



WhitePaper

Best Practices for Handling an Ethics Hotline Report: Developing Policies and Procedures for Conducting an Effective Ethics Investigation



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Ethics Investigation Checklist

Best Practices for Handling an Ethics Hotline Report

Developing Policies and Procedures for Conducting an Effective Ethics Investigation

Abstract

An essential element in the long-term success strategy of any business organization is the development and implementation of a comprehensive ethics and compliance program to reduce the possibility of potentially harmful unethical practices in the workplace.

According to the Ethics Resource Center (ERC), a nonprofit organization that works to advance the practice of ethical behavior in both individuals and organizations, the goal of an ethics and compliance program should be “to help governing authorities, managers, employees, and agents work together to pursue the purpose of an organization and achieve its more specific goals and objectives in a manner consistent with its standards for ethical business conduct.”

Unfortunately, no matter how strong an organization’s ethics program is and how vigilant its approach to reducing unethical practices, it is highly unlikely that ethical lapses can be eliminated completely. According to the ERC-conducted 2009 National Business Ethics Survey (NBES), 49 percent of employees indicated they had witnessed unethical behavior in the workplace.

49 percent of employees state they have witnessed an unethical act in the workplace

Source: 2009 National Business Ethics Survey-Ethics Resource Center

One critical step employers should take to combat ethical violations in the workplace is to provide employees with access to a mechanism for reporting unethical behavior in confidence and without fear of retribution, typically in the form of a third-party ethics hotline. Additionally, once a potential violation is reported, the organization must have a system in place to investigate the allegations swiftly, thoroughly and fairly.

When establishing a system for investigating ethics complaints, it is important that all processes and procedures adhere to best practices. According to QFinance, a website that provides financial resources as well as corporate ethics and governance guidance, a best practice can simply be defined as “the most effective and efficient means of achieving any task.”

The purpose of this paper is to help organizations identify best practices regarding ethics investigations and how they can be developed and implemented for their own use. Organizations can learn how establishing an ethical foundation that can lead to the creation of a stronger ethical culture. The paper will also outline the steps in an effective investigation and how to avoid potential pitfalls. A “real world” example of best practices in corporate ethics investigation policies and procedures will also be outlined.

The First Step: Establishing an Ethical Foundation

The Need for Stronger Ethical Standards

The need for stronger corporate ethical standards gained momentum in the wake of scandals such as Enron and Tyco where top executives bilked their companies out of millions, and in some cases, billions of dollars. As a result of the scandals, Congress passed the Sarbanes-Oxley Act of 2002 (SOX), a major piece of anti-fraud legislation governing corporate ethical practices and compliance in publicly traded companies. As a result, best practices in developing and enforcing ethics policies and procedures not only became necessary for the financial survival of corporations, they also served to mitigate their financial exposure.

In addition to new legislation, various scandals brought to light the notion that an organization cannot realistically expect employees to behave in an ethical manner unless it develops a strong ethical foundation that permeates the corporate culture. If employees have the understanding that there is a policy of zero tolerance regarding ethical breaches and that offenders will face severe consequences, they may be less inclined to commit unethical acts. When employees do come across a questionable ethical situation, they must believe that the organization has strong policies in place to prevent retaliation against whistleblowers.

Ethics Start at the Top

A strong ethical cultural starts at the top and trickles down through the rest of the organization. As the 2009 NBES points out, organizations exhibiting strong ethical leadership from management reported a 40 percent rate of ethical misconduct as opposed to 77 percent in weaker ethical cultures.

A culture that promotes ethics in the workplace can have a positive effect on employee morale. According to Andrew Sigler, former CEO of Champion International Corp., “A good (ethics)

program gives people the courage to do what they want to do.” In essence, a strong ethical culture allows employees to feel good about the decisions they make.

When attempting to create a strong ethical culture, top management should begin by assessing its current culture and policies as well as the nature of its business to see where ethics issues have occurred in the past and could occur in the future. For example, an accounting firm may need to tailor its ethics policies more toward preventing financial fraud, where a company that receives work primarily through government contracts may need to pay close attention to potential conflicts of interest.

Creating a Code of Ethics

Developing the Code

Once the organization determines its ethical needs and direction, the next step is to create a written policy for its employees to abide by. In many organizations, this will take the form of a code of ethics, also known as a code of conduct. In essence, a code of ethics is a set of standards and guidelines developed in accordance with the company’s values. According to the *Inc.* magazine website, an effective code of ethics should work in tandem with the company’s mission statement to establish a solid ethical foundation and baseline standards within the organization.

A code of ethics may also apply to an entire industry. Shortly after the passage of SOX, the New York Stock Exchange submitted a proposal to the Securities and Exchange Commission mandating that all NYSE-registered companies be required to develop a code of ethics covering areas such as potential conflicts of interest, proper use of company property, compliance with applicable laws, rules and regulations, and procedures for reporting unethical behavior, such as establishing an independent third-party ethics hotline and whistleblower policy.

When developing a code, it can be helpful to brainstorm for possible scenarios of ethical dilemmas employees could face in the course of conducting day-to-day business activities. Possibilities can include areas such as harassment, discrimination, fraud and conflicts of interest. It can also be helpful to seek anonymous input from employees to gain a broader perspective.

Implementing the Code

Once the code has been created, management should require that all employees receive training on all of its components as well as being made aware of any possible penalties for violating them. For legal purposes, it is also important to obtain a signed release from each employee acknowledging their understanding as well as their agreement to comply with all tenets of the code.

The Corporate Ethics Officer

In many organizations, the implementation of SOX also led to the appointment of a dedicated individual to develop ethics policies and procedures and monitor ethical behavior. This individual acts as the point-person for the company's ethical performance and is responsible for code training and enforcement, including thorough and impartial investigation of ethics hotline complaints. This individual is typically given the title of ethics officer or compliance officer.

The ethics officer works independently of a company's top executives, but should be more than just "window dressing" to give the impression that a company is serious about preventing unethical behavior. According to Odell Guyton, director of compliance for Microsoft, an effective ethics officer asks the tough questions and must take a hard look at corporate policies and procedures, even policies that have become ingrained in corporate culture over a period of years. To aid in SOX compliance, the ethics officer may be required to report to an independent audit committee comprised of corporate directors who are not involved in day-to-day management activities.

An Essential Code Component: The Third-Party Ethics Hotline

Another important factor in establishing a strong ethical culture is to provide a means for employees to report ethics violations when they occur. In accordance with best practices, this is accomplished by giving employees access to an ethics hotline, a third-party organization that is specially equipped to deal with ethical issues in the workplace. Employees who have been the victim of or have witnessed unethical behavior can contact the hotline 24 hours a day, seven days a week. The employees are able to maintain their anonymity if they wish, and the hotline handles the information in a confidential manner.

After the employee reports the issue, the hotline personnel immediately begin to process the complaint, which typically takes 24 hours or less. The hotline employees, who are specially trained in complaint-handling and information-gathering techniques, categorize the report depending upon the type of issue, such as fraud, human resources or compliance. They prepare a report that is immediately forwarded to the appropriate company representative, typically the ethics officer, who is responsible for putting the wheels of the company's investigative process in motion.

Beginning the Investigation: Preliminary Fact-Finding

When ethics officers receive the report from the ethics hotline, they may choose to conduct a preliminary investigation, the purpose of which is to determine whether the complaint has merit and warrants a more in-depth investigation. Best practices stipulate that the investigation begin as soon as possible.

During the preliminary phase, the ethics officer or designated representative typically gathers information and evidence from the complainant (in accordance with company policy), such as threatening or intimidating emails or financial documents in cases that involve possible fraud, but does not contact the respondent (the accused) or other witnesses.

If the officer needs additional information from the complainant who wishes to remain anonymous, this can be done by using the third-party ethics hotline as an intermediary. If the violation concerns a legal matter, it may be necessary to seek legal advice at this time, either from in-house counsel or outside legal representation.

It is important that the initial investigation not jump to conclusions or point fingers. At this point, the purpose is only to determine the possibility that an ethical violation did occur. It is also important that if it is apparent that an incident likely did occur, it should be determined if the alleged activity is enough to violate the code of ethics or other ethical policies and procedures.

If the ethics officer determines that there is not enough evidence to indicate a violation has occurred, the complainant should be notified in writing, again using the third-party hotline as an intermediary if necessary.

Conducting a Full Investigation

If the preliminary fact-finding results indicate that a full investigation is warranted, it should commence as quickly as possible. To ensure adherence to best practices for effective investigation techniques, the process should include a number of key steps. These include deciding who will conduct the investigation, giving proper notification to individuals involved in the investigation, preparing the actual investigation and interviews, conducting the interviews and following up. A checklist to aid in the investigative process can be found in the Appendix section of this report.

Choosing the Investigator

The ethics officer will need to determine who will conduct the investigation. Depending on the structure of the organization, the ethics officer may perform the investigation or assign it to an investigator with specific expertise, such as accounting or human resources knowledge.

According to i-Sight, a case management software vendor, in addition to relevant technical knowledge, effective investigators should possess a number of key characteristics, including:

- Active listening skills
- Critical thinking skills
- The ability to process information quickly and respond to new information that comes to light

- A thorough knowledge of the organization's policies and procedures, particularly those regarding ethics

Proper Notification

The ethics officer should notify the respondent in writing as to the findings of the preliminary investigation, including any charges that are being levied. Respondents should be given a reasonable amount of time, typically 30 days, to reply to the charges and furnish their own evidence, as well as a list of any witnesses that support their case. In the event the complainant supplied contact information to the third-party ethics hotline, the ethics officer should also notify the complainant of the findings.

If respondents need additional time to respond to the allegations, they should notify the ethics officer before the specified date. Respondents should not be told the identity of the complainant unless it is necessary for their defense, such as in the case of sexual harassment.

Depending on the circumstances, it may be advisable for the ethics officer to take action in the interim while the investigation is underway. Again to use the example of sexual harassment, it could be beneficial to consider moving the respondent to another department temporarily, approving an administrative leave of absence or changing work schedules so the complainant and respondent avoid contact with each other.

Preparation

The investigation may involve interviewing witnesses from the list of names supplied by the complainant and respondent as well as any other individuals that are deemed relevant to the investigation. To ensure that the questioning is effective and also does not violate the rights of the interview subjects, thorough preparation is essential.

The personnel records for all parties involved in the investigation should be reviewed to identify any potential biases or personal relationships, both current and past that could have potentially influenced the behaviors of the parties.

The preparation period should also be used to set goals for the investigation. In addition to reaching a fair and just outcome for all parties involved, goals can include items such as making sure the investigation complies with any legal obligations and that it is carried out in a way that avoids potential liability. Other goals can include taking steps to preserve the reputation of all parties involved, and identifying actions that need to be taken to ensure that any similar unethical activities do not occur in the future.

Steps in the Investigative Process



It can also be a good idea to review evidence-handling procedures with all parties involved in conducting the investigation at this time. Any time evidence is handled or reviewed, it should be documented who handled it and when.

Conducting the Interviews

In general, it is advisable to interview the complainant first, followed by the respondent and then any witnesses. When conducting interviews, it is important that they take place in a discreet location. If an employee is seen entering or leaving the office of the ethics officer or human resource representative, it could lead to speculation by other employees that the employee may be involved in some type of ethical or other human resources-related investigation.

The tone of the interview should be professional instead of interrogative. Questions should be open-ended where applicable to allow subjects the opportunity to elaborate on their answers. At no time should the interviewer become confrontational or try to make the subject uncomfortable. The goal is to gather as much relevant information as possible, not to badger. During the interview, the subject's demeanor, body language and mannerisms should be observed to detect possible signs of lying.

According to McLane, Graf, Raulerson & Middleton, a New Hampshire law firm that dedicates a portion of its practice to employment law, there are a number of possible questions to ask of the complainant, respondent and other witnesses:

Questions to Complainant

- The five “W’s” of journalism, “Who, What, When Where and Why” should be used to help set the scene and sequence of events
- How did the events affect you personally?
- How would you like to see the situation resolved?
- Did the conduct occur at other times that you are aware of?
- Do you have any other relevant information?
- Would you like to make a final statement?

Questions to Respondent

- What is your response to the allegations?
- What is your version of the events?
- You have stated that the allegations are untrue. Is there a reason you can think of as to why the complainant would make them?

Questions for the Witnesses

- Can you describe what you saw/heard?
- Are there others who may have witnessed the event?
- Are you aware of any other relevant information?

Following Up

After all parties have been interviewed, it may be necessary to attempt to obtain corroborating evidence to determine the credibility of the witnesses and their statements, especially in situations such as alleged sexual harassment which often results in a case of “he said, she said.” In these cases, other witnesses can help pin down questions as to the time and place that an incident was alleged to have occurred.

There may also be situations where witnesses provide conflicting answers or some responses may need additional clarification. It is a good idea to inform all parties that they may need to be interviewed again at a future date.

Making the Decision

After all the information has been compiled and the investigation has concluded, it is time to make a final determination. According to Law.com, the results should be provided on a “need to know basis,” which typically involves the complainant, respondent and any pertinent members of

management. If it is determined that remedial action is necessary, any decisions regarding punishment should be made in conjunction with management.

In situations where the employer has an obligation to protect its workforce, such as an incident of sexual harassment, the employer should notify employees that an incident has occurred and remedial measures are being taken without providing the specifics of the incident.

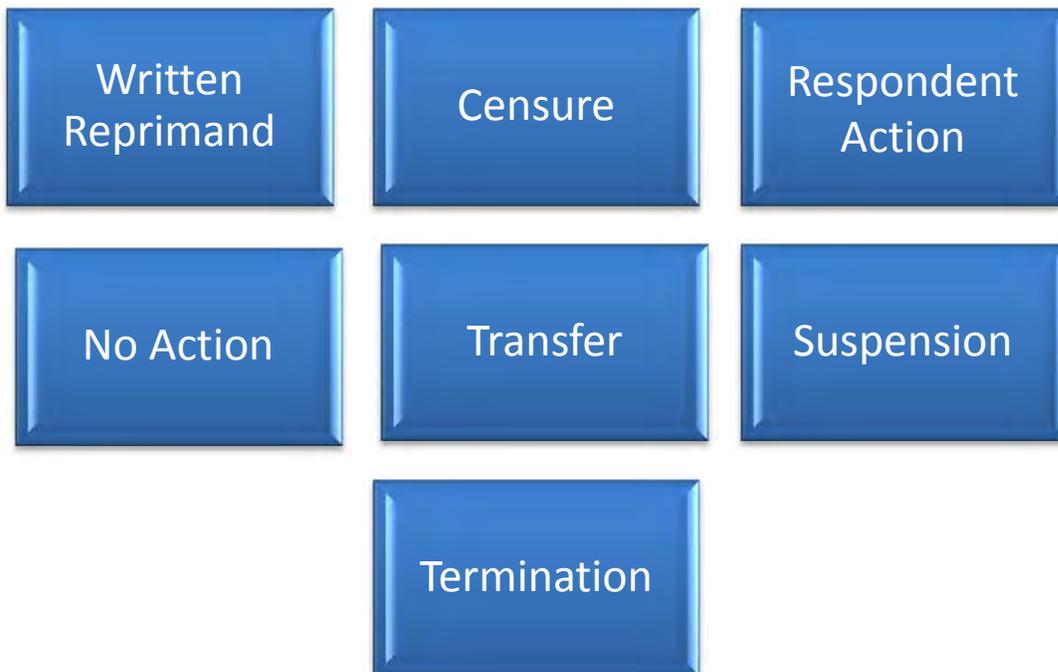
Remedies

When deciding on the type of remedial action, a number of factors should be taken into consideration. These include the seriousness of the offense and the frequency of occurrence, the overall employee record of the respondent, how similar occurrences have been handled in the past and the suitability of the intended punishment in relation to company policy.

Depending on the nature of the violations and the tenets of the code of ethics, a number of actions can take place. The respondent can be issued a written reprimand that does not actually punish the respondent but promises action if the offense occurs in the future. Censuring is another possible remedy.

Requiring action on the part of the respondent may also be an option. The respondent may be sent a letter outlining actions that need to be taken, such as providing restitution or making a formal apology to the complainant. Conditions may be imposed if the respondent does not comply.

Possible Action as a Result of an Investigation



Transferring the respondent is also an option, although this could be viewed by the respondent as adding insult to injury. A situation where a transfer might be necessary is when sexual harassment is involved.

In some cases, the violation may be severe enough to warrant suspension or even termination. Also, if criminal conduct is alleged, the respondent may be referred to the proper authorities.

If the findings of the investigation indicate a lack of evidence or that no action should be taken against the respondent, it can still be possible to reopen the case if new information surfaces.

It is also advisable to meet with complainants and respondents individually to ensure they understand the ruling and its ramifications. If complainants do not wish to meet in person, it should be made clear to them that they have the opportunity to ask any questions they may have by using another format such as email or telephone. The employer also has the obligation to take measures to protect the complainant from retaliation in accordance with SOX.

Final Report

The investigator should prepare a final report, also to be issued on a need-to-know basis. Items in the report should consist of the following:

- Summary of the complaint
- Issues that were investigated
- List of witnesses
- Summary of information from any interviews
- Findings for each individual allegation
- Remedial actions taken during the investigation
- Conclusions and recommendations

Additional Training

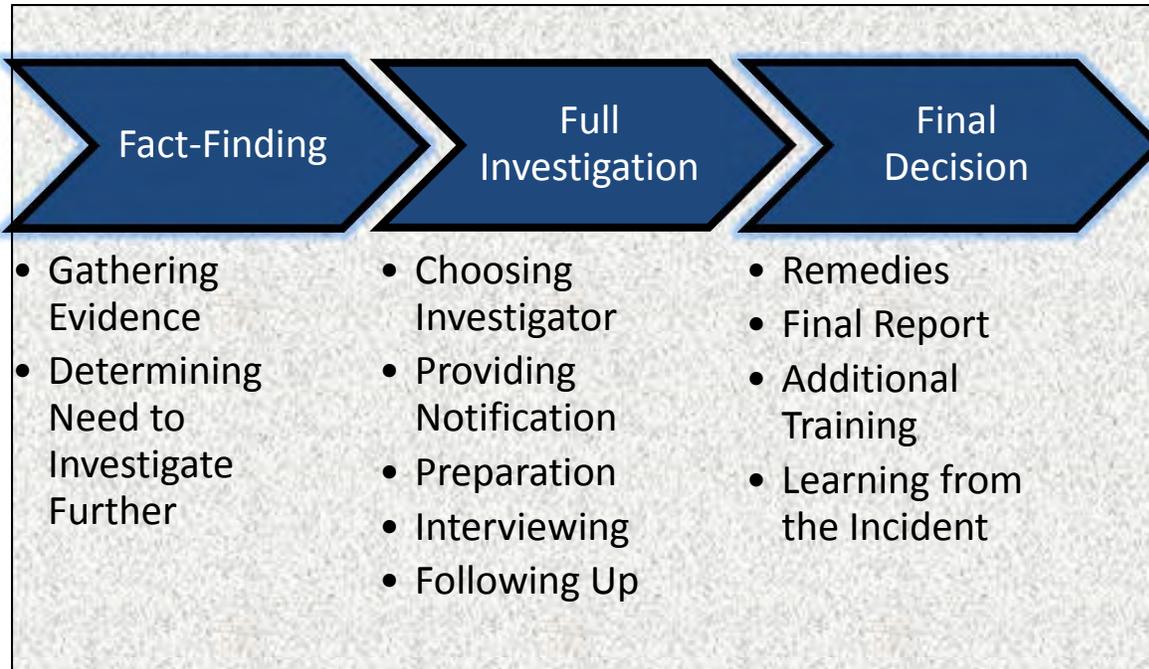
If it is determined that the actions of the respondent were unethical but do not warrant termination, it is important to take steps to prevent the situation from occurring again. Additional ethics training can ensure those who are guilty of ethics violations are fully aware of the inappropriateness of their actions, as well as the reasons they were inappropriate.

Learning from the Incident

An ethics investigation also provides an opportunity for a company to learn of any “holes” in its ethics policies that may have laid the groundwork or provided the opportunity for a situation to occur. At the conclusion of an incident, it can be beneficial take the time to reexamine policies and procedures and take corrective measures. By providing additional training to all employees, organizations can help prevent the situation from occurring again.

Also, by making public the results of the investigation without revealing the parties involved, the organization can show others the effectiveness of the investigative process while discouraging unethical actions in the future. It can also demonstrate that the organization will not tolerate unethical behavior.

Ethics Investigation Workflow



Common Pitfalls to Avoid

There are a number of potential mistakes that could sidetrack or even derail an ethics investigation or lead to inaccurate results:

Lack of Timeliness

Perhaps the worst thing a company can do is not taking action swiftly once it receives a complaint from the ethics hotline. A delay in response can cause the situation to fester, turning a relatively minor incident into something much more volatile. It also allows more time for a potentially unethical behavior to continue. A perceived lack of attention to the matter on the employer's part can give the impression that it is indifferent or even condones the activity, providing added ammunition for a possible lawsuit.

Lack of Knowledge

Employees may not be comfortable reporting the ethics complaint in the first place due to not being fully aware of the ethics complaint-handling procedure. It is important that companies take the time to properly train and education employees on the reporting and investigative process. If employees realize that they can make their initial complaint in complete confidence to a third-party hotline and not directly to the company, they may be more willing to take action and more ethical violations will be uncovered.

Poor Interviewing Techniques

According to “Five Common Mistakes in Internal Investigations,” poor interviewing techniques can also hinder an investigation and is often caused by a lack of preparation. It is important for the interviewer to review all pertinent facts and evidence and prepare a list of questions based on the information.

Lack of Expertise

There is no “one size fits all” when it comes to ethics investigations. Mistakes or oversights can occur due to an investigator not being familiar with the subject matter. For example, a human resources representative with little financial background may not be fully capable of investigating a possible accounting fraud.

Inconsistent Protocol

Even though ethics investigations can involve a wide variety of violations, the investigation protocol should be the same for all. Not doing so can result in inconsistencies in the investigative process and cause incorrect or unfair conclusions and remedies.

Management Interference

While management should be consulted during the investigative process, it should not be allowed to seize control of the investigation. Manager bias, whether intentional or unintentional, could possibly sway the outcome of the investigation.

Evaluating the Process

Every organization should evaluate its ethics investigation process from time to time to determine its effectiveness and to make changes if necessary. One way to accomplish this is to develop an ethics questionnaire that employees complete an annual basis. The questionnaire should include questions that ask employees to evaluate the effectiveness of the ethics reporting and complaint-handling process.

It can also be helpful to have a current program reviewed by an outside ethics consulting firm that is familiar with the company’s type of business. This can provide a more objective viewpoint while allowing for comparison of the process with that of similar companies in the industry.

Best Practices on Display: Xerox

To gain a better understanding of the importance placed on ethics reporting and investigation, it can be helpful to briefly examine the policies of Xerox, a company included in the “World’s Most Ethical Companies of 2010” list published by Ethisphere Institute, an organization devoted to the advancement of ethics and compliance.

Xerox makes use of the Federal Sentencing Guidelines for Organizations which in essence, make companies responsible for the actions of their employees, as the basis of its corporate ethics and compliance program. Of the seven major factors of the guidelines that are directed toward corporations and their ethics policies, three pertain directly to the reporting of ethics violations and the conducting of effective ethics investigations.

Seven Necessary Factors for an Effective Ethics and Compliance Program



Source: Xerox.com-Federal Sentencing Guidelines for Corporation

Specifically, these factors include the publicizing of the availability a third-party ethics hotline to all employees, establishing a uniform disciplinary action policy to ensure that all violations are

handled fairly and consistently and an internal process that reviews ethics investigation case data so that the company can take steps to prevent future offenses.

As part of Xerox's "Business Ethics and Compliance Office Major Activities and Focus" document, the office lists its areas of responsibility for conducting ethics investigations, including:

- Assign investigations responsibly
- Ensure completeness of investigation
- Provide counsel, direction, suggestions as appropriate
- Coordinate investigator activities where multiple functions or issues are involved

Conclusions

Developing an effective system for investigation of ethics violations in accordance with best practices is an outgrowth of a corporate culture that emphasizes ethical behavior in the workplace. Organizations that are committed to ethics will first develop a comprehensive code of ethics that lays the foundation for creating and implementing a thorough, fair investigative process which results in making sound decisions at the conclusion of the investigation.

An effective ethics investigation begins with providing the opportunity for employees to report alleged ethics violations in a confidential and anonymous fashion to a third-party ethics hotline. When the hotline supplies a summary of the incident to the corporate ethics officer, it is imperative that a preliminary investigation commence as soon as possible.

The investigation should follow a predetermined protocol to ensure consistency and fairness in the results. Investigators should possess the necessary expertise to conduct the investigation in accordance with the nature of the alleged violation. If the results of the investigation dictate that punitive measures be taken, it is important that the "punishment fits the crime" when meting it out. It is also essential that confidentiality for all parties involved in the investigation be maintained.

In summary, an organization that wishes to achieve "world-class" performance in all areas of operation should not overlook the importance of ethics in the workplace. When ethics violations do occur a proper investigation will not only help maintain organizational integrity, it can also provide an opportunity to reinforce its commitment to achieving high ethical standards.

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Appendix

Ethics Investigation Checklist

Preliminary Fact-Finding

Did you take immediate action when you received the report from the ethics hotline?

Did you gather all available initial information and evidence?

Does the initial information indicate the likelihood an ethics violation occurred?

Conducting Full Investigation

Did you select the investigator who is best suited for the task?

Did you properly notify the respondent and complainant, if applicable, of the initial findings?

Did you prepare for the investigative process by setting goals?

Did you ask open-ended questions of the complainant, respondent and witnesses?

Did you follow up by conducting additional interviews if necessary?

Making the Decision

Did you select the proper remedy based on the severity of the violation, previous similar situations and the tenets of your organization's code of ethics?

Did you take steps to protect the complainant against retaliation?

Did you prepare a final written report and provide it on a "need to know" basis?

Did you conduct additional training to reduce the possibility of future violations?

Did you learn anything from the situation that can help you strengthen your organization's ethics policies and procedures?

Post-Investigation Evaluation

Do you seek input from your employees concerning your company's ethics violation reporting and complaint handling processes by having them complete an annual ethics questionnaire?

Have you evaluated your organization's ethics violation reporting and complaint handling procedures within the last year?