

The JLG Counsel Facilitated Follow Up Option for Anonymous Whistleblowers: Always Available, Employed Only as Needed

Anonymous Whistle Blowing Required

Section 301 of Sarbanes Oxley requires that public companies provide a system for anonymous employee whistle blowing on questionable accounting or auditing matters. The revised Federal Sentencing Guidelines substantially broaden the requirements, calling for all companies, not just those which are publicly traded, to implement a mechanism to allow for anonymous reporting of actual or potential violations of law, including regulations and not limited to criminal violations.

The Importance of Whistleblower Follow Up Will Range from Minor to Critical

The initial tip from an anonymous informant is legally significant because it constitutes notice of a potential legal violation. A duty to do something is triggered, and the clock begins ticking when the notice is received.

The initial report received from the anonymous informant may contain all of the information that is necessary for decision makers to accurately assess the situation and take appropriate action. Or, the recipients of the initial report may want additional information before taking further action. The data suggests that follow up information is often sought, with variations between industries. In the retail industry follow up is sought in response to only 33% of initial reports, but in the financial industry follow up is sought with respect to 94% of the initial reports. The telecom industry falls in the middle with follow up sought in response to about 50% of the initial reports.

The nature of the information desired from the follow up will vary from a straightforward clarification of basic points to a full vetting of potentially complex issues.

The potential materiality of the reported event may vary from minor ethical or human resource issues to potential criminal conduct or accounting matters that could have a devastating impact on the entire corporation. The more complex and material the reported event, the greater the value of a full, professional vetting of initial report through follow up with the whistleblower.

If the initial report results in an ongoing investigation, the company may well want to contact the whistleblower for further input as information is developed in the ongoing investigation.

What may be adequate follow up with an informant on a minor matter likely would be inadequate with respect to a complex, potential corporate impact issue. Not having a process in place designed to provide adequate whistleblower follow up on serious, complex matters places the company and decision makers at risk. Substantial funds and time may be wasted on an investigation that is either unnecessary or poorly focused if adequate follow up cannot be obtained and the initial report, through no fault of the initial report taker, is sketchy or inaccurate. Worse, a serious potential problem may not receive the attention it deserves because the initial report does not capture the gravity of the situation and an adequate follow up is not conducted.

How Basic Reporting Programs Handle Follow Up With Anonymous Whistleblowers

In order to offer anonymous reporting, hotline providers refrain from taking identifying or contact information from an informant wishing to remain anonymous. The potential for follow up is provided by giving the anonymous caller with a “ pin” and asking the person to call back after a certain period of time. The company reviews the initial report and submits a script of questions back to the hotline company if follow up is desired. If the anonymous whistleblower calls back as requested and can provide his or her “ pin” , the operator taking the call uses the pin to access the script of questions. The operator asks the designated questions, records the answers and provides a follow up report to the company.

Web-based reporting programs follow the same general process, with the company placing the script of questions in a secure file that the anonymous informant can access with the given pin. If the anonymous whistleblower logs in as requested, he or she enters responses into a digital file where the company can review the answers.

Inherent Limitations and Risks With Follow Up Available Through Unaided Reporting Systems

1. *Dependent on whistleblower calling back.* Fifty to perhaps sixty percent of anonymous whistleblowers do not call back a second time to provide follow up. While this level of failure in the

follow up process may be acceptable with respect to minor issues, it should not be considered acceptable for handling reports of potentially serious, corporate impact issues.

2. *Random operator limitation.* If the informant calls back, the call is routed to an operator available when the call is received. The odds are overwhelming that the operator will not have any familiarity with the initial report and will be constrained to basically follow the scripted questions. Second, while all the operators may have received solid training, every operator will have to receive his or her first “ follow up” call. Again, these may be perfectly acceptable limitations for the more routine matters that constitute the bulk of the reported issues, but the adequacy of a follow up process with these limitations for handling serious corporate impact issues should be carefully considered and questioned.

3. *Scripted questions limitation.* There are a number of issues that should be considered in using scripted questions to attempt to follow up on a serious corporate impact issue. First, the whistleblower may not understand the question, and the operator without knowledge of the matter at issue is not well positioned to attempt to rephrase the question. Even a well phrased question may not be understood by the person to whom it is directed. The script creates a discoverable record of both questions asked and questions not asked. Creating such a record may or may not be in a company’ s best interest.

If scripted questions are provided, should the operator ask follow up questions not on the script based upon the answers given? With no prior background in the matter being reported, the operator’ s foundation for appropriately probing answers is quite limited. With serious corporate impact issues, companies must consider how much latitude and discretion they wish to give the hotline operator who, though well trained, is not a lawyer seasoned by years of experience

4. *The written report limitation.* A hotline is limited to providing a written report, which either summarizes or states verbatim what was said. Experienced lawyers will acknowledge that with serious matters they may prefer to receive a short, carefully crafted summary report that can be amplified in oral discussions with the person who took the information and prepared the report. Unaided hotline and web based reporting programs cannot offer this reporting flexibility.

5. *The discoverable record limitation.* The questions and answers obtained through a follow up will be fully discoverable in subsequent legal proceedings. While reports must be accurate reflections of the whistleblower's concerns, judgment can be exercised in terms of how the report is drafted so as to avoid creating collateral problems or issues in subsequent legal proceedings. The operator taking the report is not equipped by legal training or background on the underlying event to exercise such judgments. While reports can be reviewed by editors at the hotline company, such editors may also be constrained by a lack of a legal background and not having participated in the interview.

6. *The inability to use documents in the follow up questioning.* In serious matters, especially where accounting and financial issues are involved, the ability to ask the anonymous whistleblower specific questions about specific documents may be very helpful, or even critical. Unless the questioner and the whistleblower are both looking at the same document at the time the questions are asked, effective and intelligible questioning about the documents cannot occur. Indeed, using documents effectively in a questioning process is a skill that takes significant time to develop.

7. *The inability to initiate ongoing follow up as an investigation unfolds.* If an investigation results from an initial report, it may be useful (or critical) to ask further questions of the whistleblower as information is gained in the investigation. Since it cannot be determined when the additional information and the follow up will be sought, a system that depends on the whistleblower to initiate a follow up contact is not well suited to such a process. If 50% or more do not call back one time when requested, one can expect that the callback rate will further decline overtime, especially if follow up questions are not ready when the callback is made.

The limitations on effective follow up with anonymous whistleblowers are inherent with hotline and web based reporting systems. These limitations can be quite acceptable over a broad range of matters reported through a company's reporting program. However, with respect to some anonymously reported matters, likely those that are more serious and complex, the potential cost and risk associated with these inherent limitations on the follow up capability of unaided reporting systems may be significant.

The JLG counsel facilitated follow up program is an integrated option that provides professionally vetted follow up when the company determines that a more robust approach will have value to the company.

How the JLG Counsel Facilitated Follow up Works

1. JLG enters into a contract with the company to serve as counsel to anonymous whistleblowers in connection with follow up questioning when, and only when, requested to do so by the company.

The contract between JLG and the company strictly limits the representation by JLG to the follow up process. JLG will not represent the employee in claims against the company or in other matters.

2. When an anonymous report is received, the taker of the report explains that the company has two options that it may use if follow up information is desired. One is the “ pin” and “ callback” system currently in place. The second is by providing the whistleblower a lawyer who represent the employee and serves as the conduit through which follow up information is sought.

The company’ s material promoting the reporting program should promote and explain both follow up options as well.

3. The whistleblower is asked to agree to participate in the counsel facilitated follow up if the company deems that such is the best method in light of the matter reported.

A. If the employee agrees, he or she is switched to a JLG identification intake system (voicemail or digital). It is explained that the identification information is being taken in anticipation of potential legal representation and will be held in confidence under attorney-client privilege. If the company does not indicate within an agreed time a desire to potentially use the JLG follow up, the identification information is removed from the system.

B. If the employee does not agree, the “ pin and callback” follow up system is still in place. The company is in a better position for at least having offered a more robust option if the subsequent follow up falters due to the inherent limitations discussed.

4. JLG sends a letter to the participating anonymous informants further explaining the process and reinforcing the fact that actual legal representation will only be triggered if the company decides to engage the counsel facilitated follow up program.

5. The company representative will decide whether follow up is desired and, if so, which of the two channels to use:

A. If the JLG counsel facilitated option is selected, JLG is notified and in turn notifies the employee, sending a retainer letter describing the limited scope of the representation. JLG receives a copy of the initial report, such other information as the company deems appropriate, and a description of the additional information the company desires to obtain from the whistleblower. The information request can be limited and specific or very general. The company sets guidelines for the nature and scope of the follow up process (i.e. a basic telephonic interview or an in-person session). JLG conducts the questioning and assists in preparing an accurate and useful report to the company. JLG also serves as the mechanism for retaining local counsel to provide the counsel facilitated vetting when desired by the company, thus providing global coverage if needed.

B. If the JLG counsel facilitated option is not selected, the follow up proceeds through the hotline or web based reporting as usual.

C. If the hotline callback system is initially selected but the whistleblower does not call back, the JLG process can be initiated if follow up is still desired.

6. JLG reports accurately reflect the whistleblower's concerns and knowledge, as established through professional vetting. The report also will take into consideration the discoverable record, both as it relates to the whistleblower and the company. The firm's attorneys can orally amplify on written reports in appropriate circumstances.

7. If the company initiates an investigation, the firm serves as a proactive channel for seeking additional information from the whistleblower as the review process proceeds.

8. If the company wishes to assure that the informant is advised of the results of any review based upon his or her report, the firm serves as a conduit to assure that the message is delivered.

Advantages of the JLG Counsel Facilitated Follow Up

1. Identity of the anonymous whistleblower is protected under the attorney client privilege.
2. Serious and complex matters will receive the professional vetting required. The report is more useful and accurate as a result of the vetting.
3. Follow up can be proactively pursued without depending on the whistleblower to callback. The rate of failure in follow up should be significantly reduced.
4. The JLG process serves as a backup to the hotline callback system.
5. Document based questioning can be part of the follow up process.
6. The company will be able to effectively seek additional input from the anonymous whistleblower on an ongoing basis as an investigation unfolds.
7. Professional vetting of a serious matter will reduce costs by better focusing any follow up investigation. Professional vetting will also better identify reports lacking foundation and reduce the potential for costly and unnecessary investigations.
8. The strength of the counsel facilitated follow up program will be a positive factor if the company must negotiate over a serious matter with regulatory or law enforcement personnel.
9. The follow up reporting process is more flexible and can help the company better manage the discoverable record, which can be important at the initial stages of an investigation into a potentially serious issue.
10. Inclusion of the counsel facilitated follow up option will confirm to employees the company's commitment to support reporting, even if serious matters possibly involving senior management.
11. JLG serves as the vehicle for retaining local co-counsel when desired by the company for the follow up, thus giving the company the ability to have counsel facilitated follow up anywhere in the world.

Cost

1. A very minimal charge is made to cover the integration with the company' s reporting system and the overhead associated with maintaining the identity database and notifying anonymous whistleblowers that counsel facilitated follow up may be initiated if the company desires.
2. If the company chooses to use counsel facilitated follow up, the firm charges very reasonable hourly rates for senior attorneys.
3. The company is in complete control of when the counsel facilitated follow up is used. The company also defines the scope of the follow up desired, such as in-person or telephonic interview, thus further managing the cost.

The firm must, of course, be sure that its efforts are sufficient to protect the interests of its client, the employee.

Why Use JLG For The Counsel Facilitated Follow Up Process

1. We have only senior attorneys who are well qualified to handle the process.
2. We strictly limit our representation to the follow up process and contractually commit not to seek to represent whistleblowers in claims against the company or in other matters.
3. JLG maintains a very low overhead structure and passes the savings in the form of very reasonable fees for highly experienced attorneys.
4. The focus on the niche of counsel facilitated whistleblower follow up will make JLG both more adept at integrating with the company' s basic reporting system and efficient in providing the follow up service.
5. We are experienced in managing and working with co-counsel. We can serve as the means for bringing on local counsel as necessary or appropriate. Using JLG as the base for counsel facilitated follow up, a company can utilize local counsel any place in the world to follow up with anonymous whistleblowers when desired.

Conclusion

If a company can envision any circumstances where the JLG counsel facilitated follow up with anonymous whistleblowers would be of value, then the company should integrate the follow up option into its reporting process at this time.

If the JLG counsel facilitated option is never used, legal fees are never incurred. The base integration charge is insignificant, and a form of inexpensive “ insurance premium.”

If a circumstance arises where professional, counsel based vetting of an anonymous whistleblower’ s knowledge and beliefs would be of significant value to the company, the costs to the company of not having the JLG option available can be very significant.

Information or Questions:

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