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Global HR Hot Topic

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Launching a Global Whistleblower Hotline—Beyond Europe

Challenge:

Sarbanes-Oxley, Dodd-Frank and corporate social responsibility "best practices" drive multinationals to offer robust whistleblower hotlines. But six legal doctrines around the world can present significant hurdles to launching a hotline overseas.

Domestically within the United States, launching new work rules, employee handbooks and codes of conduct can trigger legal issues, especially in unionized workplaces. Then, in the US, a *whistleblower's call* to a workplace hotline triggers a separate cluster of legal issues, such as regarding internal investigations, employee discipline and whistleblower retaliation. But American employers, even unionized ones, that offer a stand-alone workplace whistleblower hotline to US staff rarely face blowback. Indeed, offering employee report "procedures" stateside affirmatively *complies* with a mandate in Sarbanes-Oxley and is a recommended "best practice" response to the Dodd-Frank whistleblower bounty.

- A "workplace whistleblower hotline" comprises three basic components: (1) a communication that encourages (or forces) employees to denounce colleagues suspected of wrongdoing, that explains how to submit a denunciation and (often) that guarantees informants confidentiality or anonymity and non-retaliation; (2) a *medium or media* (channel or channels) for accepting denunciations, such as an email address, a web link, a postal mail address, a telephone number or some combination; and (3) *protocols/procedures and scripts* by which a hotline responder, often a specialist outsourced company, processes denunciations and passes them onto someone at the hotline-sponsor company to investigate. (Internal *investigations* into whistleblower denunciations raise tough legal issues of their own, particularly in the cross-border context, but investigations into specific denunciations are completely separate from the pre-investigatory launch and operation of a workplace whistleblower hotline. As to cross-border internal investigations, see our Global HR Hot Topic for October, November and December 2009.)

America's *laissez faire* approach to hotlines can lull multinationals into overlooking or minimizing the surprisingly-steep compliance hurdles to launching whistleblower procedures across worldwide affiliates. From our American point of view that sees hotlines as a best

Pointer:

When launching a global whistleblower hotline, account for—and surmount—up to six hurdles in each affected jurisdiction.

Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case's International Labor and Employment Law practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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This is an excerpt from Donald C. Dowling, Jr., Global Whistleblower Hotline Toolkit: How to Launch and Operate a Legally-Compliant International Workplace Report Channel (Nov. 2011), available at whitecase.com.

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practice for nurturing compliance by rooting out crimes and corruption, these six restrictions look like technicalities grown bigger and more complex than they should have any right to get.

But points of view regarding hotlines can be very different abroad. Employees in whistleblowing-averse societies like Russia, Latin America, the Middle East, India, much of Asia and Africa can fear hotlines as entrapment. In jurisdictions such as Korea, corporate whistleblowing is essentially taboo. Meanwhile, data protection laws in Europe actively block hotlines, and violations can spark passionate resistance from European workforces and can trigger punitive sanctions. Hotline-averse societies, not surprisingly, create legal doctrines that rein in workplace whistleblower hotlines. Six such legal doctrines can make the launch of an international report channel a global compliance project of its own.

Before offering a hotline to employees outside the US, check whether any of these six categories of legal issues arise in each relevant jurisdiction. Isolate, in each affected country, those issues the hotline will trigger under local law. Then take steps to make reporting protocols and employee communications packages comply.

Category #1: Laws Mandating Whistleblower Procedures

Our first category of hotline-regulating law is *mandates that require setting up whistleblower hotlines in the first place*. These laws reach even an organization already committed to launch a hotline because any report channel rolled out where law requires hotlines must comply with strictures in the hotline-mandating law.

For multinationals that raise funds on US stock exchanges, the vital hotline-mandating law is SOX § 301(4), the US statute that forces company board audit committees to offer "employees" "procedures" for the "confidential, anonymous" submission of "complaints" and "concerns" of "accounting or auditing matters." (The Dodd-Frank law of 2010 amends many parts of SOX but does not tweak this particular mandate.) SOX § 301(4) requires that audit committees of SOX-regulated corporations, including so-called "foreign private issuers" based outside the US:

> *shall establish procedures* for: (A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the *confidential, anonymous* submission by *employees* of the issuer of concerns regarding questionable *accounting or auditing matters.*

Fortunately, any viable hotline likely complies if only because SOX § 301(4) offers a lot of leeway in structuring "complaints" "procedures." Congress wanted audit committees to tailor bespoke report "procedures" to fit each company's own needs, and so the US SEC refuses to "mandat[e] specific [hotline] procedures." Any robust whistleblower channel that a SOX-regulated employer communicates to its (at least US) employees likely complies with SOX § 301(4)(B) as long as employees know about it and can access it "confidential[ly] and "anonymous[ly]." Indeed, structuring a SOX-compliant hotline is so easy that no one ever seems to have gotten it wrong: As of mid-2011, no SOX § 301(4) prosecution had ever been reported. Compliance may be so simple that most all covered confidential and anonymous "complaints" "procedures" comply with SOX § 301(4). That said, though, there seems to be a viable argument that SOX § 301 may not necessarily require multinationals to launch hotlines outside *the US*.

The issue then becomes hotline mandates outside the US. But these laws are rare. As of 2011 very few laws beyond US SOX force employers to offer hotlines. For example, the UK Public Interest Disclosure Act 1998, India's Limited Liability Partnership Act 2008, Japan's Whistleblower Protection Act and South Africa's Protected Disclosures Act 2000 contain whistleblower retaliation prohibitions but do not affirmatively require report channels. Anti-fraud securities laws tend not to require hotlines, either. Japan's Financial Instruments and Exchange Law ("J-SOX") does not require them, nor do UK financial accountability laws or the UK Bribery Act. Legislatures in a few jurisdictions *recommend* whistleblower hotlines—for example, India's clause 49 of the Listing Agreement and Spain's Recommendation 50.1(d), part II of *Codigo Unificado de Buen Gobierno* 19 May 2006. But companies can and do ignore these.

Still a few isolated laws in a handful of places require or have required employers to sponsor report channels. Liberia Executive Order #22 of 2009 issued by Liberia's Nobel Peace Prize-winning president required "private entities" to launch procedures for "receiving and processing" "public interest disclosures" about private company "malpractices." But that order has now lapsed. Norway's Working Environment Act grants Norwegians a right to report "censurable conditions" and urges employers to "establish" some "routin[e]…or…other measures" for employee whistleblower reports. But this is qualified, little more than a strong recommendation. That said, multinationals launching cross-border whistleblower hotlines must adapt report channels to strictures in local hotline mandates like Norway's Working Environment Act.

Category #2: Laws Promoting Denunciations to Government Authorities

Requirements of whistleblower procedures aside, our next category of hotline regulation is laws like US Dodd-Frank that promote employee/stakeholder denunciations to *government*

authorities. These laws do not regulate company hotlines *per se*, but they steer employer hotline strategy for two reasons: First, encouraging whistleblowing to government competes with employer hotlines by enticing internal whistleblowers to divert denunciations from internal company compliance experts over to outside law enforcers who indict white collar criminals. Second, laws that require (as opposed merely to encourage) government denunciations rarely except corporate hotline sponsors. These laws therefore force hotline sponsors to divulge hotline allegations to law enforcement. For both reasons, hotline sponsors need strategies to account for these laws.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended Sarbanes-Oxley in many key respects but did not touch SOX § 301(4)'s mandate for hotline/"complaints" "procedures." Rather, Dodd-Frank took a radically different approach to whistleblowing that ultimately promotes robust internal company hotlines for a completely different reason. Under Dodd-Frank § 922 and US Securities and Exchange Commission [SEC] implementing rules of May 2011, a US government "bounty" pays cash awards of 10% to 30% of SEC-recovered sanctions over US$1 million to eligible whistleblowers—whether living stateside or abroad—who told the SEC "original information" about securities violations leading to an actual money recovery. Even whistleblowers who bypass internal SOX § 301 hotlines are eligible. Dodd Frank's lure of a huge payday may tempt whistleblowers more than even the warm feeling of doing the right thing by calling an in-house SOX hotline. The *Wall Street Journal* and many others lament the discordant policy message here to would-be whistleblowers.

Despite the stark policy clash between SOX § 301 and the Dodd-Frank bounty, at the end of the day both laws push company hotline strategy in the very same direction: SOX *requires* an employer to offer internal hotline "procedures" while Dodd-Frank *motivates* the very same thing—a conspicuous internal report channel robust enough to attract denunciations that informants might otherwise report to government enforcers.

Going beyond Dodd-Frank and looking at laws outside the US that also regulate whistleblower denunciations to local government enforcers, any multinational launching a global hotline needs to account for laws that require government whistleblowing, if only because these laws rarely exempt hotline sponsors themselves and so require companies to disclose hotline denunciations over to local law enforcement. Yet these laws are rare in the free world. The Malaysian Whistleblower Protection Act of 2010, as one example, encourages whistleblowing with a vague Dodd-Frank-like bounty. Now-lapsed Liberia Executive Order #22 used to encourage individual whistleblowers to report to government. But the Malaysian law and even US Dodd-Frank merely *promote* denouncing wrongdoers to government. They pose no compliance challenge to companies launching and staffing internal hotlines, although they motivate multinationals to promote report channels robust enough to attract denunciations that might otherwise go to law enforcers.

The tougher compliance and hotline administration issue here is laws that *require* divulging evidence of criminal behavior to government enforcers. Because few if any mandatory-reporting laws exempt hotline sponsors, these laws require divulging credible hotline reports to law enforcers *even before a thorough internal investigation*. Fortunately, very few free-world jurisdictions impose these laws. Slovakia's Criminal Code, as one example, forces Slovaks (including employers) who reliably learn of illegal behaviour to denounce wrongdoers to the police. Also, Liberia's now-lapsed Executive Order #22 forced employers that received credible criminal allegations through mandatory hotlines to report them to Liberia's "attorney general." These laws cripple hotline strategy both because they require organizations to use their hotlines to incriminate themselves and because they limit organizations' power to investigate denunciations.

Category #3: Laws Restricting Hotlines Specifically

Our next category is hotline mandates that run in completely the opposite direction and *restrict* organizations' freedom to launch and operate report channels. In theory this category includes all laws that specifically ban or limit whistleblower hotlines. But no such laws are known to exist anywhere. Rather, the only known laws that specifically target and restrict employer whistleblower report procedures are European Union member state guidelines interpreting EU data protection (privacy) laws in the hotline context. On those laws, see our *Global HR Hot Topic* for December 2011.

Category #4: Laws Prohibiting Whistleblower Retaliation

A fourth category of whistleblowing law is prohibitions against whistleblower retaliation. These are increasingly common. US SOX and Dodd-Frank as well as American state whistleblower retaliation laws grant causes of action to stateside whistleblowers punished for whistleblowing. Now, more and more overseas jurisdictions from UK and South Africa to Malaysia, Japan and beyond have joined this trend and prohibit whistleblower retaliation. Indeed, freedom from workplace whistleblower retaliation has actually been declared a human right, at least in Europe: In a decision of July 2011 involving Germany, the European Court of Human Rights allowed all employees to denounce wrongdoing free from the specter of retaliation.

Whistleblower retaliation laws are sometimes colloquially called "whistleblower laws" and so they might seem to play a role

in the launch of a legally-compliant hotline. But for the most part they do not. These laws are specific to workplace-context whistleblowing but in practical effect they have almost nothing to say about hotlines because retaliation is impossible until after a whistleblower call ends and a follow-up investigatory stage begins. Retaliation can become an issue only after an employer responds to a would-be whistleblower.

That said, there is a big hotline *communication* issue here. In whistleblowing-averse jurisdictions around the world from Russia to Latin America and the Middle East to India and parts of Asia and Africa, an employer needs to overcome worker fear of reprisal for whistleblowing. This means guaranteeing that no one using the report channel in good faith will suffer retaliation. But globally communicating a non-retaliation commitment almost surely extends, quasi-contractually, otherwise non-existent anti-retaliation rights to whistleblowers in jurisdictions without retaliation laws. Consider carefully the strategic and legal implications before making an anti-retaliation commitment across borders.

Category #5: Laws Regulating Internal Investigations

Probably every jurisdiction imposes some legal doctrines that reach employer investigations into allegations of employee wrongdoing. Depending on the country and the allegation investigated, an internal investigation might trigger, for example, local laws on labor/employment, data privacy/protection, tort, crimes, criminal procedure, private-party due process and prohibitions against exporting state secrets. But these doctrines only kick in after an investigation starts. They have almost no bearing on the launch and staffing of a global whistleblower hotline because a hotline is a *pre-investigatory* tool.

This said, there is a hotline *communication* issue here. Heavy-handed communications about a hotline might later support claimants who allege the employer rigged its investigation process. For example, imagine a hotline communication that says something to the effect of: *We investigate every report exhaustively, leaving no stone unturned to verify the truth of reports received.* Few organizations are likely to convey so blunt a message, but if one did the statement might turn up later as evidence supporting a victimization claim. Ensure communications about report channels do not convey an overzealous approach to complaint-processing and investigations. Where necessary, such as in Europe, be sure hotline communications spell out the private due process rights of whistleblowers, witnesses—and targets.

Category #6: Laws Silent on, but Possibly Triggered by, Whistleblower Hotlines

Our final category is broader: Legal doctrines that neither explicitly address hotline whistleblowing nor have yet been interpreted in the hotline whistleblowing context, but that a hotline might theoretically trigger. This category is necessarily vague, and makes determining which laws fall into it difficult. Our two most likely candidates are data protection laws silent on hotlines and labor laws imposing negotiation duties and work rules obligations.

Data protection laws silent on hotlines: Beyond Europe, more and more jurisdictions around the world now impose European-style omnibus data privacy/protection laws. Argentina, Canada, Costa Rica, Hong Kong, India, Israel, Japan, Malaysia, Mexico, Peru, South Korea, Taiwan, Uruguay and others as of 2011 had passed or were implementing comprehensive (as opposed to sectoral) data protection laws. Some of these are almost as tough as data laws in Europe. In the future these laws might be argued to reach whistleblower hotlines, paralleling the analysis in Continental Europe. But as of 2011 none of these data laws was known ever to have been interpreted to reach whistleblower hotlines.

The way Europeans stretch their data laws to reach hotlines may be exceptional. Data privacy/protection laws regulate information about identifiable humans, but the launch and staffing of an employer whistleblower hotline—before it receives a whistleblower call that might or might not later morph into an internal investigation—does not implicate any personal data whatsoever, about anybody. A hotline standing alone does not contain or process personal data about any whistleblower, target or witness. A hotline is a mere channel, not a database, and is more analogous to a telephone, computer or communications device than to a human resources database that warehouses information about, for example, payroll, attendance, performance management, expense reimbursements, business travel or benefits/pension/insurance administration. For that matter, even when a real-life whistleblower contacts a company hotline to denounce an identified colleague, the personal data transmitted get sent *by the whistleblower,* not the company hotline sponsor. So even an actual hotline denunciation would not seem to implicate a hotline sponsor company in processing personal data until the moment the denunciation ends and hotline staff further processes data received by writing up a report and perhaps launching an investigation. Of course, many but not all *European* jurisdictions reject this analysis and regulate report channels as if they were somehow databases. We have no way yet to know whether *non-European* jurisdictions with comprehensive data laws will be so aggressive.

Labor laws imposing negotiation duties and work rules obligations: Labor laws—specifically, mandates imposing labor negotiation duties and obligations regarding work rules—are another type of law that, although silent on and not yet construed as to stand-alone whistleblower hotlines, could reach workplace report channels. Labor laws in most every jurisdiction require at least some employers to bargain with trade unions over certain changes in the workplace. Some jurisdictions also require informing and consulting about new workplace practices with other employee representatives such as works councils, health and safety committees, and ombudsmen. But the texts of collective labor statutes never address hotlines specifically. As of 2011, few if any regulations, court decisions, or administrative rulings anywhere on Earth had construed bargaining obligations as to launching a stand-alone whistleblower hotline.

An employer subject to labor consultation obligations might take the position that merely offering a new stand-alone hotline does not change anyone's work conditions and so is not subject to labor discussions. Employee representatives might counterargue that now having to work under a hotline regime poisons the work environment because it turns every co-worker and colleague into a possible spy. In the US, unionized employers have to bargain with their unions before implementing new workplace surveillance technology like email and video monitoring. A US labor union inclined to resist a whistleblower hotline could characterize the report channel as a sort of monitoring/surveillance tool that triggers this same bargaining obligation. This same analysis could apply abroad, as well. Whether launching a stand-alone hotline falls under existing bargaining obligations is rarely settled law. The answer can depend on the comprehensiveness of the local bargaining obligation, the applicable collective agreement, the workplace bargaining history and the local society's receptivity or aversion to whistleblowing. Consulting over a stand-alone hotline will much more likely be held mandatory in Continental Europe and China than in the Middle East, the Americas, much of Asia, Latin America, or Africa.

In launching a stand-alone whistleblower channel outside the US, check whether local worker representatives in each jurisdiction could plausibly argue that new report procedures trigger mandatory bargaining/consultation. Look into whether existing collective arrangements address reporting and grievance procedures, whether the society is whistleblowing-averse, and whether the company's own worker representatives tend to obstruct most changes to the workplace. Where the employer can convince its worker representatives why the proposed hotline benefits everyone and is not a material adverse change, bargaining/consultation should present no hurdle.

But resisting worker consultation over a stand-alone hotline is not always a sound strategy. In whistleblowing-averse societies that suspect hotlines as a form of entrapment, consultations may make sense to make the hotline effective. And in certain jurisdictions an affirmative agreement with worker representatives about a hotline can help surmount challenges on grounds beyond labor law. For example, a labor/management works agreement (*Betriebsvereinbarung*) in Germany and a "plant bargaining agreement" in Austria that accept a workplace hotline can rebut claims that report procedures violate *data protection laws*. Bargaining is also necessary where a hotline does not stand alone but comprises a piece of a more extensive compliance program inarguably subject to consultation, such as a new global code of conduct with a mandatory reporting rule that requires whistleblowing.

A workplace hotline can also implicate a separate labor law issue: *mandatory work rules*. France, Japan, Korea and other countries require that employers post written work rules that list prohibited workplace infractions. A stand-alone whistleblower hotline, as distinct from a mandatory reporting rule, is not a work rule and so should not require changing already-posted lists of infractions. But a hotline launch that includes a new mandatory reporting rule likely requires tweaks to extant rules.