

OUTSIDE COUNSEL

BY JOHN F. LAURO

Protecting Corporate Employees: The Need for a New Bill of Rights

Over the last several years there has been a dramatic change in the practice of white-collar criminal defense. The highly publicized corporate scandals involving Enron, WorldCom, and others, and the federal government's reaction to those events have resulted in an enormous shift of power away from protecting corporate employees' rights.

After the passage of the Sarbanes-Oxley legislation and the Justice Department's issuance of the so-called Thompson Memorandum,¹ the focus has been on enhancing the power of big government and protecting the existence of large corporations. Individual corporate employees, however, have been left powerless, facing the reality that events beyond their control could result in the loss of employment or life-long prison sentences.

Corporate 'Cooperation'

Many commentators have suggested how corporations should operate in this new environment. Indeed, the concept of corporate "cooperation" has spawned an entirely new relationship between corporations and their employees. Now, in order to ensure a continued existence and to please the government (in the hope of obtaining some sort of deferred prosecution agreements), corporations unleash their lawyers and investigators to identify alleged "wrongdoers" who can be served up to the government on a silver platter. The Justice Department's Thompson Memorandum provides an easy road map to a corporation seeking to avoid criminal sanctions: in a word, the corporation must do everything possible to place its employees in jeopardy and deprive them of basic constitutional protections.

Corporations are told to waive attorney-client privileges, fire employees who will not tell a story consistent with the government's theory of the case, and deny employees the ability to retain skilled counsel. In addition, the government discourages joint defense agreements between a corporation and its employees, and indeed the corporation often acts as an arm of the federal government in trying to build a case against employees in order to show that it is a good corporate citizen. Employees are denied access to their records and documents and have no idea about the accusations



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leveled against them. Corporate counsel does the work of prosecutors by providing the Department of Justice (DOJ) with briefing books, witness summaries, and expert reports.

In a typical corporate fraud investigation, an employee—whether the CEO or a low-level accountant—faces the perfect storm of powerful forces aligned against him. Usually, the government puts together a team of investigators from the FBI and Internal Revenue Service (IRS) who work alongside lawyers from the Securities and Exchange Commission (SEC) and DOJ. The corporation hires a large law firm consisting of former federal prosecutors who are given the responsibility of assisting their former colleagues in government. The corporation's audit committee hires yet another large law firm to ensure that the first firm is doing a good enough job helping out the government. This formidable array of lawyers and investigators descend on the employees like a hoard of locusts in order to secure possible criminal targets.

The concept of identifying alleged individual culprits is antithetical to the way corporate decision-making usually takes place. Corporations thrive on action by committee and avoiding individual responsibility for decisions. It is rare that a "corporate policy" emanates from one person's directive. Instead decisions tend to be made incrementally and involve

input from various levels of the company. In today's world, rather than the corporation taking responsibility for its own "corporate policy," the government and the company begin a hunt to isolate individuals who may have played a roll, no matter how minor, in decisions that may have evolved over years. No longer are committees to blame for some questionable policies; instead, individual managers are targeted to take individual responsibility for group decision-making.

Some might be tempted to seek redress with Congress or the Department of Justice. To make that suggestion in today's political world, though, would be ludicrous. Can anyone imagine an influential politician or DOJ official getting on the television and arguing about how measures need to be put in place in order to protect employees accused of misconduct following the outbreak of a new corporate scandal. Not in our lifetime.

And there really is no federal supremacy issue. At present, there are no federal laws that would prohibit the states from passing such legislation in order to protect employees' rights. Generally speaking, the states may enact whatever legislation they deem necessary to regulate corporations, which indeed are creatures of state law. Federal supremacy would only kick in if the state passed a statute that conflicted with existing federal law, which would not be the case here.

State Legislatures

All may not be lost, however. I suggest that we need to look to an entirely new avenue for protecting the rights of individual employees: the state legislatures. That is to say, the states are primarily responsible for passing laws dealing with internal corporate governance and it is the states that can ensure that individuals are given basic protections during the course of a corporate investigation. This approach embodies the notion of a "new federalism" where state legislatures and judges become the primary actors in ensuring the protection of corporate employees' rights. After all, corporations are the creations of state law, and it is in the states that employees work, pay taxes, and build communities. Simply stated, individual rights can be protected through legislation that regulates internal corporate governance.

'Employees Bill of Rights'

Now is the time for state legislatures to pass a "Corporate Employees Bill of Rights" to ensure that ordinary citizens are not denied fundamental liberties.

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The legislation could be part of other statutes that deal with corporate governance. Moreover, these rights are not extraordinary and would create a level playing field in corporate. They also flow directly from constitutional principles that are embedded in our rule of law:

I. The Right to Counsel. Every corporate employee should enjoy the right to counsel during an investigation. Current state laws usually give corporations the discretion to advance reasonable legal fees to employees. The advancement of reasonable fees should be made mandatory, unless the corporation can demonstrate that the employee acted for his own benefit and contrary to the interests of the corporation (say in an embezzlement scenario). In a corporate investigation everyone has lawyers—the government, the company, the board of directors—except individual employees. This has to change.

II. The Right Against Self-Incrimination. Corporate employees should be entitled to assert their Fifth Amendment right against self-incrimination and refuse to speak to corporate counsel or the government without any untoward consequences such as termination or suspension. Further, corporate counsel should be required to advise employees that anything told to counsel will likely be shared with the government and that speaking to counsel is the legal equivalent of being interviewed by the FBI. Under the current regime, employees who refuse to “cooperate” by being interviewed by corporate counsel or the government are usually fired. If someone does speak with counsel and the government later doesn’t like the story, then the employee may be prosecuted for “obstructing” the investigation.

III. The Right to Confront Accusations. Typically, corporate investigations are shrouded in a fog of mystery. Employees know only that documents are being produced, offices are being searched, and computers are being downloaded. Yet few employees understand the key issues or how their conduct may fit into the inquiry. Employees are left in the dark to worry, lose sleep, and anticipate the worst. As an alternative, corporations should be required to advise employees of substantive allegations of wrongdoing involving their corporate duties. In that way, employees can begin to prepare an adequate defense and meet the allegations head-on.

IV. The Right to Obtain Corporate Documents. As most of us know, employees are usually shut out of the information flow during an investigation. Although the government and the corporation have access to important documents and records, the employees do not. I was recently told by corporate counsel that he could not give me a copy of my client’s personnel file unless he first received permission to do so from the government lawyers on the case. This situation is absurd and must end. Rather, corporations should have an obligation to share with employees all documents relevant to the investigation that relate to the employee.

V. The Right to Retain Experts. Corporate investigations involve complex accounting, tax, and other issues. Often experts are hired by the government and the company to sort through these issues and offer expert guidance on the proper treatment of complicated subjects. Corporate employees should have the same rights. Like the advancement of attorney’s fees, employees should be entitled to have reasonable fees advanced for the retention of experts who can assist the employee in meeting allegations of purported wrongdoing.

VI. The Right to Exculpatory Information. So often during investigations the corporation’s counsel may uncover information that might exculpate the corporate employee. That information should be shared with the employee immediately rather than waiting for the employee to be charged and having the government turn it over to the defense a few days before trial. An employee who may have spent her entire career toiling for the benefit of the corporation is certainly entitled to know whether the company is aware of evidence that could exonerate her from serious federal criminal charges.

VII. The Right to Respond to Presentations Made to the Government. When a corporation makes a presentation to the government that could implicate an employee, he or she has no ability to respond. Without question, corporations are now routinely turning over work product and analyses to government agents in an effort to avoid prosecution. These presentations, for the most part, do not enjoy any privilege protection and may otherwise be discoverable in litigation. Therefore, a corporation should have no reluctance in providing such information to an employee to enable him to fairly respond to positions taken by the company and conclusions reached during an investigation.

VIII. The Right to Leaves of Absence. Corporate investigations are stressful and require an employee’s full attention. Documents need to be reviewed, and time spent with counsel assessing the matter is crucial. Moreover, employees may feel uncomfortable working around other employees who may be witnesses, or worse, cooperators seeking to gain more information to help with their own situations. Thus, employees should be entitled to reasonable leave in order to deal with investigations and trials.

IX. The Right to Be Free From Retaliation for Exercising Rights. No employee should suffer harm from the corporation for exercising a right guaranteed by the state. As discussed above, employees have been fired for not waiving their Fifth Amendment rights against self-incrimination. This type of retaliation for exercising fundamental rights must stop. Instead corporations should scrupulously protect the rights of its employees.

X. The Right to Seek Legal Redress. In the event a corporation refuses to abide by its obligations under a Bill of Rights, then an employee should be entitled to compel a company to do so by filing an action for injunctive or other relief. Further, employees injured by reason of a corporation’s failure to abide by the legislation should have the ability to seek monetary damages. Only then would a “Corporate Employees Bill of Rights” have true meaning.

Conclusion

A bill of rights may not provide the entire answer for restoring some balance between individual protections and the interests of corporations in connection with complex investigations, but it would go a long way in doing so. At a minimum, strong state legislation would provide a prudent buffer to the likes of the Thompson Memorandum, which seeks to deprive individuals of fundamental protections in order to enhance the power of big government.

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1. Thompson Memorandum (Document 161 below. See related documents 162 and 163 as found in the Criminal Resource Manual

within the U.S. Attorneys’ Manual and is posted at Web site: http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00100.htm).

The Thompson Memorandum and related documents are only internal DOJ policies that do not have the force of law:

161 Federal Prosecution of Business Organizations—DAG Letter

The Deputy Attorney General
Washington, D.C. 20530

Jan. 20, 2003

MEMORANDUM

TO:

Heads of Department Components
United States Attorneys

FROM:

Larry D. Thompson

Deputy Attorney General

SUBJECT:

Principles of Federal Prosecution of Business Organizations

As the Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud. While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself.

Attached to this memorandum are a revised set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization. These revisions draw heavily on the combined efforts of the Corporate Fraud Task Force and the Attorney General’s Advisory Committee to put the results of more than three years of experience with the principles into practice.

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

Further experience with these principles may lead to additional adjustments. I look forward to hearing comments about their operation in practice. Please forward any comments to Christopher Wray, the Principal Associate Deputy Attorney General, or to Andrew Hruska, my Senior Counsel.

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