

A focus on multinationals: adding enterprise value through global whistleblower protocols and promoting employer values

By Preston Pugh, Esq., Trina Fairley Barlow, Esq., Rachel Lesser, Esq., Crowell & Moring, LLP, and Daniel P. Christmas, Esq., Corning Inc.

October 29, 2021

In recent years, whistleblowers have increasingly alleged misconduct by companies across every industry. In 2020, more than 40 percent of employees in America reported witnessing misconduct in the workplace.¹ Thirty percent of American employees reported having felt pressure to “compromise standards” in 2020, almost twice what that figure was in 2017.²

Reports of alleged retaliation skyrocketed too.³ The U.S. government thus continues to protect whistleblowers and incentivize reporting, in part because whistleblower reports are often essential to government investigations into complex fraud and other cases of noncompliance.

For the first time in the history of the Navex annual global “Incident Management Benchmark” survey, the median number of internal whistleblower reports per 100 employees actually fell between 2019 and 2020.

Not surprisingly, the United States has awarded some of its largest awards ever in the SEC whistleblower program in just the last 18 months.⁴

This increase in whistleblower activity, however, is not just an American phenomenon. Whistleblower activity worldwide is becoming more common — everywhere from the Asia-PAC to EMEA to South America — and the conditions are ripe to see that trend grow.

The 2021 Global Business Ethics Survey by the Ethics and Compliance Institute reflects that employees in several large countries (China, India, Mexico and Spain) reported experiencing more pressure in 2020 to compromise standards than ever before.

They also reported facing retaliation at significantly higher rates than they experienced in years past. Only a small number indicated that they believed their workplaces had a strong ethical culture. And the number of countries with whistleblower programs — both those that offer bounties, and those that simply provide strong antiretaliation protections — is on the rise.⁵

Given this increased whistleblower activity and related environmental concerns, one might assume that the number of internal workplace whistleblower complaints has increased too. For many employers, however, that has not been the case.

For the first time in the history of the Navex annual global “Incident Management Benchmark” survey, the median number of internal whistleblower reports per 100 employees actually fell between 2019 and 2020.⁶ This trend leaves employers without an opportunity to correct misconduct, noncompliance or other workplace problems as they are happening, instead only learning about them from an external source weeks, months or even years after they occur.⁷

This phenomenon, which has many potential root causes, creates significant challenges for employers as they seek to enhance their culture of compliance and minimize legal risk. This presents an important question: how can employers meet and address this challenge?

Many employers have met this challenge head-on. We recently spoke with one in-house leader, Dan Christmas, Director, Corporate Compliance at Corning Incorporated, about the steps Corning has taken to succeed. We cover a few key aspects of Corning’s program below.

1. Create employee trust by creating a speak-up culture

Creating a speak up culture has multiple components to it, and it takes work. Culture is not created or changed overnight. An organization must embed a commitment to compliance in its purpose and values, and leadership must speak and act in support of that commitment to compliance.

As the DOJ said in its June 2020 updated guidance on the Evaluation of Corporate Compliance Programs, “[t]he employer’s top leaders — the board of directors and executives — set the tone for the rest of the employer.”⁸ To do this, leaders must define the ethical standards of the employer, clearly communicate them to the organization, and lead by example.⁹

Beyond top leadership, however, what is also particularly important is a clear and visible commitment by middle management to the culture of compliance, since often it is middle management that interacts directly with employees who witness alleged misconduct.

DOJ’s guidance states that prosecutors should “examine how middle management, in turn, have reinforced” the standards set by leadership and “encouraged employees to abide by them.”¹⁰

A robust speak up culture can give a company a better reputation, higher employee morale, a lower likelihood of damaging external reporting, and a competitive advantage.

Critical to the success of a speak-up culture is creating an environment where employees do not fear retaliation or other negative consequences for speaking up. Effective compliance programs must include “proactive measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers.”¹¹

A robust speak up culture can give a company a better reputation, higher employee morale, a lower likelihood of damaging external reporting, and a competitive advantage.

For example, a speak up culture can lead to improved board and shareholder relations, and the opposite can be true, as evidenced by a number of recent examples. The goal is to create a culture that ensures misconduct is not only reported, but that it is also fully investigated, stopped, and remediated.

Aspects of a speak up culture are also frequently covered by the increasing environmental, social, and governance disclosures (ESG) made by companies.

For example, the SEC is now considering mandatory ESG disclosures, where whistleblowers would be able to send actionable tips to the SEC.¹² Other non-governmental organizations actively and publicly report on the ESG practices of companies, such as the Corporate Human Rights Benchmark¹³ and the KnowTheChain Benchmark.¹⁴

Dan Christmas explained how Corning is handling this latter set of issues:

“At Corning, we have worked to improve and enhance our sustainability efforts, releasing our first-ever corporate

sustainability report in 2021.¹⁵ As part of this report, as well as other requests for ESG disclosures from NGO’s and customers, we have had to report on our internal whistleblower mechanisms, including how we ensure mechanisms for reporting concerns through our supply chain.”¹⁶

A speak-up culture is also important for the retention of employees and customers. Being recognized for a culture of compliance can be a key market differentiator and provide companies with a competitive advantage.

For example, for more than 15 years, Ethisphere has annually selected a list of the “World’s Most Ethical Companies.”¹⁷ According to Ethisphere, “[t]he World’s Most Ethical Companies historically outperform their peers and competitors financially, demonstrating a tangible ROI for doing the right thing. The connection between good ethical practices and financial performance, called the Ethics Premium, has been tracked for years.”¹⁸

Companies selected to this list actively share this information with the public and market themselves with “World’s Most Ethical Companies” branding, demonstrating their belief that such a designation is a competitive advantage.¹⁹

On the opposite side of this scale, the failure to establish a speak up culture may lead to the loss of employees, claims made by those leaving, and negative commercial impacts in the marketplace. Companies dealing with these sorts of negative issues have an opportunity for internal process improvement, providing a significant incentive to revisit outdated or incomplete internal policies and procedures and to not only bring them in line with the law, but with the company’s goals and culture.

As Christmas states,

“At Corning, we have worked to create and maintain a speak up culture through various means. We have found that ensuring leadership and middle management speak openly and often about compliance is important for setting the right tone. Employees need to be reminded that *what* they do is just as important as *how* they do it. A formal whistleblower policy²⁰ is necessary, but so are frequent employee communications about the importance of reporting concerns of misconduct. We conduct anonymous surveys of our employees to ask whether they can report without fear of retaliation and target our training and communications to those areas of the company where scores deviate from the norm. We also have worked to make our anonymous reporting mechanisms as ‘user-friendly’ as possible, allowing employees to report via phone, the web, or even using a QR-code wherever they are in the world. All of this effort is directed toward creating a culture where employees feel not only comfortable but also committed toward reporting concerns internally, giving us the opportunity to investigate and address misconduct.”

2. Enhance whistleblower policies consistent with your employer’s risk profile

It is equally important to adopt a robust and thorough whistleblower policy that clearly outlines reporting and

investigating procedures. While policies must comply with requirements under the law, there is not a single policy that will work for every employer in every industry.

Instead, companies should create policies that meet their specific needs, considering the unique features of their markets, industries, culture, and plans for expansion; their own history related to prior whistleblower complaints and claims; and, other messaging from employees through risk assessments, culture surveys and exit interviews.

A transparent process with clear mechanisms for reporting incentivizes potential whistleblowers to share their concerns internally, before going to an external body.

Nonetheless, there are certain core components that should be a part of every whistleblowing policy, including:

- a statement fully describing the employer’s support for reporting and commitment to anti-retaliation;
- a description of the employer’s internal reporting channels;
- a high-level description of its process for investigating whistleblower claims;
- the requirement that complaints be made in good faith;
- a process for anonymous reporting; and
- a description of the employer’s whistleblower training protocol.

We explain more below.

A. Statement of support for reporting and commitment to anti-retaliation

An employer’s policy or code of conduct should expressly support reporting misconduct and confirm a commitment to anti-retaliation for any who do speak up. Not only do these statements hammer home the importance of a “speak up” culture, but they are critical for setting the tone for how investigations will be handled. Such statements help an employer to “incorporate the culture of compliance into its day-to-day operations,” a factor considered by U.S. Department of Justice (“DOJ”) prosecutors in evaluating corporate compliance programs.²¹

Christmas explains,

“The more an employer can reinforce these commitments to reporting and prohibiting retaliation, the better it is for establishing a culture of compliance. At Corning, we expressly state these commitments in our Whistleblower Policy,²² our Code of Conduct,²³ our Sustainability Report,²⁴ and in our internal training and communications about the Code of Conduct.”

Whistleblowers often cite fears of retaliation as the largest impediment to their reporting, or even why they may feel inclined to

report externally. In addition, many jurisdictions worldwide enforce civil and criminal penalties on companies or managers who retaliate against a whistleblower. Any whistleblowing policy should make it clear that retaliation is against the law and will not be tolerated.

Employers and employees alike should know that the penalties for retaliation can be very strict and can potentially be more than just steep fines. Under the EU Directive, for example, companies managers, or coworkers that attempt to interfere with the reporting process, retaliate against whistleblowers, or reveal the whistleblower’s identity can face legal penalties.²⁵

Similarly, individuals or companies who violate Australia’s Treasury Laws Amendment (Enhancing Whistleblower Protections) Act of 2019 and the Corporations Act by revealing the identity of a whistleblower or failing to have a compliant whistleblowing policy can be subject to criminal and civil penalties.²⁶

In the United States, under the Sarbanes-Oxley Act, those who retaliate against a whistleblower could face a serious fine or up to ten years in prison.²⁷

B. Description of internal reporting channels and investigation process

The focus in describing internal reporting and investigations processes should be transparency and clarity. It should be clear to those who wish to report misconduct exactly how they can do that, what types of misconduct they should report, and how their concerns will be investigated.

A transparent process with clear mechanisms for reporting incentivizes potential whistleblowers to share their concerns internally, before going to an external body. Without clear expectations, employees may lose faith that the employer can be trusted to adequately investigate their concerns.

Clear expectations will also increase accountability for the investigators: management or human resources can easily determine if the investigation is progressing in a timely manner and following the proper procedures.

According to Christmas,

“Corning’s Whistleblower Policy clearly lays out the multiple ways that individuals can report concerns; how those reports will be reviewed and investigated; and how the company will remediate substantiated reports. We strive to complete all investigations within a set, reasonable time period, and to inform reporters about the outcome of each case. Making these commitments, and just as importantly, sticking to them, gives employees confidence in Corning’s internal reporting process.”

C. Good faith complaints

Not only should a policy delineate what types of misconduct to report, but it should stress that all complaints be made in good faith. The employer will benefit from a decreased likelihood of the misuse of its investigations process, while emphasizing the seriousness with which it treats all complaints, its investigations, and its whistleblowing policy.

D. Anonymous reporting

Without anonymous reporting, employees who fear retaliation by management or identification by their peers may not report internally. They may, however, feel comfortable reporting externally, given the protections that come with reporting to the government. An anonymous reporting mechanism contributes to a speak-up culture. It shows that, no matter the source of the complaint, the employer truly wants to learn about, investigate, and resolve concerns.

Anonymous concerns often require more work to get the information needed to conduct a complete investigation. Ongoing communication with the complainant is vital in this regard, and advances in technology are helpful, allowing anonymity to be maintained through the use of designated e-mail accounts and reporting platforms that can be accessed through scannable QR codes.

“At Corning,” Christmas says, “we welcome and support anonymous reporting through our third-party Code of Conduct Line, as many employees only feel comfortable making a report if done so anonymously. Our portal allows us to post messages to and receive messages from the anonymous reporter, protecting their anonymity while allowing us to gather more information in support of our investigation.”

E. Description of the employer’s training protocol

Whenever whistleblowing policies are updated, employees should be notified and trained on the changes. Such protocol should be clearly outlined in the policy.

The training programs are just as relevant as the policies to ensure that “the compliance program is well-integrated into the employer’s operations and workforce” — another focus of the DOJ in evaluating compliance programs.²⁸ A policy is not “truly effective” unless accompanied by proper training.²⁹

3. Prepare for the significant impact of the EU Whistleblower Directive

Whistleblower activity in the EU is likely to increase significantly in the short term, once the sweeping European Union Whistleblower Directive (“EU Directive”) takes root. The Directive requires EU member states to meet or exceed by December 17, 2021, certain minimum standards for investigating whistleblower complaints and protecting whistleblowers from retaliation.

Under those standards, employers will have a choice of how they want to implement secure channels and internal reporting procedures, but they must be included in the employer’s whistleblower policy.³⁰

Internal reporting channels must include a designated, impartial person or department to conduct investigations and take measures to ensure only those designated investigators are privy to the identity of the whistleblower and details of the investigation.³¹ The Directive lays out detailed requirements for member states’ external reporting channels, too.³²

The purpose of the Directive is to provide greater protection across EU countries for those seeking to expose breaches of EU law. While

it has expressly declined to require Member States to enact any laws that provide a financial incentive for reporting, the protection system in other ways exceeds the standards for protection of whistleblowers in the U.S. Given the effort behind enacting the Directive and transposing it into national law, renewed attention on compliance and enforcement is likely.

To comply with the Directive, employers first need to identify where in the EU they do business and understand the specific requirements of those places. The Directive provides Member States with the flexibility to exceed the Directive’s minimum standards (for example, how to define “workers”),³³ and it also leaves other critical questions up to them (for example, Member States may extend the standards to entities outside the scope of the EU Directive).³⁴

After identifying the relevant legal requirements, companies should assess their existing whistleblower policies and procedures, keeping in mind not only the need to comply with the Directive and laws of the Member States, but also to navigate potential conflicts in other laws, such as the General Data Protection Regulation (“GDPR”) and its data privacy requirements. Companies should then act swiftly to update their policies and procedures to comply with the Directive, national law, and the goals and culture of business.

Whistleblower activity in the EU is likely to increase significantly in the short term, once the sweeping European Union Whistleblower Directive takes root.

“At Corning we have worked with our EMEA legal team to understand the requirements of the directive, and to what extent our existing program meets those requirements. Where necessary, we are updating our policies and procedures to address any gaps identified and to ensure compliance with not only the EU Directive but also other overlapping legal obligations, such as the GDPR,” Christmas explains.

4. Improve whistleblower complaint and investigations training and education

An effective whistleblowing policy is only as good as the training and education provided to managers, supervisors, employees and other stakeholders involved in, or potentially impacted by, the investigation process.

Training should be more than a static tool used to reiterate policies and procedures. Regular, dynamic training programs — particularly when policies change or when other workplace trends develop — provide yet another opportunity to promote a “speak up” culture and educate employees about the employer’s values.

At a minimum, training should include:

- (1) education for employees on the reporting procedure and associated policies;

- (2) an explanation of what occurs during the investigation process after a report is made; and
- (3) training for supervisors, Management, Human Resources, and others who will be directly or indirectly involved in the investigation process.

Beyond that, training should include concrete, real-word hypotheticals and case studies that help facilitate discussion among participants and increase awareness around effective strategies for bringing, investigating and resolving workplace concerns.

Further, training should include a mechanism for employees and stakeholders to share their experiences, real-life concerns, and best practices related to the employer’s complaint and investigation process. The goals of training should always be transparency and thoroughness and should be viewed as another opportunity for the employer to learn about any gaps and opportunities for enhancing the process.

Mitigating legal risk is imperative, but employers have so much more to gain from creating and promoting a better workplace culture.

While education should begin with training, it should not end there. Given the evolving and dynamic environment related to whistleblowers, employers should be constantly thinking about additional ways to not only regularly communicate that they take complaints seriously, but also to emphasize that they make changes and implement corrective actions in response to complaints whenever such action is warranted.

Finding the right balance between protecting confidential personnel actions and demonstrating that the employer promptly and decisively addresses misconduct in the workplace can be one of the most important educational tools that an employer has at its disposal. Such actions can help decrease external whistleblower complaints and demonstrate that the employer is committed to a culture of compliance.

Dan Christmas reflects,

“We definitely have found this to be true at Corning — letting employees know that the company does investigate and take action against wrongdoers is critically important for ensuring employees trust the process and will report concerns internally. From time-to-time, we publish internal communications describing key cases investigated and actions taken, being careful to ensure we protect the privacy of those involved. We also include statistics about our cases and outcomes in our internal reporting and training materials, reinforcing that we appropriately investigate every report we receive. We have also recently begun to publish some basic case information externally,³⁵ in conjunction with our sustainability

reporting, providing new transparency into our investigation management.”

Conclusion

The reasons for employers to create, enhance, and administer a comprehensive whistleblowing policy are many, not the least of which are changes in the current legal framework and clear indicators that global whistleblower bounty and protection laws will only continue to proliferate. Mitigating legal risk is imperative, but employers have so much more to gain from creating and promoting a better workplace culture. It could be the competitive advantage that makes all the difference.

Notes

¹ <https://bit.ly/3pLairk>

² <https://bit.ly/3nwMZyR>

³ *Id.*

⁴ <https://bit.ly/3nwMZyR>

⁵ <https://bit.ly/3jHsj65>

⁶ <https://bit.ly/3vQP0cG>

⁷ <https://bit.ly/3pLairk>

⁸ <https://bit.ly/317xq9f>

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See <https://bit.ly/3vOSQmS>

¹³ <https://bit.ly/3beOBHx>

¹⁴ <https://bit.ly/3BplmLD>

¹⁵ <https://bit.ly/3EdBvXI>

¹⁶ <https://bit.ly/3jKzN8e>

¹⁷ <https://bit.ly/3jJdMXp>

¹⁸ *Id.*

¹⁹ See, e.g., <https://bit.ly/3CgB3ax>

²⁰ <https://bit.ly/3mox0mV>

²¹ <https://bit.ly/317xq9f>

²² <https://bit.ly/3EkqN1A>

²³ <https://bit.ly/3jHUMBv>

²⁴ <https://bit.ly/3EdBvXI>

²⁵ <https://bit.ly/3nBVbOC>

²⁶ <https://bit.ly/3vOrPjs>

²⁷ <https://bit.ly/3EdBenE>

²⁸ <https://bit.ly/317xq9f>

²⁹ *Id.*

³⁰ <https://bit.ly/3nBVbOC>

³¹ *Id.*

³² <https://bit.ly/3nBVbOC>

³³ *Id.*

³⁴ <https://bit.ly/3nBVbOC>

³⁵ <https://bit.ly/3BFV0gd>

About the authors



(L-R) **Preston Pugh** is a partner at **Crowell & Moring LLP** based in Washington, D.C., and Chicago. For more than 20 years, his practice has focused on internal investigations and whistleblower litigation on behalf of corporations, large organizations and boards of directors. He is a former assistant U.S. attorney and senior counsel for investigations at GE Healthcare and has been appointed as a compliance monitor

multiple times. He can be reached at ppugh@crowell.com. **Trina Fairley Barlow** is co-chair of the firm's labor and employment group and a member of its government contracts group. She has defended and advised clients in False Claims Act whistleblower retaliation cases and led large internal investigations involving labor and employment, government contracts, and ethics and compliance issues. She can be reached at tbarlow@crowell.com. **Rachel Lesser** is an associate based in the firm's Washington, D.C., office. She practices in the labor and employment group and antitrust and competition group and assisted in investigations as an intern with the House Select Subcommittee on the Coronavirus Crisis. She can be reached at rlesser@crowell.com. **Daniel P. Christmas** is senior counsel and director of global corporate compliance at **Corning Inc.** He advises internal clients on matters including government investigations, government contracts, and export controls and sanctions. He is a certified compliance and ethics professional (CCEP).

This article was first published on Westlaw Today on October 29, 2021.