

# FEDERAL PROSECUTORS OFFER INCENTIVES TO SELF-REPORT WORKPLACE MISCONDUCT: SOME PRACTICAL TIPS AND REMINDERS FOR EMPLOYERS

Insights  
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Federal prosecutors recently outlined a new approach to the way they treat criminal corporate misconduct – including offering some enticing incentives to corporate leaders for self-reporting potential violations. What does this mean for companies and in-house counsel with respect to their compliance and investigation programs? In the event of *potentially* criminal conduct, how should you decide whether to self-disclose and how can you be expected to make that determination “immediately”? While it’s thankfully relatively rare for most in-house counsel and HR leaders to come across potentially criminal misconduct, this new policy underscores the importance for your company to have comprehensive policies and practices regarding when to conduct workplace investigations, when to notify counsel of a complaint or concern of potential wrongdoing, and who should conduct the investigation.

## What Happened?

On January 17, 2023, Assistant Attorney General Kenneth A. Polite, Jr. provided remarks at Georgetown University addressing the recently revised Department of Justice (DOJ) policy with respect to companies involved in, or at least who become aware, of criminal corporate misconduct within their ranks. The revised policy offers companies “new, significant, and concrete incentives to self-disclose” such misconduct as soon as they learn of it. Incentives include DOJ declining to prosecute the company or, even if it does prosecute, substantially reduced criminal exposure. And, in a change from the prior policy, these incentives are available

## Related People



**Jeffrey Shapiro**

Partner

617.532.5891

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even if there are “aggravating factors” (e.g., executive-level involvement, pervasive misconduct, significant company profit, etc.).

To be eligible for these incentives, a company must:

1. Self-disclose the misconduct *immediately* upon learning of it;
2. Establish that, at the time of the misconduct and disclosure, the company had an effective compliance program and system of internal accounting controls that enabled the identification and misconduct and led to the company’s voluntary self disclosure; and
3. The company provided “extraordinary cooperation” and undertook “extraordinary remediation.”

In addition, even companies that do not voluntarily self-disclose misconduct immediately are incentivized under the revised policy to cooperate and remediate.

### **When to Conduct a Workplace Investigation**

The duty to investigate arises whenever – and however – the company becomes aware of conduct that may be a serious violation of law or policy. The source of the information could be normal reporting channels, compliance line calls, and awareness on the part of a management member. In short, knowledge by any supervisor (even if obtained informally or away from work) generally constitutes company knowledge and, in turn, triggers the duty to act. The failure to properly act in the face of that duty can lead to significant legal exposure and negatively impact employee morale, turnover, etc.

### **When to Notify Counsel**

Companies apply different rules and standards as to when counsel should be notified of complaints or concerns of potential misconduct. Some require notification to their in-house legal department prior to every workplace investigation, whereas others allow this determination to be made on a case-by-case basis. However, all companies should have a process where counsel is notified immediately of allegations or concerns of serious misconduct.

That requires “serious” to be defined, of course, but this should include allegations which are at least potentially

credible and which, if true, could result in significant legal exposure. Doing so will allow counsel to assist in:

- Assessing whether the investigation should be conducted at their direction and under the attorney-client privilege (which cannot be done retroactively);
- Ensuring senior company leaders are properly notified;
- Determining whether any interim action is appropriate while the investigation is being conducted; and
- Deciding who should conduct the investigation.

### **Who Should Investigate**

There is no “one size fits all” answer as to who should conduct a workplace investigation. This decision often requires judgment under the circumstances. Sometimes it may be appropriate for human resources, employee relations, or another company leader to conduct an internal investigation. Other times in-counsel may be best suited to do so (recognizing the privilege considerations and implications). And other times, for various reasons, it may be wise for the company to engage external counsel or another independent third-party to conduct the investigation. These are judgments to be made under the particular circumstances, and often there is more than one reasonable answer.

In all instances, the investigator should:

- Be credible and trustworthy;
- Be knowledgeable of the policies or laws that were potentially violated;
- Not be biased or have a real or apparent conflict of interest; and
- Not be a fact witness to the events under investigation.

However, this revised DOJ policy underscores why it is sometimes best for companies to engage an external investigator. To be clear, the DOJ’s revised Corporate Enforcement Policy (CEP) has the potential to put in-house counsel in nearly impossible situations.

For example, if in-house counsel is conducting a workplace investigation and learns of potential criminal conduct, they are then faced with an assortment of difficult questions based on several potentially conflicting factors. On the one hand, as noted above, now more than ever, companies have a tremendous incentive to voluntarily self-disclose. Counsel is duty bound to do what is best for the company and, after all, this could be the deciding factor as to whether the company faces a criminal prosecution at all. But there are many countervailing considerations:

- **What does it mean to self-disclose “immediately” and how can a company do so without first completing the investigation?** The very essence of a proper workplace investigation is to be fair and impartial and not to reach conclusions until the investigation is completed – so how can an investigator be expected to self-disclose immediately?
- **What could self-disclosure mean to the company in the context of other pending or potential government investigations or civil litigation?** Self-disclosure could have massive implications to the company in other respects, including pending or potential civil matters, parallel enforcement investigations, or other regulatory actions.
- **Should counsel consider the interests of the individual employee alleged to have engaged in wrongdoing?** Even if only acting as counsel for the company, does that mean it's okay to tell the government of *potentially* criminal conduct of one of your employees?

For all of these reasons, in-house counsel would be well-advised to have a buffer between themselves and the witnesses when the allegations may involve potential criminal wrongdoing. Of course, that's not always possible to predict, but the point is there are times when independent third-party investigators should be used – and this revised DOJ policy provides an example of such an instance.

## Key Takeaways

1. It's more important than ever for companies to have an effective compliance program with multiple channels for employees to raise concerns, a strong commitment against any form of retaliation, and clear processes and

procedures to promptly and thoroughly investigate potential wrongdoing.

2. Those processes should include notification and escalation procedures so that legal and senior leaders are promptly notified of allegations and concerns of serious misconduct.
3. In-house counsel should consider engaging an external, third-party investigator for particularly serious allegations, especially when the investigation involves potentially criminal conduct and especially in light of the DOJ's revised policy.

## **Conclusion**

We will continue to monitor and provide updates about this and other key developments regarding workplace investigation best practices. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have any questions, reach out to your Fisher Phillips attorney or the author of this Insight.