
2004 Federal Sentencing Guidelines Require Employers to Periodically Train All Employees on Workplace Ethics

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Commentary, 2004 Federal Sentencing Guidelines

I. Overview

The Sarbanes-Oxley Act of 2002 directed the United States Sentencing Commission to ensure that the Federal Sentencing Guidelines were “sufficient to deter and punish” organizational criminal misconduct.² In response, the Sentencing Commission proposed important amendments to the Sentencing Guidelines—which will become law on November 1, 2004. The new Guidelines greatly increase organizations’ obligations to institute effective ethics and compliance programs. In particular, the new Guidelines require organizations to periodically provide compliance and ethics training to all employees.

Part II of this article examines organizations’ legal obligations to institute compliance and ethics programs and train employees on these topics. Part III examines the return on investment organizations should expect to enjoy in providing compliance and ethics programs. Part IV describes the content of effective compliance and ethics training.

II. 2004 Federal Sentencing Guidelines’ Requirements

Guidelines Apply to All Organizations, Not Just Publicly-Traded Companies

While the Sarbanes-Oxley Act covers only publicly traded companies, the Federal Sentencing Guidelines apply to “all organizations whether publicly or privately held, and of whatever nature, such as corporations, partnerships, labor unions, pension funds, trust, nonprofit entities, and governmental units.”³

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² Section 805(a)(2)(5) of the Sarbanes-Oxley Act of 2002, Public Law 107-204.

³ “An Overview of the Organizational Guidelines,” by Paula Desio, Deputy General Counsel, United States Sentencing Commission, 2004.

An Effective Ethics and Compliance Program Can Reduce Punishment If Legal Violations Occur

First, the bad news: The new Guidelines make clear that:

“Criminal liability can attach to an organization whenever an employee of the organization commits an act within the apparent scope of his or her employment, even if the employee acted directly contrary to company policy and instructions. An entire organization, despite its best efforts to prevent wrongdoing in its ranks, can still be held criminally liable for any of its employees' illegal actions.”⁴

Now, the good news: While the new Guidelines make clear that organizations can be held liable for their employees' illegal actions, the Guidelines provide a strong incentive for employers to take proactive action to prevent unethical and illegal conduct. Specifically, organizations that can show that they have instituted an effective ethics and compliance program—including an effective training program—can greatly reduce the potential fines and other punishment that they might face. Indeed, the U.S. Sentencing Commission has written that:

“The potential fine range for a criminal conviction can be significantly reduced—in some cases up to 95 percent—if an organization can demonstrate that it had put in place an effective compliance and ethics program and that the criminal violation represented an aberration within an otherwise law-abiding community.”⁵

Conversely, the absence of an effective compliance and ethics program may be used to increase the punishment the organization receives.⁶

Guidelines Explicitly Define Seven Required Elements of an “Effective Compliance and Ethics Program”

The 2004 Federal Sentencing Guidelines explicitly define what is minimally required to establish that an organization has an “effective compliance and ethics program.” Specifically, Section 8B2.1 of the Guidelines requires the organization to:

1. Establish standards and procedures to prevent and detect criminal conduct
2. Place responsibility with the organization's governing authority and high-level personnel to ensure that the organization's compliance and ethics program is adequate
3. Preclude persons who have engaged in illegal or unethical actions from serving in high ranking positions
4. Audit, monitor, and periodically evaluate the program's effectiveness, and provide a way for employees to report concerns about illegal behavior without fear of retaliation

⁴ *Id.*

⁵ *Id.* (Emphasis added.)

⁶ *Id.*

5. Provide incentives to employees and agents to not act illegally or unethically, and discipline those who do
6. Take reasonable steps to respond to misconduct and to prevent future misconduct
7. Provide periodic training to all personnel on the organization's compliance and ethics program

Simply Providing Employees an Ethics Policy or Code of Conduct is not Legally Sufficient

The 2004 Federal Sentencing Guidelines emphasize that organizations must not only have a compliance and ethics program on paper, but that the program must be *communicated to and utilized by* employees within the organization. Merely distributing a Code of Ethics or Code of Conduct among one's employees is not sufficient. Instead, effective training is required.

Guidelines Require Ethics and Compliance Training

Section 8B2.1(b)(4)(A) of the 2004 Federal Sentencing Guidelines specifically states that:

“The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to [all personnel] by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.”

Such training must be provided to “the members of the governing authority, high-level personnel, substantial authority personnel, the organizations employees, and, as appropriate, the organization's agents.”⁷

If the plain language of the statute is not enough, the Commentary to the Amendments makes clear that compliance and ethics training is required. Specifically, the Commentary states:

“Section 8B2.1(b)(4) makes compliance and ethics training a requirement, and specifically extends the training requirement to the upper levels of an organization, including the governing authority and high-level personnel, in addition to all the organization's employees and agents...”

Formal Training Program Required

The Guidelines state that small organizations (defined as those with fewer than 200 employees) may provide training through informal meetings with staff members—as long as those trainings still effectively communicate the organization's compliance and ethics

⁷ 2004 Federal Sentencing Guideline, Section 8B2.1(b)(4)(B)

program and procedures. However, organizations with 200 or more employees should provide more *formally planned and implemented* training programs.⁸

Training Must be Provided to Employees Periodically

Organizations must do more than just provide a one-time training to their employees. Instead, as the Commentary to the Guidelines notes, “Subsection (b)(4) establishes that this communication and training obligation is ongoing, requiring ‘periodic’ updates.”⁹

Of course, organizations should not simply force employees to take the same training course repeatedly. As one Ethics Officer noted in a study commissioned by the Ethics Resource Center, “Our audience has matured. I think it’s insulting to hit them with the same stuff year after year.”¹⁰ Instead, subsequent ethics courses should refresh employees on the major principles learned in previous courses and update them on new developments in the law and changes in organizational policies.

Sentencing Guidelines Will Likely Also Set Bar in Civil Cases and Regulatory Actions

While the Sentencing Guidelines are designed to determine the punishment faced by organizations convicted of criminal misconduct, in the past courts and regulatory agencies have also used the Guidelines to set the bar in civil cases and regulatory agency actions. As the Commentary to the Guidelines emphasizes, while effective programs should prevent criminal conduct, they “also should facilitate compliance with all applicable laws.”

III. Return on Investment of Effective Compliance and Ethics Programs and Training

The 2004 Federal Sentencing Guidelines will require organizations to devote a substantial amount of resources to comply with the Guidelines’ mandates. However, by taking a proactive approach to compliance and ethics programs, organizations should ultimately save money by reducing the high costs associated with criminal and ethical lapses.

An effective ethics and compliance program should reduce the number of ethical and legal violations committed by an organization’s employees. According to a study from the Ethics Resource Center, a third of employees surveyed said they had witnessed unethical conduct in the workplace. In organizations that did not have an ethics program in place, 23 percent of employees said that they had felt pressure to compromise their ethical standards in the workplace. In contrast, in organizations that had an ethics

⁸ Commentary to Guidelines, Section 2(C)(iii)

⁹ Commentary to Guidelines

¹⁰ *Integrating Ethics and Compliance Programs: Next Steps for Successful Implementation and Change*, by Joshua Joseph, Ethics Resource Center, 2001.

program in place, only 13 percent of employees felt pressure to compromise ethical standards.¹¹

Second, effective ethics and compliance programs, especially training programs, can help ensure that employees are able to spot possible ethical and criminal violations and know where to seek guidance or report concerns about these issues. Such internal reporting may help organizations prevent and correct problematic behavior before the behavior becomes a legal violation.

Third, even if an organization's employee or agent commits an ethical or criminal violation such that the organization can be held criminally liable, an organization that can show it had an effective ethics and compliance program in place can greatly reduce the punishment that it might receive. As described above, the U.S. Sentencing Commission has indicated that, "The potential fine range for a criminal conviction can be significantly reduced—in some cases up to 95 percent—if an organization can demonstrate that it had put in place an effective compliance and ethics program..."¹²

Fourth, an organization with an effective compliance and ethics program can avoid the costs and negative publicity of an ethical or legal violation. A 1997 DePaul University study found that companies with a defined corporate commitment to ethical principles do better financially than companies without such a commitment. Similarly, a University of Southwestern Louisiana study entitled, "The Effect of Published Reports of Unethical Conduct on Stock Prices," showed that publicity about unethical corporate behavior lowers stock prices for a minimum of six months.

According to W. Michael Hoffman, Executive Director of the Center for Business Ethics at Bentley College, given the legal obligations and the potential financial savings from effective prevention programs and training, organizations "have sort of been running, not walking, to jump on the ethical bandwagon, because it's sort of like having a house without fire insurance if you do not try to meet these ethical requirements."

IV. Content and Delivery of Ethics and Compliance Training

Typical Training Topics

Compliance and ethics training should address areas where employees may, perhaps unwittingly, violate organizational policy or violate a law and thereby expose the organization to criminal or civil liability. Most organizations will train employees, at a minimum, on the following topics:

- 1) **Confidential Information**
 - i) Insider trading

¹¹ *Id.*

¹² "An Overview of the Organizational Guidelines," by Paula Desio, Deputy General Counsel, United States Sentencing Commission, 2004. (Emphasis added.)

ii) Handling confidential information relating to employees, customers, and vendors

2) Conflicts of Interest

- i) Spotting and handling situations where the employee's personal interests, or the interests of a family member, may compete with the organization's or shareholders interests
- ii) Handling job offers from vendors and customers

3) Proper Accounting

- i) Sarbanes-Oxley Act requirements
- ii) Why Sarbanes-Oxley applies not only to accountants and CFOs but to all employees
- iii) Properly reporting hours worked, expenses, etc.

4) Organizational Property

- i) Using organizational property for personal use
- ii) Using computers, Internet, email, and other technology resources properly

5) Gifts and Favors

- i) Accepting meals and other gifts from vendors
- ii) Exchanging gifts with co-workers, supervisors, and subordinates

6) Outside Employment

- i) Ensuring that second jobs do not conflict with employees' responsibilities to the organization
- ii) Working for your organization's client in a personal capacity
- iii) Use of organizational property and resources for outside employment

7) Reporting

- i) Importance of reporting concerns or seeking guidance on ethical issues
- ii) How to report ethical and compliance concerns under your organization's policies
- iii) Anti-retaliation and whistleblower protections of Sarbanes-Oxley and other laws

Training topics should be customized to your workforce

In addition to the topics listed above, you may need to provide your employees additional compliance and ethics training, depending on your industry and the nature of your workforce. For example, if you have employees who deal with foreign governments, you will need to provide those employees instruction on the Foreign Corrupt Practices Act.

The training you provide may need to be customized to each employee's roles and responsibilities. While all employees will need training on the topics listed above, your organization's directors and high ranking personnel also will need additional instruction on their specific responsibilities under the Sarbanes-Oxley Act, the Federal Sentencing Guidelines, and other applicable laws and regulations.

Focus not just on law, but also on your organization's policies and commitment to ethical culture

Effective ethics training focuses not just on what the law requires but also on what your organization's policies require. Organization's policies vary, so ensure that the training you provide explicitly describes your organization's policies on specific subjects. For example, are your employees allowed to accept meals from vendors? Is there a dollar limit on the value of a meal that an employee can accept from a vendor? If so, make sure the training addresses these issues.

Effective ethics training does not simply inform employees of the applicable laws and policies, but it also communicates to employees your organization's commitment to an ethical culture. For this reason, it's a good idea to have the training introduced by a high ranking official within your organization. (In instructor-led training, the high-ranking official can appear at the beginning of each ethics class to introduce the training to class participants; in online or video-based training, the high-ranking official can appear in the introduction section of the training.) This "commitment from the top" communicates to employees that the organization's leadership recognizes the importance of the topic.

Effective training forces employees to think through complex "gray areas"

Instead of simply preaching to employees the importance of ethical behavior, effective training helps employees navigate through the minefield of complex "gray areas" that employees may encounter in the workplace. Most employees do not knowingly violate a law or policy. Instead, many ethical violations occur when an employee is faced with a difficult choice that requires the employee to balance competing interests where the right thing to do is not clear. Effective training provides employees a clear set of practical tools for identifying and resolving these ethical dilemmas.

V. Conclusion

The 2004 Federal Sentencing Guidelines, which will become law on November 1, 2004, require all organizations to periodically train all employees on workplace ethics and compliance. Organizations that provide such training will not only meet their legal obligations but also should reduce the costs associated with ethical and legal lapses. The most effective training programs focus not only on legal requirements, but also communicate to employees the organization's policies and commitment to an ethical culture.

The importance of effective compliance and ethics training cannot be understated. As one Ethics Officer noted, "The training program is one of the most important things that you can do to promote ethical practice. It's the element of your program that will be seen, felt, touched and experienced by every single employee."¹³

¹³ *Integrating Ethics and Compliance Programs: Next Steps for Successful Implementation and Change*, by Joshua Joseph, Ethics Resource Center, 2001.