

Ryan Braun and Building Employee Trust in Your Compliance Program

Most people who have a modicum of interest in baseball now know that Ryan Braun was successful in the appeal of his 50 game suspension by Major League Baseball (MLB) for testing positive for performance enhancing drugs; i.e.: elevated levels of testosterone. The suspension had been levied based upon tests taken late last season, at the conclusion of which Braun was awarded the National League's Most Valuable Player (MVP) award for the most sterling season, with a Batting Average of .332 with 33 home runs and 111 RBIs while leading the Brewers to the National League (NL) Central title. Although the entire process is required to be confidential under the MLB collective bargaining agreement with the players' union, both the test results and notice of Braun's appeal were leaked to the press by person or persons unknown.

Braun won his award because the sample of his urine that was tested was not handled in compliance with the MLB/Players' Union agreed upon testing protocol. The worker who took the sample did not deliver it to FedEx on the same day the sample was taken from Braun because he said it was Friday night, after 8 PM and all the FedEx offices were closed. (A quick note here that anyone who has ever been an associate at a law firm *knows* just how bogus that excuse is as there is **ALWAYS** a FedEx office open. My suggestion is next time to try the airport.) Instead the employee of the drug testing company took the sample home and kept it in his refrigerator over the weekend. This failure to deliver the sample, as required by the agreed upon testing protocol, was enough to allow a tripartite panel of arbitrators to overturn the suspension by a 2-1 vote.

As equally important as it is to have a written process in place, it is as important to follow this process. In the realm of individual rights this is called procedural fairness and it is one of the things that will bring credibility to your Compliance Program. Following an agreed upon process is called the Fair Process Doctrine and this Doctrine generally recognizes that there are fair procedures, not arbitrary ones, in a process involving rights. Considerable research has shown that people are more willing to accept negative, unfavorable, and non-preferred outcomes when they are arrived at by processes and procedures that are perceived as fair. Adhering to the Fair Process Doctrine in two areas of your Compliance Program is critical for you, as a compliance specialist, or for your Compliance Department to have credibility with the rest of the workforce.

This is particularly true in the realm of discipline in your compliance program. If you define a process that is to be followed by all employees when an event occurs, then the company must also follow its procedures in the investigation and administration of discipline. Discipline must not only be administered fairly but it must be administered uniformly across the company for the violation of any compliance policy. Simply put if you are going to fire employees in South America for lying on their expense reports, you have to fire them in North America for the same offense. It cannot matter that the North American employee is a friend of yours or worse yet a 'high producer'. Failure to administer discipline uniformly will destroy any vestige of credibility that you may have developed.

In addition to the area of discipline, which may be administered after the completion of any compliance investigation, you must also place compliance firmly as a part of ongoing employee evaluations and promotions. If your company is seen to advance and only reward employees who achieve their numbers by whatever means necessary, other employees will certainly take note and it will be understood what management evaluates, and rewards, employees upon this. I have often heard the (anecdotal) tale about some Far East Region Manager which goes along the following lines “If I violate the Code of Conduct I may or may not get caught. If I get caught I may or may not be disciplined. If I miss my numbers for two quarters, I will be fired”. If this is what other employees believe about how they are evaluated and the basis for promotion, you have lost the compliance battle.

So, just as Lin-sanity can inform your compliance program, the Ryan Braun suspension and reversal can also inform your compliance program. To build a solid compliance program, trust by your employees that they will be treated fairly is required. Companies can build trust by living their stated values as set out in their company Code of Conduct and compliance program. As reported in the New York Times (NYT), MLB has come “out firing against Braun, with Rob Manfred, the executive vice president for labor relations, saying in a statement that the league “vehemently disagrees” with” the arbitration ruling. If MLB wants to have any credibility it must follow its own agreed upon testing procedures. So quit whining, if you set up a procedure, you had best follow it. The Procedural Fairness Doctrine requires nothing less.

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