



Conducting An Internal Investigation: Managing Messages, Risks and Outcomes

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Presented by:

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Meet Today's Speakers



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Welcome

You may download the slides and hypothetical scenario for today's program by clicking the PDF links in the upper left corner of your screen.

Also on the left is a **Q&A box** where you may type your questions. We'll look at those questions at the end of the program and answer as many as we can.

At the end of the program, you'll receive an **email with a link to a survey**. Please take a moment to fill that out and give us your feedback.

Overview of Presentation

- Risks associated with an internal investigation
- Messaging during an internal investigation
- Outcomes of an internal investigation

Hypothetical

ZZ Hearing Aid Corporation, a publicly-traded company, is the largest seller of hearing aids in the United States. ZZ has a large sales team that markets its products to ear, nose, and throat physicians (ENTs). One member of the sales team is Sid Prokwo. Sid's sales territory covers California. Many of the physicians who are contacted by Sid care for patients who participate in California's Medicaid program. California Medicaid pays ZZ for hearing aids supplied to Medicaid recipients when the hearing aids are prescribed by an ENT. Medicaid recipients may need hearing aids in one or both ears depending on the extent of hearing loss. California Medicaid pays more for binaural (two) hearing aids than for a monaural (one) hearing aid. Of course, ZZ's sales increase when a physician orders binaural hearing aids for a patient.

Hypothetical (cont.)

ZZ has a written compliance program that instructs its sales team not to encourage physicians to prescribe binaural rather than monaural hearing aids when binaural hearing aids are not medically necessary. Sid is well aware of ZZ's compliance plan, but he is also painfully aware that he hasn't received a bonus in the past 3 years. Sid's supervisor has told Sid he's likely to get a big bonus this year if his sales volume increases by 20 percent or more. Thus, Sid has been offering physicians free golf trips if they prescribe at least 20 ZZ binaural hearing aids per month.

Hypothetical (cont.)

Bill Wright is another ZZ salesman. Bill's sales volume has been lower than Sid's volume. At ZZ's weekly sales meeting, Bill has heard endless praise for Sid's performance and repeated criticism from the sales manager that Bill is not keeping pace with Sid. Bill can't bear the thought of seeing the smirk on Sid's face when Sid is declared the sales leader at next week's meeting. This has led Bill to investigate how Sid has managed to be the top ZZ salesman for the last several months. Bill has discovered Sid's sales "technique" and now reports his discovery to you, ZZ's compliance officer. What do you do?

Six Triggers for Conducting an Investigation

1. Whistleblowers
2. Alleged violations of law or improper conduct
3. Potential overpayment by government
4. Government investigation
5. Media inquiries
6. Competitor complaint

Three Objectives of the Investigation

1. To fully understand the facts so that company can make informed decisions about course of action
2. To evaluate company's legal and financial exposure for prior acts and omissions
3. To fix any potential problems with company's policies and procedures so as to minimize future exposure

Risks of Inaction

- Increased financial loss (damages)
- Increased reputational harm
- Disruption of business
- Need to make a decision to act:
 - Before a competitor learns of problems
 - Before shareholders/customers learn of problems
 - Before the government begins its investigation:
 - Possible mitigation of loss
 - Cooperation credit

Integrated Team Approach

- Considerations: exposure, objectivity, identity of wrongdoer, availability of resources, cost, conflicts of interest
- In-house counsel: contact with executives; business and legal judgment
- Outside counsel: experience with DOJ/MFCU; objectivity; “air bag”
- HR: employment law issues; information on wrongdoer(s); discipline
- Finance: accounting expertise; data collection
- IT Department: preservation of evidence; data gathering

Integrated Team Approach

- Media relations: protect brand(messaging to public and employees)
- Compliance: origin of complaint; impact on firm's policies, data gathering
- Internal Audit: find the paper trail; fraud indicators

Risks to Manage During an Investigation

Team: Attorneys (Inhouse/Outside);
Compliance; HR; Medical Relations

- Simultaneous government investigation
 - Federal and State
- Possible Whistleblower lawsuit - Bill
- Shareholder lawsuits
- Disclosure responsibilities
- Civil Lawsuit – Wrongful termination - Sid

Risks Associated with Internal Investigation

- No attorney-client privilege/inadvertent waiver of attorney-client privilege
- What employees who learn of investigation will do with information
- Leaks to press/adverse publicity
- Destruction of evidence
- Inadvertent disclosure of too much information to vendors
- “Stalking horse”/4th Amendment Issue
- Disruption of business, impact on employee morale

Eight Practice Tips

1. Define scope of investigation: focus on complaint and potential wrongdoers
2. Draft investigative plan
3. Preserve and collect documents/electronic data
4. Analyze documents/electronic data
5. Consider messaging/ communication strategy
6. Interview witnesses
7. Analyze facts/results of investigation
8. Consider disclosure, corrective actions, compliance

Practice Tip #1: Define Scope of Investigation

Team: Attorneys, Compliance

- Evaluate potential administrative, civil, criminal liability:
 - Individual liability
 - Corporate exposure
- Consider to whom are you accountable during life of internal investigation:
 - Board of Directors
 - Government

Practice Tip #1: Define Scope of Investigation

- Understand the complaint
 - What is the alleged misconduct?
 - How long did misconduct occur?
 - Who has relevant information about the alleged misconduct?
 - How widely-known is the alleged misconduct?
 - Internally and externally?

Practice Tip #1: Define Scope of Investigation

- Who is the source of the complaint
 - Employee
 - Competitor
 - Vendor
 - Customer
- Does the government know?
 - Impact on scope of investigation

Practice Tip #1: Define Scope of Investigation

- Who are the wrongdoers
 - Lower-level employee(s)
 - Vendor/subcontractor(s)
 - Supervisor(s)
 - Managerial employee(s)
 - Group of wrongdoers

Practice Tip #2: Draft Investigative Work Plan

Team: Attorneys, Compliance, HR, Finance, IT, Internal Audit

KEY QUESTIONS:

- Participants in wrongdoing
- Time frame for completing investigation
- Costs: resources you need to do investigation
- How will investigation impact ordinary business of the organization?
- Documents to Review: IT and Finance
- Who to Interview: must, should, want

Practice Tip #2: Draft Investigative Work Plan

- Experts/outside consultants
 - Cost, scope, need, competence, credibility
- How to preserve legal privileges:
 - Challenges to a/c privilege and work product
 - Outside counsel's role
- How to close the investigation

Practice Tip #3: Preservation & Collection of Data/Documents

1. Spoliation
2. Obstruction of justice
3. Loss of company's credibility
4. Sentencing in criminal cases

Practice Tip #3: Preservation & Collection of Data/Documents

Team: Compliance, IT, Finance, Internal Audit, HR, Attorneys (in-house/outside)

1. Identify relevant documents –
 - paper/electronic (email, voicemail, text, messages, smartphones)
 - onsite/offsite
2. Identify relevant custodians
3. Document hold notice
4. Verify compliance with document hold notice

Practice Tip #3: Preservation & Collection of Data/Documents

Special considerations when under investigation by government

- What's requested, what's relevant?
- What's privileged?
- Imposed deadlines

Practice Tip #4: Analyze Documents/Electronic Data

Team: Attorneys, Compliance, IT, Finance, Internal Audit, HR

1. What do the documents tell you?
2. Are there documents missing?
3. Are there documents that the company does not routinely keep?
4. Do you need to ask custodians for additional documents?
5. Which documents do you need to review before interviews?

Back to the Hypo...

Bill spoke to ZZ's compliance officer. The compliance officer promised to investigate Bill's complaint, but Bill believes the investigation is moving too slowly. When he calls the compliance officer for an update, Bill is unable to obtain any information regarding the status of the investigation. The next day, Bill has lunch with his friend, who's a news reporter at local TV station, KOIG. Two weeks later, after traffic and weather, KOIG broadcasts a story about ZZ's "questionable" sales practices.

Practice Tip #5: Messaging & Conducting Business During an Internal Investigation

Who you are concerned about:

- Customers
- Auditors:
 - Limit on disclosure of findings?
- Shareholders
- Third parties: potential buyers, insurance companies, vendors, lenders
- SEC - 10K, 10Q
- Government – DOJ/MFCU, Attorney General

Practice Tip #5: Messaging & Conducting Business During an Internal Investigation

Team: Attorneys, Compliance, HR, Media Relations, Finance, Internal Audit

- How to manage the message:
 - Need crisis plan before the crisis
 - Saying too little, saying too much . . .
 - What you say can be used against you – and everywhere
 - Does the government know?
 - Employees
 - Social media issues

Practice Tip #6: Interviewing Witnesses – Consideration Before You Start

Team: Attorneys, Compliance, HR

1. What is the purpose of the interview?
2. Who should attend the interview?
3. Need for company's legal counsel at interview?
4. Who does the company's lawyer represent?
5. Lawyer for the witness?
6. What will you do with witness statements?

Practice Tip #6: Interviewing Witnesses – Strategic Questions

Team: Attorneys, Compliance, HR

- How much do you tell the witness?
- Immediate response to information gleaned from interview?
- Need to modify scope of interview?
- Need to adjust the investigative plan?
- Cross-contamination of witnesses issue
- Openly/covertly hostile witnesses issue
- Non-retaliation considerations

Practice Tip #7: Analyzing Facts and Results of Investigation

Team: Attorneys, Compliance

- Do you have the information and data you need to draw conclusions?
- Use of experts to analyze data
- Reconciling inconsistent information gathered from different sources

Practice Tip #8: Managing Outcomes

Team: Attorneys, Compliance, HR, Internal Audit, Finance

DISCLOSURES:

- Know your audience: government, shareholders, Board of Directors
- Reporting the outcome – oral or written?
- How much detail?
- Analyze privileges and confidentiality concerns

Practice Tip #8: Managing Outcomes

Team: Attorneys, Compliance, HR

CORRECTIVE ACTIONS:

- Employee discipline
- Training
- Return of overpayment?
- Modifications to existing compliance plan

Questions?



Type your questions into
the Q&A box on the left.

We'll answer as many as we can.

More Questions? Contact Us.



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