

# Effective Code Standards on Raising Concerns and Retaliation

By Emily Heard and William Miller

More and more companies are adopting formal standards on reporting misconduct and non-retaliation. However, an examination of code documents from 100 multinational companies by the International Business Ethics Institute revealed these standards to be often ineffective, containing language that is counterproductive to an environment of open communication. In fact, the Institute found that only 31% of standards examined were deemed to be effective.<sup>1</sup>

As reporting misconduct and non-retaliation continue to become increasingly important within the ethics and compliance community and in the legal arenas, it is in the best interest of companies to assess their current code standards to identify ways in which their standards could be made more meaningful and effective. This article, an excerpt from the Institute's forthcoming publication, *Creating an Open and Non-Retaliatory Workplace*, outlines best practices for creating effective code standards on raising concerns and on non-retaliation.

## Code Standards on Raising Concerns

The following section highlights what to include in effective standards on raising concerns.

### 1. *Provide an Overview of Employee Responsibility to Raise Concerns and the Rationale for Raising Concerns*

Often employees do not think that raising concerns is their responsibility.<sup>2</sup> Standards should clearly state that it is the responsibility of every employee to report concerns. The standards should also help employees understand why it is vital that they disclose their concerns. The rationale should be appropriate for the entire workforce. Multinational companies could use some of the following rationales to demonstrate the importance of raising concerns:

- Allows the company to resolve problems
- Fulfills a shared responsibility to stakeholders
- Helps to improve operations
- Fosters a more productive work culture
- Bolsters open communications within the company
- Contributes to a safer work environment

Organizations should be aware that solely encouraging employees to come forward to protect an organization's reputation will not be persuasive to most employees outside of the United States. For employees outside of the United States, the notion of "corporate reputation" may have little to no meaning, or may be seen as an overly superficial or "self-serving" rationale.

### 2. *Include Guidelines for Addressing Concerns Regarding Minor Misconduct Directly with Colleagues*

Employees should be made to feel that they are part of their companies' ethics programs, instead of simply being "subjected to them." By offering employees the choice of addressing concerns directly with colleagues, the company demonstrates not only its commitment to its ethics and compliance program, but also the confidence it has in its workforce.

While there seems to be a significant amount of legal discomfort in the United States with employees resolving issues directly with colleagues, such an approach can mitigate against creating a "culture of reporting" and might make "speaking up" more favorable, particularly in areas where employees are wary of reporting on colleagues for cultural and historical reasons.

Standards should encourage employees to approach colleagues directly with concerns provided the misconduct does not constitute illegal activity and does not pose significant potential damage to the organization. Companies should provide examples of the forms of misconduct that are appropriate to discuss directly with colleagues (e.g., sending inappropriate e-mail, misuse of office supplies, etc). For this

option to be effective, the standards should provide tips for approaching colleagues directly, (e.g., express your concerns factually and do not be confrontational).

Additionally, employees know their colleagues and will be able to assess whether or not a colleague will be open to a direct conversation about ethics and compliance issues. If an employee feels that his/her colleague is apt to become overly defensive or react in some other negative way, the employee should be encouraged to refer the matter to one of the company's ethics and compliance resources.

### 3. *Create a Carefully Worded "Good Faith" Policy*

Many standards indicate that employees should only report misconduct in "good faith," a term that is problematic because every employee is apt to understand it differently. Clear understanding is rendered even more challenging under multinational conditions. The expression *in good faith* is, in fact, discouraged in the U.S. literature on reporting sexual harassment because it has been found to have a "cooling effect" on reporting. One article notes, "the Equal Employment Opportunity Commission (EEOC) has taken the position that such provisions can amount to unlawful retaliation because they imply that disciplinary or other adverse action will be taken if the employer deems the complaint in 'bad faith.'"<sup>3</sup>

Yet with regard to other types of reporting, companies do need to protect themselves from employees who intentionally make "bad faith" allegations. The UPS *Code of Business Conduct* offers employees particularly effective language regarding the expression *good faith*.

*"'Good faith' does not mean an individual has to be right; but it does mean believing information provided is truthful."*<sup>4</sup>

By taking the extra step of providing a working definition of "good faith," the UPS standard successfully mitigates against the possibility of any chilling effect.

Some companies may also wish to include language in the standard explaining that employees who knowingly provide false information or accusations are subject to disciplinary actions, i.e., demotion, termination, etc.

### 4. *Cite and Explain All Channels for Raising Concerns*

Corporate codes should describe all channels (e.g., manager, ethics office, helpline, ombuds, etc.) available to employees to raise concerns or ask questions about ethics and compliance issues. The standard should encourage employees to go to their manager first, but also demonstrate that employees are free to select the best channel for them.

It is likely that a company's ethics and compliance resources will vary by geographical location. For example, some multinational companies may not have anonymous helplines in certain parts of Africa or Europe. Without providing specific local resources or contact information that may vary from one location to the next, the standards should detail the general global resources at an employee's disposal (e.g., managers, Ethics Office, Legal, etc.).

Because different geographical regions are apt to have varying resources available and because ethics, compliance, and functional personnel can change periodically, it is best to include a separate regional or local insert in the company standards package that can be easily updated and replaced, as needed. For each resource, the insert should contain the following information:

- Names of responsible individuals
- Phone numbers
- Fax numbers
- E-mail addresses
- Office addresses

Some companies are now making mention of external reporting channels and resources in their code standards. Providing such information will cause even the most ardent skeptics in a company to start

believing that the organization takes misconduct seriously. Such non-profit organizations as Public Concern at Work in the U.K. and the Government Accountability Project in the U.S. will provide employees with confidential advice regarding how to raise a concern. In certain environments, it may also be appropriate to refer employees to their unions or works council. Include this contact information on the regional insert to the global code document.

#### *5. Offer Guidelines for Raising Concerns in a Constructive Manner*

It is rarely easy for employees to come forward with concerns of wrongdoing. They likely do not know what to expect and they may fear their managers' reactions and retaliation. In order to ease the process of speaking up, the standard should provide some guidance on what employees should expect, as well as how best to express their concerns. For example, if reporting to a manager, the standard should instruct employees to schedule a meeting, discuss the concern calmly, and present any evidence they might have.

#### *6. Explain the Difference Between Anonymity and Confidentiality*

Many employees – and many companies – confuse *anonymity* and *confidentiality*. Legislation in some countries, particularly the United States, requires publicly traded companies to offer employees an anonymous resource for reporting certain types of misconduct. However, other areas discourage anonymous reporting. For example, French legal authority, the Commission nationale de l'informatique et des libertés (CNIL) was concerned that anonymous helplines may violate the privacy of French citizens and lead to false accusations. However, in November 2005, the CNIL adopted guidelines that allow companies to use helplines, but that also protect the rights of individuals who are incriminated in a helpline report. As well, the European Union's Article 29 Working Party on Data Protection issued an opinion in February 2006 that encourages companies to promote confidential reporting instead of anonymous reporting.<sup>5</sup>

The standard should inform employees that in raising a concern to a manager, Ethics Officer, or functional department, their report will remain confidential, where possible, meaning that the individual's identity will not be revealed unless an investigation or legal proceedings require his/her identity to be disclosed. The ombuds function<sup>6</sup> is the only function in the United States that can guarantee confidentiality. In the U.S. this function can invoke the "ombuds privilege," which states that an ombudsperson will not have to disclose the identity of an employee who has brought forward allegations of misconduct, even if challenged in a third-party lawsuit.<sup>7</sup> Employees in the U.S. and some other areas may also be able to report issues anonymously to helplines. This should be noted in the standard.

#### *7. Describe the Process Followed Once a Concern is Raised*

The standard should convey to employees that reports of misconduct are treated seriously and the organization has procedures for investigating reports. While companies may not wish to disclose all of the details of the investigation process, they should address it in general terms in the code standard. For example:

- Discuss what takes place after the report is made to various channels
- Indicate that if employees call the helpline and wish to remain anonymous, they will receive a tracking number and a time to phone back to receive an update on their report or query
- Mention that employees may be required to participate in investigations and that investigations are conducted in a professional manner and in accordance with company standards

If, however, the company cannot guarantee that the procedures will be followed in each case, then this language should be omitted from the standard.

#### *8. Include Guidelines for Receiving Reports of Misconduct*

Some companies are starting to include guidelines for managers to use when receiving reports of misconduct. This is an effective way to educate managers, as well as to reiterate messages delivered in training that managers might receive. For example, the standard should remind managers to:

- Talk to employees about their concerns in confidence
- Ask open-end questions
- Listen attentively to their colleagues

- Discuss and explain next steps
- Thank the individual for coming forward

The standard should also point out that employees are apt to be sensitive and feel vulnerable after raising a concern. Managers should be provided with additional tips to help them understand how to continue to treat that employee fairly, e.g., engage in friendly conversation, provide meaningful assignments, etc.

#### 9. *Employ Language Appropriate for a Global Workforce*

Companies should use terminology appropriate for a diverse workforce. For example, individuals raising concerns may be described as *witnesses* to reduce the “informant” connotation that hinders speaking up in many regions. In addition, employees can be encouraged to *seek advice and guidance* about questionable situations, rather than *reporting misconduct*.

### **Code Standards on Retaliation**

The fear of retaliation has a detrimental effect on open communications in the workplace. Companies should consider the following recommendations when drafting non-retaliation policies.

#### 1. *Make the Non-Retaliation Statement Clear*

The standard should indicate that retaliation against employees who raise concerns will not be tolerated. The following is an example of effective language:

*Retaliation against employees who raise concerns or questions about misconduct will not be tolerated. Employees who come forward with concerns play an important role in maintaining a healthy, respectful, and productive workplace, as well as protecting our stakeholders.*

Note that the final sentence of the example provides a practical rationale for calling the company’s attention to retaliation when it is suspected or observed in the workplace.

#### 2. *Offer Examples of Formal and Informal Retaliation*

Examples of both formal and informal retaliation should be included in the standard. Examples of formal retaliation might include termination of employment or a negative performance appraisal without performance justification. Forms of informal retaliation might consist of avoidance by co-workers or failure to include the employee in social functions.

It is important that employees and managers understand that employees who have made reports may be extremely sensitive to any perceived change in treatment in the workplace. In fact, some employees may register a change in treatment when no actual change has occurred.

#### 3. *Explain the Consequences of Retaliation*

The standard should note that those who do retaliate will be subject to disciplinary action, including possible termination. Such a statement will convey the message that the company means business when it comes to dealing with retaliation in the workplace.

#### 4. *Let Employees Know How to Raise Concerns about Retaliation*

The standard should provide a clear process to disclose real or perceived retaliation. Organizations should encourage employees to discuss any suspected retaliation with their managers, Ethics Office, or other appropriate channel. Providing multiple resources to employees for dealing with issues of retaliation is critical because the concern that an employee might raise could involve his/her supervisor.

#### 5. *Place No Conditional Protections on Retaliation*

Fear of retaliation significantly inhibits employees from raising potentially important concerns. Yet, many standards only provide a brief statement about protections, which often does not guarantee protection from retaliation to employees who report misconduct. For example, language in some standards is similar to the following sample: *Employees will be protected from retaliation to the extent possible.*

With the exception of legal staff, no employee will understand what “to the extent possible” actually means. Under what circumstances will the company not be able to protect an employee from retaliation, especially if the company has already indicated that it has a zero tolerance policy on the matter? This type of language does not make employees feel comfortable in reporting concerns. Further, it most likely serves as an obstacle to reporting, meaning the company will miss out on invaluable opportunities to learn about wrongdoing.

### **Conclusion**

While many companies, particularly in the United States, have already adopted code standards on raising concerns and retaliation, it is essential that these standards are meaningful. Following the tips in this article can assist organizations in ensuring their standards are effective. Developing and implementing effective code standards on raising concerns and retaliation can help demonstrate that an organization values open communication, and is an important step in laying the foundation for an open and non-retaliatory workplace.

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<sup>1</sup> For this study, the Institute reviewed and compared 100 code documents from multinational companies of diverse sizes, industries, and geographical “home regions.”

<sup>2</sup> Judith Samuelson and Mary Gentile, “Get Aggressive About Passivity,” *Harvard Business Review* (November 2005).

<sup>3</sup> Jathan Janove, “The Faragher/Ellerth Decision Tree,” *HR Magazine* (September 2003) [www.shrm.org/articles.html](http://www.shrm.org/articles.html).

<sup>4</sup> UPS, *Code of Business Conduct*.

<sup>5</sup> Article 29 Data Protection Working Party (February 1, 2006); “Privacy Rights of Whistleblowers and their Accused,” *The Guardian* (February 16, 2006).

<sup>6</sup> The ombuds office is another common resource to which employees can turn to seek guidance or raise concerns. A recent article by Andrew Singer in *Ethikos* (“Ombuds Office Helps Coca-Cola Bottler Avoid Explosions,” November/December 2005) provided the following definition: “An ombuds office is an impartial, confidential, and informal channel for resolving conflicts within an organization.” Employees can bring a wide array of issues to an ombudsperson, including ethics issues, discrimination, harassment, and compensation issues, among others.

<sup>7</sup> George Wratney, “Consider Adding an Ombudsman to Your Compliance Arsenal,” *Compliance & Ethics* Volume 2, Number 3 (August 2005).