

# Addressing Workplace Complaints: A Critical Step in Light of Whistleblower Incentives

April 9, 2024

Prosecutors and regulators have [recently offered significant financial rewards to whistleblowers](#) to come forward in an effort to spur corporate enforcement. But whistleblowers aren't made overnight – many times they are persuaded to act by the perception that management is ignoring their complaints. In light of increased efforts by prosecutors and regulators to encourage whistleblowing, it is more important than ever that companies establish strong processes to take in, review and resolve internal complaints.

The facts alleged in a recent whistleblower retaliation case – which survived a motion to dismiss – exemplify the pathway from internal complainant to whistleblower. On March 18, 2024, the US District Court for the Southern District of New York [denied a motion to dismiss a whistleblower retaliation claim](#) against HSBC after finding that the plaintiff met the “relatively low bar” for pleading that his internal complaints contributed to his termination.

Steven Callahan, a former trader for HSBC Securities, alleged that he was terminated because he reported illegal “front-running” by traders at HSBC both internally and to a regulator. Judge J. Paul Oetken found that HSBC’s termination of Callahan and its filing of a negative post-termination Form U5 qualified as adverse employment actions under the Sarbanes Oxley Act of 2002 (SOX). Further, Judge Oetken determined that Callahan had adequately pleaded that his protected activity was a contributing factor to these adverse actions based on the temporal proximity between his reports and the actions, “indications of pretext” in the company’s explanation for his termination, and the company’s “inconsistent application of policies and its differential treatment of Callahan compared with that of other employees.” The court also sustained certain promotion, suspension and bonus claims that were effectively time-barred under SOX but still viable under state law.

Before reporting observations of front-running to the US Commodity Futures Trading Commission (CFTC), Callahan allegedly reported his concerns directly to company managers and supervisors on multiple occasions over the course of six months – which the company allegedly ignored. That is to say, Callahan did not become a whistleblower overnight. Ignored complaints to management combined with financial incentives from the [Department of Justice](#) (DOJ) and other federal regulators – including the [CFTC](#) – create the perfect conditions for a concerned and disgruntled employee to make the jump to federal whistleblower.

## Effectively managing employee complaints

Investigations by the DOJ, the Securities and Exchange Commission and other federal agencies sparked by whistleblower complaints are an ever-present threat to employers that appear to be on the rise. Employers must pay close attention to their protocols for managing internal complaints to minimize the risk that such complaints will escalate into government investigations. Proactive measures for receiving and responding to complaints of workplace misconduct are crucial for minimizing and curtailing potential whistleblower complaints.

Companies can help protect themselves – and their business interests – by following best practices for receiving and responding to complaints of workplace misconduct.

### 1. Adopt whistleblower complaint policies.

Companies should establish complaint management policies that provide secure and efficient channels for employees to submit workplace complaints, including whistleblower-related concerns. These policies should establish confidential and anonymous channels for employees to bring their concerns to their employers’ attention. The instructions given to employees who wish to avail themselves of these channels should be clear and accessible. Processes for managing complaints after initial reporting should be fair and transparent as to the company’s procedure for evaluating claims and providing timely responses. Concerned employees also should receive assurances that they will be protected against retaliation for raising concerns.

Beyond formal complaint management policies, nurturing a company culture that emphasizes “open-door policies” can help prevent escalation of workplace complaints. Providing employees informal, trusted and accessible outlets to raise

workplace concerns will not only help employees feel supported, but also will often facilitate earlier identification of potential employee-related concerns. Regardless of approach, it is critical to have a system in place that facilitates appropriate intake and resolutions to complaints of workplace misconduct.

## **2. Train personnel to respond appropriately.**

Managers and supervisors should be adequately trained to recognize whistleblower complaints and to appropriately escalate and respond to those complaints. Without such training, complaints of workplace misconduct might not be treated or even viewed as “whistleblower complaints.”

To that end, companies should train managers on the relevant company policies and give them the tools to field complaints with professionalism – and without skepticism. Employees will be more likely to participate in the company’s internal investigation if their complaint is received by well-trained individuals who take them seriously and help them effectively navigate the complaint management processes, while providing assurance that such complaints will be promptly addressed and retaliation will not be tolerated. These middle-managers will often be the ones interfacing most with whistleblowers – and their preparedness could mean the difference between an effective internal response and a full-blown federal investigation.

## **3. Engage outside counsel.**

Although the procedures described herein are intended to encourage internal resolutions for complaints of workplace misconduct and harassment, there are times when outside counsel can provide an important “gut check” on whether a complaint merits deeper investigation.

If a company decides to investigate a whistleblower complaint internally, reliance on outside counsel can ensure that the investigation is sound and appropriately thorough. Alternatively, an investigation of a complaint that implicates the company at a higher level – for example, allegations of misconduct by officers or board members – will almost always be better addressed through an independent investigation by external counsel. Of course, not every workplace complaint will require a full investigation, but engaging outside counsel early to evaluate the severity of a claim can help an employer craft the appropriate investigative procedures in order to protect against, or at least minimize, scrutiny from regulators.

## **4. Conduct thoughtful investigations.**

A workplace investigation should be conducted when there exists a credible allegation of workplace misconduct or breach of ethical practices.

Any investigation should be structured to effectively address the issues identified while still being mindful of business imperatives. A thoughtful internal investigation that detects misconduct, ensures compliance with applicable laws and regulations, and identifies areas of improvement in the company’s internal operations will always aid in the protection of the interests of the company and its shareholders.

## **5. Implement remedial efforts as appropriate.**

At the conclusion of an internal investigation, it may be appropriate to implement policy or personnel changes to address the underlying causes of misconduct or prevent future instances of wrongdoing. Additionally, a company that uncovers potential wrongdoing during an internal investigation should consult outside counsel to determine whether and when to self-report to the relevant regulatory body.

Even where no remedial steps are deemed necessary, employers must be thoughtful about their communications with the complainant, including “closing the loop” on the result of the investigation. Employees should be thanked for raising issues of potential workplace misconduct and encouraged to come forward if they become aware of misconduct in the future. And, of course, it should be emphasized that retaliatory actions against the complaining employee will not be tolerated and should be reported to the company immediately.

Following well-conceived policies and procedures for workplace complaints may often be enough for a whistleblower to feel heard and to ensure that any misconduct is addressed and remediated – minimizing the risk that whistleblowers will escalate their allegations to the government.

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