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Know Your Business: 7 Workplace Misconduct Risks

Employment and Labor

A senior West Australian State Government executive pleaded guilty late last year to 564 corruption and money laundering charges and stealing more than A$27 million over an estimated 10-year period. Touted as the largest case of public sector corruption in Australia, many have been wondering how and why such misconduct could have gone undetected for so many years.

Misconduct in the workplace comes at a high price. At its highest, workplace misconduct can result in criminal investigations and convictions, including insider trading, theft, fraud, bribery, and corruption, and can create significant reputational damage. Internally, managing employee misconduct diverts substantial time, cost, and resources away from the core operations of the business. Reduced productivity and staff morale, as well as adverse impacts on workplace culture, can also be part of this cost.

The roles and expectations of in-house lawyers are rapidly changing. Today, businesses are leaning on their in-house counsel more than ever to not only manage liabilities (legal, financial, reputational, operational) but also to act as a trusted adviser in preventing them. Employee misconduct has risen to the top of the agenda in many workplaces, particularly with the rise of remote workforces, employee market disruption, and business and operating model changes.

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Yet, one of the greatest challenges to effectively identify, address, and prevent employee misconduct is having both an awareness and understanding as to how it occurred in the first place. A collaborative approach across the business, with key stakeholders such as human resources, legal, risk and audit, and ethics and compliance staff working together to identify the business's problem areas and blind spots, is key toward calculating what went wrong and how it can be prevented from happening again. In-house lawyers can leverage their strategic thinking, analytical, and problem-solving skills to play a key role in shaping and influencing this process.

Some core issues and areas to which in-house counsel may wish to turn their mind to in considering potential sources of workplace misconduct include:

1. Conflicts of interest

Conflicts of interest may be actual, potential, or perceived. They may concern financial or non-financial interests and direct and non-direct interests. Yet, a conflict of interest does not of itself mean there was wrongdoing. However, the failure to declare a conflict of interest can potentially prejudice an employee's judgement or decision-making, or give rise to a situation where an employee may exploit a situation for their or another's, gain.

It is, therefore, critical that businesses have robust processes for declaring and managing conflicts of interest and that employees understand their ongoing obligations to report all conflicts of interest to their employer.

2. Use of information

Information is a valuable asset. Yet, in the wrong hands it can pose a significant threat to the business. Misconduct can occur by the improper use of information by current or former employees for their personal benefit or to benefit a third party.

So, how does your business protect its trade secrets, commercially sensitive information, intellectual property, and otherwise confidential information? What onboarding and exit processes does the business have for communicating and reinforcing to employees their legal obligations, and the business's expectations, as to employees dealing with its information both during and after their tenure?

In-house lawyers can play a key role in advising the business to mitigate against this workplace risk.

3. Corporate spending

Corporate spending can become a hot spot for misconduct. However, it may not always be easy to detect. Large transactions, without justification, present obvious red flags. Providing, that is, that there are appropriate mechanisms within the business to detect them.

But what about smaller transactions that occur more frequently that may not require approval or justification? Ask: Who within the business has a corporate credit card or the authority to incur expenses on behalf of the business? How are transactions authorized, processed, and approved? What are the business's policies and procedures when it comes to corporate spending? And is the business auditing (regularly and randomly) its corporate spending to ensure all employees are complying with its policies, procedures, and processes?

4. Procurement

Weak procurement processes can pose a significant risk to a business such as not managing inadequate supplier performance, issues with supply chains, unethical sourcing, delays and disruptions to business operations, fraud, and corruption.

What are your processes for procuring goods and services from third-party suppliers? Are you satisfied that your business has clear procedures and practices for selecting and approving suppliers, contract management, and supply chain processes?

Like conflicts of interest, procurement processes can provide the opportunity for employees to exploit blind spots within the business for personal gains, such as financial and non-financial kickbacks and other rewards. Employees should be made aware of the business's procurement practices and be required to disclose any gifts, invitations to events, or other benefits prior to accepting a vendor or contract. Pre-tendering, tendering, and post-tendering practices should also be systematically reviewed and audited (regularly and randomly) to identify any non-compliance with policies or procedures or potential misconduct.

5. Whistle-blowers

Whistle-blowers can be integral to identifying sources of suspected misconduct. Yet, information as to potential unethical or unlawful conduct may also arise in indirect or informal ways, such as staff surveys, performance reviews, or complaints processes. Many jurisdictions have established legislative processes, and protections in place for whistle-blowers.

However, it is just as important that a business develops mechanisms for reporting integrity issues, health, safety, and well-being concerns, and that employees are aware of those mechanisms. And it is critical that practices for considering, investigating, and escalating complaints and reports made by its employees are established and consistently applied across the business. Exit interviews can also provide an important source of information to understand employee observations or concerns that they may not have felt empowered or supported to raise during their employment.

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6. Timesheets, overtime, and allowance claims

The last thing a business wants to do is create a culture of mistrust. Yet, a lack of oversight in monitoring employee's working hours, overtime, and allowance claims can provide an opportunity for employees to fraudulently claim benefits and remuneration to which they are not entitled.

To mitigate against this, line managers need to effectively manage and direct workflows to understand what employees are working on and the time required to complete those tasks. This includes approving overtime and allowances before they arise. Effective workflow management not only reduces the opportunity for fraud, but also improves working relationships between employees and line managers, which in turn may increase morale and decrease the risk of burnout.

7. Use of resources for personal use

Does your business permit its employees to use work-issued devices, tools, and services (such as computers, printers, phones, hospitality, and cars) for personal use? Businesses need clear policies and procedures that establish whether (and in what circumstances) employees can use business assets for personal use and must assure that all employees are made aware of the business's expectations and the consequences should they not comply with policies and procedures.

Limit opportunities for misconduct

As in-house lawyers, we won't always understand why people do bad things, but we can play a significant role in limiting the opportunities for misconduct to occur.

The views expressed in this article are those of the author, and do not represent the views of her current or former employers.

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