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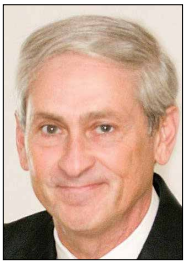
by Jeffrey M. Kaplan

Discipline for violations

It is generally the last thing compliance & ethics (C&E) officers want to deal with. But it is often the first thing prosecutors ask about in their assessments of C&E programs. So, what do companies need to bear in mind when meting out discipline in individual cases, or designing or improving disciplinary systems?



Kaplan

First, discipline must be sufficiently rigorous. In the abstract this sounds easy, but summoning the will to be appropriately tough can be hard when dealing with real lives and real careers.

Second, discipline must be sufficiently fair. In particular, companies need to avoid giving the impression that C&E is only for "the little people," to paraphrase what the late Leona Helmsley is reputed to have said about taxes. Going light on senior managers or other valued personnel can diminish the sense of organizational justice at a company that is essential to a C&E program's success generally and to its speak-up culture in particular.

The more process that a company has put in place regarding these decisions, the greater the chance that any given decision that will be made is the correct one—i.e., sufficiently rigorous and fair. Among other things, such a process should include input and review by appropriate personnel (given the nature of the violation and position of the culpable party) and consideration of relevant precedent at the company.

Third, discipline should be imposed not only for those who were personally involved in the violation in question but also others (particularly managers) who culpably failed to prevent or detect the wrongdoing. I should emphasize that discipline in these latter situations is not to be imposed on a "strict liability" basis; there does need to be some element of real fault. But where a manager's being "asleep at the switch" contributed to the violation, the manager should pay an appropriate price.

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Fourth, discipline should be publicized. This can be particularly tricky given the defamation risks that might exist in these and related situations (as explored in a recent column[1]). But appropriate publicity need not involve identifying individual offenders. Another effective approach is to publicize key statistics around discipline, such as the number of investigations of violations of E&C policies that took place in a given time period, the percentage of those where the allegation was sustained, the percentage of sustained allegations involving managers, and a statistical overview of discipline for managers and others. ✳

1. Jeffrey Kaplan: "Defamation risks in doing compliance work" *Compliance & Ethics Professional*, 2017;14(10):45.

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