

EMPLOYMENT PRACTICES LIABILITY CONSULTANT

Employee Hotline Reporting Systems

By Don Phin, Esq.

I began my employment law practice back in 1983, the “early days” of employment practices litigation in California. At that time, I remember employee hotline reporting systems using 800 numbers being in vogue. They typically focused on a specific exposure such as fraud, whistleblowing, or sexual harassment. Many still do.

Along came the Internet, and reporting programs such as [NAVEX](#) and [Convercent](#) emerged. They expanded their offerings to become global operations, managing tens of thousands of hotline reports per year over a wide range of subject areas.

In this article, I will provide a rundown of some of the major reporting program players in today’s employment practices liability (EPL) marketplace, the features they offer, benefits these programs provide, and what can be done to make them even more effective.

Other vendors, in addition to those already mentioned, include the following.

- ♣ [My Safe Workplace](#)
- ♣ [Compliance Hotline Services](#)

- ♣ [Red Flag Reporting](#)
- ♣ [Employment Practices Solutions](#)

I chose these vendors due to their support for EPL reporting (not just reporting of fraud or whistleblowing allegations).

Given new cloud-based technologies, there has been a flurry of new vendors including [Employee Confidential](#) (where I am on the Board of Advisors), [Ethicontrol](#), and many more. I recently learned of a new mobile app, AllVoices, which claims,

With AllVoices anyone can anonymously report instances of harassment, discrimination, or bias (either witnessed or experienced firsthand) directly to their CEO and company board.

I also learned about [Spot](#), another app that allows a complainant to confidentially record his or her concerns to a chatbot, which will use artificial intelligence to conduct an interview and create detailed reports that can then be sent, anonymously or not, to higher-ups.

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The Types of Risks That Can Be Reported

Reporting hotlines can address a wide range of risk exposures. They include financial misconduct, criminal misconduct, ethical violations, discrimination and harassment, privacy and security concerns, safety concerns, and other, more general misconduct. While companies like NAVEX support these complaints, other hotlines focus on specific risks such as fraud, ethics, EPL, or safety. I conducted a phone interview with Amina Haswell, MBA, CCEP, who is the manager of human resources (HR) risk and compliance for Wawanesa Insurance. Wawanesa already used Navex's services but needed to do some customization for it to support the EPL-type claims. The lesson: If you purchase one of these programs, you should first find out if they are already pre-configured for EPL exposures.

Legislation Impacting EPL Hotline Usage

While laws such as Sarbanes-Oxley (and others) apply to financial whistleblowers (or the Occupational Safety and Health Administration [OSHA] with regard to safety concerns), there is no "whistleblower"-specific legislation requiring that reporting programs must be used for EPL purposes.

Program Features and Benefits

The goals of a reporting program are to (1) send a message to its employees that the company will not tolerate harassing, discriminatory, or otherwise wrongful conduct; (2) provide an easy, expedient, and confidential way to make internal complaints; and (3) ensure that there is good case management of any complaints that are made.

While many companies still support call-in—based hotlines, most companies have expanded their offerings to include Web-based, text-based, and mobile applications. In addition,

employees still have the traditional avenues of an executive's "open door" or reporting a complaint directly to a manager or to the HR department. Here's a listing of possible features of reporting programs.

- ♣ Global based/US based
- ♣ Customized workflows and rules
- ♣ Board reporting
- ♣ Spanish and other languages
- ♣ Data and metrics
- ♣ Compliance with data privacy laws
- ♣ Case management/investigation resources
- ♣ Permissions/notices/coordinating teams
- ♣ Push surveys
- ♣ Multiple reporting channels
 - Toll-free number
 - Customized website
 - Email
 - Text messaging
 - Fax
 - Postal mail
- ♣ Client-branded Web reporting pages
- ♣ Case management system
- ♣ Exclusive client Web reporting URL
- ♣ Client-branded hotline training video
- ♣ Promotional and instructional material
- ♣ Consultation with subject matter experts
- ♣ Rapid incident reports
- ♣ Monthly summary reports

In one interview I conducted, the user (who wished to remain anonymous) felt that the fact that she could coordinate internal and external support on a case file, without using

emails, was of great benefit. This feature is not available on call-in-only-type systems.

An Increased Demand for Hotline Services

The #MeToo movement has motivated many employers to look deeper into hotline reporting services. Owing to the heightened awareness about workplace-related sexual harassment, many employers will provide access to these services not only to employees but to customers, clients, and other stakeholders as well.

The Fear of Using Reporting Systems

Employees have been able to report their concerns to management for as long as I can remember. Every company claims to have an “open door.” However, many employees do not take advantage of the chance to report concerns, due to a fear of the repercussions or negative perceptions they feel will be aimed at them afterward.

Many workplace violations result from somebody exercising power over a subordinate, in the form of sexual harassment, bullying, or forcing someone to go along with an ethics violation. Employees remain in fear of this power, even if a reporting system exists.

When they make complaints, employees are concerned about the potential for retaliation, including being terminated or losing career opportunities. Employees are also concerned about being ridiculed, embarrassed, and attacked as a result of having made a complaint. Given such realities, providing an anonymous reporting system does not necessarily mitigate these traditional fears associated with reporting.

Program Limitations

Anytime a reporting system receives complaints, whether the reporting system is managed by the EEOC, OSHA, or your own company, there will be a range in the importance of reports, from those that are trivial to ones that

are serious and of immediate concern. For example, of the approximately 6,696 sexual harassment claims filed with the [EEOC](#) in 2017, 4,206 (about 63 percent) were closed as having “no reasonable cause.”

While there may be anonymous disclosure of severely inappropriate employment practices, there can also be relatively less urgent yet still significant employee complaints. Examples may include a complaint that an employee’s chair is causing back problems or that the employee who sits next to him or her stinks of bad perfume.

Reporting programs can also be manipulated by their users either to help protect themselves from performance or other concerns or to sabotage someone else. For example, a sales representative who is not achieving his mandated quarterly numbers could submit a bogus complaint about a nearby coworker harassing him, concluding with a comment along the lines of “I think his behavior is really having an impact on my performance” in an attempt to mask the real reason for his poor performance (e.g., his unwillingness to make the appropriate number of sales calls).

Furthermore, these systems cost time and money to purchase, implement, promote, and support. Companies face challenges when they do not make the adequate investment and the reporting system falls short of expectations. There is also a concern that technology-driven interfaces, whether through voicemail prompts or an online interface, can feel “cold” and chill an employee’s desire to even work with the system. Interestingly, and this makes intuitive sense, the non-Web/online reports (meaning someone speaks to somebody internally) have higher rates of substantiation.

Many attorneys to whom I spoke also mentioned that a company is limited in the extent to which it can investigate a claim that is reported anonymously. According to [Dan Rowley, Esq.](#),

Anonymous complaints to hotlines are difficult to investigate. They are more productive when you are able to identify the

reporting party and convince them to share their story. I had one investigation where I was never able to identify the reporting party and, therefore, never able to gather the facts that may have supported their allegations. It ended up being a waste of money and time. In another case, I was able to identify the reporting party, and it turned out that additional facts reported were critical to the investigation.

Margot Sandenbergh, CEO and cofounder of Employee Confidential and Campus Confidential, provided these insights and observations about anonymously reported claims.

It's necessary that people who report claims anonymously have their own secure and confidential dashboard. This will allow them to feel they are being heard and encourage them to continue being part of the investigation. It is vital to include case updates and a message board for them to keep communicating with the company case investigators. The reporters must have the ability to keep attaching additional evidence and contribute to building a witness list.

Who's on the Other Line?

Perhaps the major concern of anyone making a report of inappropriate employment conduct is the "who, what, when, and how" pertaining to the actual handling of his or her complaint. This applies to complaints made either anonymously or in person.

Companies have options on who handles the first contact. Often, it is either an employee of the vendor who operates the reporting system or someone assigned internally (i.e., an employee of the organization using the reporting system) to receive complaints. This is a tipping point because how and when the employee complainant receives a response (or receives no response) dramatically affects the complainant's confidence in the reporting system. Once an employment-related situation

escalates to a certain critical point, there is usually a handoff to a more experienced investigator and perhaps the legal department. Managers not trained in proper investigation techniques should not be investigating complaints. There is also wisdom in having independent investigators get involved. I would suggest "testing" the program with some fictitious complaints.

Employers are wise to promote the confidentiality and benefits of using their reporting system. They should also publish both written and video-based frequently asked questions, explaining how the entire process works. In addition, the publication of success stories should also be used to promote the effectiveness of the reporting system. Conversely, if even one poor employee experience becomes known to the workforce, it can result in a chilling effect for the entire reporting initiative. These programs are all about trust, and, as we all know, the cloth of trust is always woven in a delicate fabric.

Limitations Aside, There Is Great Value in Having Hotline Reporting Programs

Obtaining information about reporting systems from individual insured businesses or their EPL insurers is difficult at best. I tried to interview several underwriters and all were tight-lipped. All I could get was statements like "I can tell you that when underwriting EPL coverage, we don't ask what specific risk management suite/provider an insured uses, but we do ask whether or not they use one. If they do, that is taken into consideration when offering both policy terms and from a rating/pricing standpoint. Credits are provided when a reporting system is being utilized."

The best we can do in evaluating the effectiveness of reporting systems is to assess the experience of reporting hotlines in general. The Association of Certified Fraud Examiners (ACFE), in the 2016 [*ACFE Report to the Nations on Occupational Fraud and Abuse*](#),

indicated that 47.3 percent of ethics violations are discovered through tips where there were hotlines, compared to only 28.2 percent for organizations without hotlines. Tips are still the most common method of discovering ethical misconduct. Interestingly, 51.5 percent of tips are generated by employees, while 31.9 percent are received from customers, shareholders, competitors, and vendors. This is why a reporting program should reach out to all stakeholders—not only to employees.

One example of how hotlines can provide employers with a proactive approach to controlling unethical behavior is by reviewing their impact on the dollar amount of loss and the duration of the misconduct before it is directly addressed. According to the 2016 AFCE survey, organizations that detected fraud via hotline tips experienced a median loss of \$147,000 and a median duration of 17 months. In contrast, when fraud is detected by external audit, the median loss is \$470,000 and the median duration is 24 months. The AFCE study also indicates that the median loss for organizations without hotlines was \$200,000 compared to only \$100,000 for those providing access to hotlines. This is largely because companies with hotlines tend to have issues brought to their attention much sooner than those not offering a hotline.

I have every reason to believe these statistics would also hold true in the EPL arena.

It is also important that a reporting platform includes the ability to identify and build data on the root causes of incidents, such as specific and individual behavioral factors appearing to cause the complaint or, on the other hand, whether inappropriate employment conduct is condoned or even encouraged by a company's culture. The ability of a reporting system to make these kinds of distinctions and inferences would help companies better identify risks and prevent employment-related incidents. Platforms such as Employee Confidential and Convercent include this feature.

The 2017 Ethics and Compliance Benchmark Report for Legal Professionals

This is an [excellent report](#) that is well worth a read. Some of its more significant findings include the following.

- ♣ There was an increase in the overall reporting rate per 100 employees in 2016. The reporting rate rose in 2016 to a median of 1.4 reports per 100 employees after 2 years at 1.3 reports per 100 employees. Over the past 7 years, there has been a significant rise in the reporting rate—a 56 percent increase since 2010.
- ♣ The majority of all reports received fall into the HR, Diversity, and Workplace Respect category, and this percentage continues to fluctuate within the 69 percent to 73 percent range. Other categories include accounting-related reports, ethics, safety, and theft.
- ♣ When compared to the number of reports of retaliation going to outside agencies like the EEOC, organizations are still not getting the opportunity to address a claim of potential retaliation before it is reported externally. (This is most likely because, at that point, complainants don't believe "the company system" will protect them.)
- ♣ In the past 8 years, there has been a slow but steady decrease in the rate of anonymous reports from the 2009 peak rate of 65 percent, down to 56 percent in 2016. A lower rate of anonymous reporting can be an indicator of employees trusting the system and the people who manage it ... or an indication of a strong job market.
- ♣ Only the substantiation rate of HR, Diversity, and Workplace Respect reports was below 40 percent. Noting that more

than one-third of all HR, Diversity, and Workplace Respect cases are substantiated, these are still very important cases for organizations to address. And, if the organization also adds a separate reporting tier for HR and managers to enter reports received directly, the resulting report analytics will help organizations identify localized problem areas more quickly.

Conclusion

Hotline reporting systems are used by more companies every day. They provide employers with yet another tool to help reduce

risk exposures (in addition to becoming aware of them at an earlier point in time) and maintain an ethical company culture. The effectiveness of reporting systems will largely depend on marketing their existence to employees and on the quality of the experience employees have when utilizing them.

Don Phin, Esq., is coeditor of EPLiC and president of HRSherpas, Inc. He speaks frequently on HR risk management issues and has written numerous books on the workplace. To learn more, visit www.donphin.com.