

Criminal Law Places Corporations at Odds with Employees (Second of a Series)

This first installment of this installment of this series discusses the hazards facing a corporation, which discovers that employees acting within the scope of their employment have committed offenses. It discussed how, in defending the corporation during a criminal investigation or trial, corporate officials must be careful to avoid any felony. Additionally, even while preparing its defense to an investigation or criminal charges, the corporation must prepare for the possibility that it will eventually be convicted. Recent changes in law mandate that those plans include a thorough housecleaning, possibly involving termination of all personnel who may be deemed responsibly for the offenses. In turn, this may place the corporation in the impossible position of having to alienate those who are most knowledgeable about the facts of the case at precisely the time when it most needs that information.

Corporation's Exposure From Employees' Acts

The common sense assumption that a corporation will always have the facts concerning offenses for which it can be held responsible is wrong. Corporate criminal liability can arise from unknown and unforeseeable acts by employees. In general, a corporation may be convicted of any crime, which an employee in the course of his employment commits, and which is intended, in whole or in part, to benefit the corporation. Thus, for example, an employer may be criminally liable for a fraud, committed by a salesman, which is intended to increase corporate sales and thereby enhance the salesman's stature. Moreover, it is not a defense that the "collective knowledge" rule, it is not necessary for the government to prove that any single individual had sufficient guilty knowledge to be prosecuted personally. It may be sufficient if a company employee collectively had the level of knowledge required for criminal conviction.

Sentencing Guidelines Drive a Wedge Between Corporation and Employees

The Federal Sentencing Guidelines place the company, its officers and employees at odds with one another immediately upon the discovery that a crime may have been committed. The Guidelines were intended to eliminate unwarranted disparity among sentences imposed in similar cases. Unfortunately, they also provide equal, strong incentives for the company to fire suspect employees immediately and provide incriminating information about them, and for culpable employees to implicate their employer.

Under the Guidelines, sentences are derived from a table and then adjusted to account for aggravating and mitigating factors. The result most often is a sentence of imprisonment, even in "white collar" cases, which formerly would have resulted in probation. The primary escape valve for a convicted defendant is to provide "substantial assistance in the investigation or prosecution of another person who has committed an offense," in which case the court is permitted to grant a "downward departure" from the applicable guideline. The course is obvious for any individual

who is convicted and facing a federal jail sentence: provide the government with incriminating information about anyone whom he can, be it his co-conspirator or employer.

The Guidelines provide equal incentive for the company to provide incriminating information about suspect employees and fire them immediately, even if no one has been charged with a crime and no investigation is underway. Should the company later be convicted of a federal offense, the Guidelines will ordinarily mandate the imposition of a fine, including tolerance of criminal activity and obstruction of the investigation. On the other hand, the company can decrease its culpability score significantly through voluntary disclosure and full cooperation in the investigation of any offense.

These provisions create a serious dilemma for the company. On the other hand, the Guidelines create an incentive promptly to find and turn in all potentially culpable employees, even in the absence of any governmental inquiry. Otherwise, should the company eventually be convicted, it may be deemed to have tolerated the criminal activity, or even, under some circumstances, to have obstructed justice. Furthermore, a significant increase in the fine because of the company's failure to take the foregoing steps, and otherwise to cooperate fully with the investigation, may give rise to a derivative action by disaffected shareholders. On the other hand, pursuing this course of action often may permanently alienate employees who may be the best sources of information for the company's defense.

Compounding the problem, once there is a reason to believe a crime may have been committed, separate counsel for "suspect" employees is mandatory, since corporate counsel has an obvious conflict of interest. Even if the corporation is willing to pay for the employees' lawyer, it often will not receive the kind of cooperation that it wants. Counsel engaged to represent company employees will owe his or her exclusively loyalty to them, and not to the company. The employees' best interest sometimes will lie in refusing to cooperate in the company's internal investigation. This, in turn, will hamper the company's effort to unravel the facts and defend itself. In such cases, a joint defense is virtually impossible.

Obviously, these kinds of problems might be avoided by the implementation of an effective compliance program, whereby the company encourages employees to comply with all applicable laws and regulations. Furthermore, a compliance program will benefit the company in the event an offense is "inadvertently" committed and may be helpful in persuading the government that prosecution of the company is unwarranted. The Guidelines also provide for a reduction in the culpability and, hence, the fine, if the defendant company has compliance program in place. And, the existence of a compliance program will often be essential for a convicted corporation to avoid being placed on corporate "probation," a new form of punishment under the Guidelines, which is similar to a receivership.

The Long Arm of the Law

These are difficult times for any individual or corporation caught up in the federal criminal justice system. The sheer complexity of many regulations, combined with the government's increased reliance on criminal enforcement, requires corporations to devote inordinate manpower and energy to prophylactic measures. Unfortunately, it is impossible to provide a simple or

comprehensive chart for navigation through these dangerous shoals. There is no doubt, however, that corporations, their officers and directors must keep the long arm of federal criminal law in mind when establishing and enforcing both internal policies and external business practices.

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