002, applies to "whomever," which includes nonprofits and their board members, officers, and employees. It outlines the element of a crime. It can lead to a prison sentence.

In August 2005, the National Conference of State Legislatures released a survey of state whistleblower laws. It reported that 32 states provided statutory protections to whistleblowers. Many of these states limit the protection to public employees, but some states also protect private-sector employees. California is such a state. Its labor code provides that is unlawful for an employer to retaliate against an employee who discloses information to a government or law enforcement agency, when the employee reasonably believes that the employer has violated a state or federal statute or regulation, or with reference to employee safety or health, unsafe working conditions or work practices in the employee's employment or place of employment. The employer may be required to reinstate the employee's employment and work benefits, and pay lost wages. Connecticut, Florida, Michigan, New Jersey, New York, and Ohio have similar laws. Many state laws also protect employees against firing if it would violate "public policy," which could include, for example, terminating an employee because she reported an employer's illegal actions.

Tip**CONSULT LEGAL COUNSEL BEFORE DRAFTING POLICY**

No whistleblower policy should be drafted without thoroughly reviewing applicable federal and state statutes in consultation with legal counsel. Of particular concern, is the need to understand the state laws pertaining to whistleblower protections.

The scope of the federal law and state law applicable to a particular CAA may impact the scope of the CAA's whistleblower policy. When examining these statutes, CAAs and their attorneys should keep the following questions in mind:

- Does the statute protect just governmental employees, or are private sector employees also protected?
- Even if the statute's protection is limited to just governmental employees, how does it define members of that group? Might employees of an organization subject to open meeting or record laws be granted statutory protection?
- Does the statute only provide protection in the case of external reports to governmental agencies, or does it also protect those making internal reports to people employed by the CAA?
- Is the protection limited to reports of only certain types of activity, or does the statute protect all reports?
- If the report turns out to be false, are there limitations on what actions the CAA can take to sanction the employee for making a false report?

Some Laws and Government Agencies Encourage Reporting and Reward Whistleblowers

Many government entities maintain hotlines to encourage reporting of waste, fraud, and abuse of government funds and resources, including grants and contracts awarded to nonprofits. For example, programs funded by the American Recovery and Reinvestment Act are required to post a whistleblower notice that includes a phone number to contact the Recovery Board Fraud Hotline. Many federal agencies' inspector generals' offices also have fraud hotlines.

In addition, some statutes reward whistleblowers. Legislatures and governmental officials recognize that determining whether governmental funds have been misused is not an easy task. To minimize the effort, many governmental entities deputize employees, volunteers, and others to blow the whistle. Under what are termed "false claims" acts, whistleblowers share a percentage of recoveries of misused government funds. The best known of these statutes is the Federal False Claims Act, but there are state and local analogues.

Most employees do not know about the Federal False Claims Act, but if they have a concern about illegal activity, they might do a web search on the term "whistleblower," or the phrase "report illegal activity." Search results will reveal dozens of law firms willing to assist employees in their efforts to report fraud and abuse involving government contracts and grants. These law firms are not acting out of benevolence. They agree to provide legal assistance in exchange for a percentage of any reward paid to the whistleblower.

An employee, volunteer, or other person who believes that a false claim has been filed with the federal government can bring a legal action as a *qui tam* (as someone who acts on behalf of the king). In other words, the government is not necessarily the only entity that can bring legal action if a CAA knowingly makes a false claim under a governmental contract or grant. Of course, the employee or volunteer is unlikely to act alone when filing a suit. This is where the law firms that specialize in false claims litigation enter the picture. Under the statute, the employee or volunteer is entitled to receive at least 15 percent, but not more than 25 percent of the amount recovered. The lawyer looks to this reward for his fee.

An entire body of law has developed around false claims and *qui tam*. A complete discussion of that law is beyond the scope of these materials. What CAAs must understand is that by providing an internal path for reporting wrongdoing, the CAA may be able to avoid a fight with an adversary who is equipped and has the incentive to pursue a lawsuit on behalf of the government.

Many government entities maintain hotlines to encourage reporting of waste, fraud, and abuse of government funds and resources, including grants and contracts awarded to nonprofits.

Part III: Writing a Good Whistleblower Policy

A well-drafted whistleblower policy should encapsulate the CAA's needs, as well as its culture and internal structures. Those designing the policy should adopt the mindset of an employee who is reluctant to make a report, developing a procedure designed to mitigate that reluctance, which will generally require that the policy elevate "nuts and bolts" over generalities. At minimum, the policy should address the following issues:

Purposes

A well-designed whistleblower policy often requires several pages to communicate its details. Many stakeholders will not take the time to read the entire policy. Consequently, the policy should begin with a provision that outlines its purposes. This should be written so as to encourage someone who knows about a problem to keep reading. Here is illustrative language:

The Organization has implemented various policies and controls to ensure that its resources are used to further its nonprofit mission. While no set of policies or controls can eliminate all unethical or illegal behavior or prevent theft or misuse of organizational resources, the Organization's board of directors recognizes the vital role that employees and volunteers can play in bringing inappropriate or illegal behavior to the attention of the board and others who are in a position to respond. In recognizing the role you play, the board has adopted this whistleblower policy to encourage you to report your concerns to the appropriate individuals without fear of retaliation or harassment. The board asks for your assistance in protecting the Organization's assets, activities, and mission. We appreciate and recognize the importance of your role.

Intended Audience(s)

The policy should identify to whom it is directed. Employees are the obvious audience. The drafter should also consider addressing volunteers, vendors, and those served by the CAA. Because an effective whistleblower policy is directed to various audiences, the organization should consider adopting separate policies for each audience. More importantly, the relevant portions of the overall policy should be made available in ways that will be visible to and readily accessible to each audience.

- **Employees.** The whistleblower policy should be included in the employee handbook.
- **Volunteers.** The whistleblower policy should be incorporated into the volunteer handbook.
- **Vendors.** The organization's standard form purchasing contract should include language asking vendors to report wrongdoing and fraud.
- **Service Recipients.** Any information packet provided to service recipients should include a discussion of the whistleblower policy. This is particularly important for CAAs with Head Start programs and programs assisting other vulnerable groups. Head Start parents need to know how to report concerns over child neglect or abuse. School-age youth, the elderly and the disabled also can be subject to neglect and abuse, so their children and guardians should be aware of how to report concerns.

CASE SCENARIO:

NEED TO DISCLOSE WHISTLEBLOWER POLICY

Sarah Douglas runs a diaper distribution business. Max Sussman, BCA's purchasing agent, has been placing orders for an extraordinary number of diapers that he claims will be used in BCA's Head Start program. Douglas suspects that Sussman is selling some of the cartons of diapers to other programs and pocketing the money. Five years ago, BCA's board adopted a whistleblower policy. It attached the policy to the board meeting minutes and distributed it to employees. Other organizations that Douglas does business with usually include a statement on their

purchase orders about whom to contact if the vendor thinks there might be fraud. Although BCA's policy covers vendors, nobody has ever informed Douglas that the policy exists. She isn't sure whom to contact and decides to go about her business: "Why rock the boat if nobody seems to care?"

LESSON: CAAs must make sure that everyone who might have important information about fraud and other potential problems is aware of the policy.

Types of Concerns Covered by the Policy

The policy should identify the subject matter of allegations or types of concerns covered by the policy, which in most cases should include:

- Financial fraud
- Violations of the law
- Violations of federal procurement and contracting law
- Violations of conflict of interest policies
- Waste and/or mismanagement of organizational resources
- Workplace safety
- Workplace violence
- Employment practices (e.g., discrimination, harassment, and collective bargaining rights)
- Privacy violations
- Environmental concerns
- Substance abuse
- Service quality

The policy should list each subject matter covered by the policy as part of a laundry list, together with a general catch-all statement covering any illegal or unethical behavior.

CASE SCENARIO: TROUBLE WITH OPEN DOOR POLICIES

BCA's board desired to portray itself as very democratic and accessible. It adopted a whistleblower policy instructing employees to contact any board member with any problem. Several of the board members are lawyers, but most members have no legal or managerial experience, nor have most ever dealt with a whistleblower, when two separate whistleblower reports are made.

Situation 1: Harvey Mapplethorpe believes he was unjustly passed over for promotion. He contacts Celia Williams, his neighbor who serves on BCA's board, to complain about this perceived wrong. Mapplethorpe tells Williams that he thinks he was passed over because of his age. Williams is quite sympathetic, telling him that she sees how he was treated unfairly and that she will get the problem fixed. When Williams raises the issue with the executive director, she learns that Mapplethorpe has been chronically late for work and is unreliable in other ways. Wanting to avoid an embarrassing situation, Williams lets the matter slide into oblivion. Unfortunately, it doesn't. Mapplethorpe contacts a lawyer, informing him that even a board member told him he was treated unfairly. The lawyer files an age-discrimination suit on Mapplethorpe's behalf.

Situation 2: April Golden's daughter, Lilly, is in BCA's Head Start program. Lilly comes home from school upset. On questioning, Golden learns that Lilly believes Jenny Smart, a teacher, touched Lilly inappropriately. April immediately contacts Harold Wiley, a member of BCA's board. Wiley asks Golden to bring Lilly to one of his restaurants for questioning. He asks whether Lilly was fully

dressed when this happened, where Smart touched her below the waist, and whether others saw the incident. Lilly tells Wiley that her pants were down, that Smart touched her buttocks, and that other students were present. Wiley immediately sends a memo to the entire board, informing them that Jenny Smart sexually molested a student and there are witnesses. Following a thorough investigation, the staff learns from other students that Lilly was coming out of the bathroom with her pants drooping around her knees. Some boys were laughing and Lilly began to cry. Smart saw what was happening, rushed to her aid, and pulled up her pants and buckled Lilly's belt. Prior to the investigation, the local newspaper obtained a copy of Wiley's memo and published a story suggesting that Smart had molested a child. Smart has sued BCA for defamation.

LESSON: Unless a CAA is willing to provide training to the persons named as the recipients for whistleblower reports, it is asking for trouble. Moreover, not everyone has the temperament or experience to deal appropriately with reports. In most cases, an organization will be better off naming a few people as report recipients rather than a large number. Fewer candidates for reports provide the CAA with greater control over the process. The two situations demonstrate what can happen when people who don't regularly receive reports and have not undergone training respond to a report.

Reporting Concerns

The policy should specify whom the whistleblower should contact about the whistleblower's concerns. A whistleblower policy must recognize that the person designated to receive reports might be the subject of a report and should avoid designating just one person as the recipient for all reports from whistleblowers. Alternatives should always be offered. Conversely, CAAs should avoid open door policies that advise employees, volunteers and others to contact any member of the board of directors with their concerns. Unless each board member has undergone special training, this open-door policy is a mistake. As volunteers, most board members do not have day-to-day contact with the CAA. This makes it more likely that they don't fully know the CAA's inner workings. Moreover, without training, their natural response may not be the proper one. CAAs should provide potential whistleblowers options and ensure that anyone who is designated as a contact for whistleblowers should have some training in what is and what is not a proper response.

- **Immediate Supervisor.** Many whistleblower policies are written based on the assumption that a whistleblower wants to report his concerns to someone other than the whistleblower's immediate supervisor. This is a faulty and potentially damaging assumption. The policy could contain a statement encouraging whistleblowers to bring concerns to an immediate supervisor. This suggestion demonstrates why governance policies involve much more than just a piece of paper. Encouraging employees to approach their immediate supervisor first only makes sense if everyone is comfortable with this approach—a culture of collaboration. Fostering this sort of cooperation is in the employee's and the CAA's long-term interest because the supervisor-employee relationship is at risk if the employee "goes around or over" the supervisor.
- **Around or Over Supervisor.** In many instances, the whistleblower will be uncomfortable reporting his concerns to an immediate supervisor, particularly if the supervisor is the source of those concerns. A whistleblower policy should always provide the whistleblower with the option to report around or over his immediate supervisor. It should therefore designate the appropriate recipients. Each recipient should be identified by name and position, together with the preferred method of contact, including e-mail addresses or phone numbers.
- **Designated Subject Matter Contacts.** A CAA should consider designating different people as recipients of reports, with the designation determined by subject matter. For example, the policy might designate the CFO or the board's audit committee as the recipient of reports involving financial fraud and related matters. If the CAA has a lawyer on staff, the policy might designate the lawyer as the one who receives reports involving illegal activity and federal procurement law. Employment-related matters might be referred to the head of HR or the board committee that handles personnel matters.
- **Site-based Contacts.** Some CAAs have operations at more than one location. When that is the case, the policy should take the different locations into account. If, for example, a policy directs people to contact the head of HR regarding workplace discrimination, the policy should recognize that those at a satellite location may not have direct or easy access to the head of HR. The policy must provide these individuals with a reporting mechanism that takes that into account.
- **Fail Safe Contact.** The whistleblower policy should designate an alternative recipient for reports in cases where the matter involves the executive director or someone who is a designated report recipient. If the concern involves the executive director, the board's chair is the logical candidate. When the concern involves an employee other than the executive director, then the executive director is a logical choice as the alternative.
- **Alternative Contacts.** As noted, the policy should list report recipients by name. The CAA should consider alternative recipients in cases when the primary contact is out of the office on sick leave, vacation, or business. Some organizations advise potential whistleblowers to wait for the primary contact to return. This is a mistake. The precipitating event might be the first in a series of events that could quickly escalate. Equally important, whistleblowers are often reluctant to make a report. The first time the whistleblower picks up a telephone may be the last.

CASE SCENARIO: PROMISES OF ANONYMITY

Patrice Jones works in BCA's Head Start program and observes the head of the program engaging in discriminatory hiring practices. Wanting to see those practices put to an end, Jones reviews BCA's whistleblower policy. The policy states that BCA will use its best efforts to protect a whistleblower's identity from disclosure. She reports her concerns as instructed by the policy. BCA investigates and confirms that 15 men were denied employment because of their gender. BCA decides to make changes to its employment practices on a going-forward basis. Despite this corrective action, the men file a class action lawsuit against BCA. They allege that

many BCA employees were aware of the illegal practices. To prove their case, they ask the court to require BCA to turn over any reports from employees about those practices. The court grants their motion, and BCA reveals Jones' identity, as ordered by the court.

LESSON: The written policy should address anonymity, but should not promise to use best efforts to protect the whistleblower's identity, or otherwise suggest that it can prevent disclosure in all cases.

Confidentiality/Anonymity

A whistleblower policy should never contain an outright promise of confidentiality or anonymity because no organization can absolute guarantee such a promise. There will be instances when addressing the problem, no matter how delicately handled, will result in the whistleblower's identity becoming apparent to others even if the whistleblower's name is never explicitly revealed. Moreover, if the matter results in litigation or a government investigation, the CAA simply cannot guarantee that it will not be legally required to reveal the whistleblower's identity. The policy should address confidentiality as a means of encouraging whistleblower's to file reports, but make no guarantees. The policy certainly can indicate that the CAA will try to protect the whistleblower's identity. It should avoid using the phrase "best efforts" because some courts have interpreted such language in other contexts to require an organization to employ extraordinary means. Here is illustrative language:

The Organization's interest in being thorough in its investigation means that it cannot promise complete confidentiality, but it will act as discretely as reasonably possible. However, the whistleblower's identity may be disclosed in order to conduct a thorough investigation or to comply with applicable legal requirements.

Retaliation

To encourage whistleblowers, the policy should state that retaliation (i.e., harassment, punitive actions, termination) against those making reports will not be tolerated. It should also specify the consequences should someone retaliate against a whistleblower. If dismissal of the retaliating offender is warranted, stating that dismissal is a sanction provides the CAA with a possible defense against a wrongful termination suit. The CAA employee handbook and, if applicable, employee contracts should incorporate the consequences of retaliation, namely making it a basis for termination.

Threats of Violence

Unfortunately, there have been serious incidents involving workplace violence in recent years. The policy should advise potential whistleblowers to contact a supervisor, the executive director, or the authorities immediately following threats that could involve bodily injury or other catastrophic consequences.

Misuse of Policy

The policy should explicitly state that reports are encouraged, but that reports should not be filed regarding petty or trivial matters. It should also state that the CAA will not tolerate reports that are filed to gain an advantage in a personal dispute between two equals. The policy should require that reports be made in good faith.

Report's Content

The policy should ask the whistleblower to be as specific as possible in outlining his concerns. It should ask for names, dates, and a description of the incidents precipitating the report. It should also ask the whistleblower to describe any steps that he has taken to address the problem. The policy should advise the whistleblower to be as objective as possible and to avoid inflammatory or emotional language.

No Internal Investigations

The policy should state that the whistleblower should not undertake an internal investigation to obtain additional information before making the report.

Mandatory Reporting

Some organizations include a provision in their policies mandating that employees report wrongdoing as soon as they observe or learn of it. Failure to report can result in sanction. This mandate makes perfect sense; employees owe a duty of loyalty to their employers. However, CAAs should proceed with caution if they decide to impose any requirement that comes close to a mandate. Those charged with drafting such a provision should ask themselves: Should or can we expect a clerical worker who makes just above minimum wage to file a report implicating the executive director in wrongdoing, particularly when the circumstances may be ambiguous? To emphasize the dilemma confronting the clerk, assume he has three children under the age of 10 and unemployment in the community is at 20 percent. Some people may still be in favor of such a provision after considering those facts. They are not wrong, but they should then ask themselves two more question: When circumstances suggest that an employee may have known something, how are we going to distinguish between hunches, glimmering suspicions, and certitude? Will an inability to draw such lines result in inconsistent (or perceptions of inconsistent) enforcement that could lead to employment practices litigation? If the drafters still believe such a provision is warranted, they should take all of these questions into account in finalizing what should be a carefully worded mandate. An alternative might be devoting additional resources to increasing the level of pride that employees already have in mission, with employees then being more likely to voluntarily report wrongdoing. Being a matter of organizational culture, this approach will only work if the channels of communication are open and supportive.

Report Investigation and Resolution Process

To the extent possible, the policy should describe how the CAA will respond once it receives the report. For many individuals, filing a whistleblower report is a stressful experience. Everyone who has ever interviewed for a job or been on a date knows all too well about the speculation that follows the event: “I wonder why they haven’t contacted me yet, or whether I should call him.” The same is true for whistleblowers. Because each report will involve somewhat unique circumstances, the CAA will be unable to describe each detail, but the policy should describe the general process for handling reports and offer an estimate of the likely response time.

CASE SCENARIO: SAFEGUARDING REPORTS

Brian McLaughlin has long believed that Maxine Gold, his supervisor, has had it in for him. She openly criticizes him in front of other employees, makes him work overtime without permitting him to receive payment for the extra hours worked, has passed him over for promotion on countless occasions, speaks to him using vulgar language, and has even slapped him several times. McLaughlin decides that he has had enough when Gold suspends him without pay for three days for no apparent reason. Without that additional pay, he won’t be able to pay his mortgage this month. McLaughlin reviews the whistleblower policy in the employee handbook. It instructs him to report his concerns by e-mail to Jason Jones, BCA’s VP of Administration, which he does. Jones is out of the office, but he has left instructions with his administrative

assistant, Marcia Newhart, to review all of his emails. Newhart is good friends with Gold both inside and outside of the office. Upon reading McLaughlin’s e-mail, Newhart immediately informs Gold. She also destroys the e-mail. Gold responds by suspending McLaughlin for another six days. With all avenues closed, McLaughlin hires a lawyer, who files suit over the failure to pay overtime.

LESSON: The organization cannot rely on whistleblowers to secure their reports. It must put in place systems that secure those reports. In this case, BCA might have created a password-protected e-mail address and instructed Jones not to grant his administrative assistant access to the mailbox linked to that address.

Part IV: Internal Process

Adopting a written policy is insufficient without supporting it through internal systems. The process includes both the system for reporting the whistleblower’s complaint and the response to it.

Reporting systems should engender confidence in the whistleblower. CAAs should consider special e-mail addresses and phone numbers that are password protected. That security should be evident to the whistleblower through web disclosure (in the case of e-mail) or outgoing phone messages when the whistleblower is asked to leave his name and number. If anonymous reporting is envisioned, the policy should advise the whistleblower that a caller ID system is in use. This sort of warning adds credibility.

A better option might be an external, third-party hotline. Following the enactment of the Sarbanes-Oxley Act of 2002, publicly-traded corporations have increasingly looked to third-party service providers to maintain whistleblower hotlines for them and many nonprofits have followed suit. External hotlines have several advantages. Most importantly, they can accept reports on a 24/7 basis. As already noted, whistleblowers are often ambivalent about making a report, which means that a whistleblower may only make one attempt. Equally important, whistleblowers may perceive an external hotline as providing greater anonymity, which can be an important factor in the whistleblower’s decision whether to make a report. Whistleblower hotlines also offer computerized tracking, multi-lingual capabilities, and specially trained operators.

Tip

THIRD PARTY HOTLINES MAY BE MORE ECONOMICAL THAN YOU THOUGHT

CAAs may be reluctant to consider an external hotline because of incorrect perceptions about cost. Each CAA will need to obtain bids, but the annual cost can be surprisingly low, often in the \$1,000 to \$2,000 range. There is often an initial start-up fee. Several providers of external hotline services offer both call center and web-based reporting as part of one package. These services use a template for web-based reporting, but the template can be customized to meet the CAA’s specific needs and concerns.

CASE SCENARIO: INVESTIGATION FOLLOW-UP

Sidney Hurwitz heads up BCA's Responsible Fathers program. Sally Mann, who is an instructor in the program, files a complaint with HR, as the BCA whistleblower policy instructs, alleging sexual harassment from Hurwitz. HR conducts an investigation, determining that Hurwitz made several off-color jokes, but that nothing else had transpired. BCA requires Hurwitz to take a course designed to help him better understand boundaries and what is and what is not appropriate workplace behavior.

Several months later, BCA receives a notice that Mann's lawyer has filed a lawsuit alleging sexual harassment by Hurwitz and a hostile work environment. An investigation reveals that the course

had no impact on Hurwitz's behavior. In fact, Hurwitz began to verbally abuse Mann.

LESSON: BCA's initial response to Mann's complaint was a logical and appropriate one. It gave Hurwitz a second chance, but required him to undergo training that was designed to sensitize him to proper workplace behavior. BCA made one critical mistake. It failed to follow-up with Mann. Had there been proper follow-up, Mann might have informed BCA of the ongoing and escalating incidents. Instead, she sought recourse outside of BCA, which could cost BCA hundreds of thousands of dollars in defense and settlement costs.

How a CAA responds to a report from a whistleblower will depend on the specific circumstances, but a basic procedure should be established. In all instances, the whistleblower's report should be acknowledged soon as possible and the whistleblower should be given as much information about the resolution process and timeline as possible.

The next step is to determine the seriousness of the allegation and the depth and scope of the investigation necessary. Not all reports merit the same level of investigation; some may need just a quick meeting with the whistleblower to check on facts, while others may need multiple interviews with many parties, review of CAA records, or even involvement of an outside lawyer. A decision also needs to be made about who will make that determination.

Before beginning the investigation, a CAA should consider how it will conduct interviews with whistleblowers who have revealed their identity and with others who may have knowledge relevant to the investigation. The following are among the issues that the CAA should address:

- **Who will Conduct the Interview.** The CAA should assign two individuals to conduct the interview. The individuals should be objective parties and at least one should be a subject matter expert (e.g., an HR person for employment related concerns, a finance person for financial concerns).
- **Where the Interview Will be Conducted.** It might be possible to conduct the interview in the office, but the CAA should recognize that other employees who see the whistleblower or other interviewee entering a particular person's office may begin to speculate. Because of that possibility, potential whistleblowers might not be willing to come forward. A better option is to conduct the interview before or after hours, and/or in a location away from the interviewee's office and his colleagues.
- **Union Presence.** Whether a union representative must be present or contacted under the terms of any collective bargaining agreement.
- **Documentation.** How the interview will be documented. Unless the circumstances are unusual, a simple pen and notepad is probably sufficient, but there may be instances where a stenographer or audio recording is warranted.

Tip

TRUST BUT VERIFY

The individuals charged with investigating a whistleblower's concerns have a duty to look at all parties objectively and honestly. They must recognize any bias they might hold toward the whistleblower or the target of the report. The best approach to questioning is to keep the tone neutral and ask open ended questions that mirror the chronology of the events under investigation (When did you learn X? How do you know that? What documents do you have?). Investigators should collect, examine, and organize any and all documents, including emails or other electronic records, related to the whistleblower's concern and have the documents in-hand during interviews. Often, a chronological sequence of documents will provide a useful guide to discovering the true story.

Part V: The Role of Legal Counsel

Not every response to a report made by a whistleblower need be reviewed by a lawyer, but the importance of legal counsel should not be overlooked or ignored. CAAs should have a lawyer review any proposed whistleblower policy. This should not be a lawyer who is a member of the board and practices in the area of family, bankruptcy, real estate law, or personal injury law, as just four examples. It should be a lawyer who is knowledgeable about corporate governance and employment law.

A whistleblower report may be the result of an honest misunderstanding. In those instances, the CAA should be able to clear up the misunderstanding and smooth any ruffled feathers. In other instances, the accusations may be more serious. The CAA may discover that the accusations are totally unfounded, or it may learn that the denial is patently false. The CAA may even learn that there has been a cover-up or conspiracy. In these instances, someone is likely to be terminated. Given the cost of employment practices litigation, a CAA that tries to handle the matter without the benefit of legal counsel has engaged in false economy. Get competent legal counsel involved early.

On occasion the executive director or another senior manager is accused of wrongdoing. There may be allegations involving reimbursement practices, kickbacks, conflicts of interest, excessive compensation, or sexual harassment. Ascertaining the facts

A log permits management and the board to systematically review complaints, potentially revealing recurring problems that the board or management should address through changes in policy, personnel, or procedures.

may require an investigation. This sort of investigation is often best carried out by special legal counsel. Although an organization cannot hide the unfavorable facts from a legal adversary by using legal counsel, lawyers generally believe that a good portion of legal counsel's efforts are protected as attorney-client communications and attorney work-product. Often of greater importance, outside legal counsel brings objectivity that an internal investigator may lack. There are lawyers around the country who specialize in internal investigations. By retaining one of these individuals, the CAA gains the specialized knowledge of someone who is experienced with investigation and responding to a crisis.

Part VI: Documenting and Tracking Whistleblower Reports

CAAs should maintain a dedicated log where every whistleblower report is recorded and then tracked. This helps ensure that a report isn't lost, overlooked, or forgotten. Logging has the added advantage of facilitating efforts to audit the whistleblower policy as a log permits management and the board to systematically review complaints, potentially revealing recurring problems that the board or management should address through changes in policy, personnel, or procedures.

A log should identify the whistleblower, the person who received the report, the time and date of the report, each person who was involved in the response, the steps taken to resolve the matter, the date when the CAA responded to the whistleblower with the final outcome of the investigation, a description of the outcome, and an assessment of whether the whistleblower was satisfied with the response.

- **Security.** Procedures must exist to secure and limit access to the log. If the log is in paper form, it should be in a locked safe or other secure place. If digital, the log should be encrypted and password protected.
- **Follow-up.** The process should include appropriate follow-up after the whistleblower's concerns have been addressed. For example, a student in a class offered by a CAA might make a report alleging sexual harassment. The ensuing investigation might determine that there was an honest misunderstanding. Nevertheless, at appropriate intervals after the matter was resolved, someone should contact the student to make sure that he continues to feel comfortable with the outcome and that there have been no further incidents.
- **System Audits.** At least once a year, someone should audit the process by reviewing all or a representative sample of reports to make sure that the CAA has been complying with the policy and related procedures when responding to reports.
- **Review.** At least once a year, the board and management should review all reports made under the policy. They should be looking for commonalities, with an eye toward recurring problems.

Part VII: Tone at the Top

Culture plays a significant role in all matters of governance. Any organization can put words on paper. Those words can inspire people in the organization to do the right thing. Alternatively, they can serve as cover for an organization that is fundamentally corrupt. No one will make a report if the CAA's culture is repressive or retaliatory. People simply won't believe the words written on the paper, no matter how eloquently stated. Potential whistleblowers have often had years to observe upper management's behavior and office politics. Whistleblowers will come forward if the board and management have set the right tone, but setting that tone requires more than words.

CASE SCENARIO:

ANNUAL REVIEW OF REPORTS MAY REVEAL PATTERN

BCA manages a number of affordable housing projects. Several staff members are charged with reviewing rental applications. During the last several years, five Asian-American applicants have written letters to BCA's executive director, Gloria Watson, complaining that despite meeting all of the income thresholds and other requirements, their applications were turned down. Watson always responds promptly. She has never received any follow-up communications from any of the applicants after she sends a response.

The truth is that Watson perceives Asian-Americans as difficult tenants, so Watson is happy that the staff is turning them down. Under BCA's whistleblower policy, Watson is named as a recipient for reports under the policy. Larry Wiggins, an employee who works in the affordable housing program, has received a lot of pushback from the Asian-American community about Watson's responses. Wiggins is afraid to report that pushback because the whistleblower policy states that all concerns should be made to known to Watson.

Out of nowhere, Watson receives notice that she and BCA have been named in a class-action lawsuit for housing discrimination. Ten Asian-Americans are the lead plaintiffs. The board is shocked to learn of the allegations.

LESSON: Had BCA's whistleblower policy specified that the board chair be notified when concerns involve Gloria Watson, the board might have seen the same discriminatory pattern that caused the lawyer to file a lawsuit. Both the board and management can derive important benefits from a whistleblower policy. The policy can place management in a position to respond to issues before they blow up in management's face. The board gains a tool to assist it with its oversight responsibilities. If the policy does not designate the appropriate persons for notice, the policy does the CAA no good.