

ACCIDENTAL CROOK

A GUIDE TO HANDLING ALMOST ANY LEGAL SNAFU

By: Jack Garson, Esq.

One of your VPs walks into your office, anguish written all over her face. “Can we talk?” she asks sheepishly. Seriously, has the delivery of good news ever started with those words? Ever?

Turns out, your company broke the law. In the real world, this could be anything. The following happens all of the time:

- You have been misclassifying some of your employees as exempt from overtime. You’ve been paying them a fixed salary regardless of how many hours they work. But you should be paying them 50 percent more per hour for every hour they work over 40 hours per week. You may have racked up a big liability.
- You have been underpaying your taxes. It’s complicated, but your finance person realized that you’ve been deducting certain expenses each year. Instead, you should have been capitalizing these expenses and only writing off a small portion annually.
- A new law went into effect that regulates your industry and it slipped by everyone at your company. All of your account execs were supposed to get training, obtain licenses and pay a registration fee. The deadline for all of this passed half a year ago and now penalties are mounting. Worse, the unlicensed sales are in legal limbo. Theoretically, your customers could walk from every deal made in the last six months.

When faced with this kind of news, CEOs sometimes pursue one of two equally disastrous courses of action: panic or denial.

The first bit of advice is simple: Don’t.

Fear and frenzy don’t make problems go away. Often the situation is far better or at least far more manageable than you imagine at first. Even if the initial news is just the tip of the iceberg, you need to know what you are dealing with so you can attack the problem effectively.

Don’t put your head in the sand, either. Pretending there is no problem is not the same as solving it. Some folks think that if they ignore a problem, it will go away and, occasionally, some problems do go away. But you can’t count on that lucky outcome. If ignored, the problem may grow bigger. Or, you may go to sell your company years later, only to have the buyer kill the deal because a cloud of potential liability still hangs over your business.



THE GAME PLAN

So, if you’ve broken the law, put together a game plan. Start here:

1. Get all of the facts. Fully investigate the situation. Too many times, you start off with bad or incomplete information. While you’re CSI-ing it, keep the yellow tape around the crime scene. That is, limit knowledge to people who need to

know.

2. Get good legal guidance. Consult with an attorney that has a lot of experience with your specific situation. If one of your employees has bribed a foreign official, violating the Foreign Corrupt Practices Act, don’t consult with a DWI attorney (who, by the way, is invaluable if your top salesperson was arrested for drunk driving). Bottom line: get the right guide.

In one case, we hired the former head of the IRS for advice about possible tax liabilities. The case was then five years old, and the CEO had attempted to fix the problem when it first occurred but he only partially addressed the problem, and it had worried him ever since. “You can’t unscramble the eggs,” said the former IRS chief, “but do whatever you can to fix the problem now and pay any taxes that are due.” The CEO took the advice and finished the clean-up he had started years before. It all paid off because the company later came under scrutiny, and withstood it, by demonstrating its diligence and compliance.

3. It’s not just what you know. If your company is facing a

criminal prosecution, it can be invaluable to hire attorneys that used to prosecute the very crimes involved. They understand how the case against you works and how best to defend or settle the matter. Even better, hire former prosecutors who used to work in the same office that has charged your company. They will know the people who are going after you and what makes them tick.

4. Throw 'em to the wolves? In many cases, a lone employee has caused all of the trouble – for example, by stealing or drinking on the job and getting into a horrible accident. In these cases, you have to decide whether you stand by your employee or turn him or her into the authorities. There are no simple answers. But there are certainly factors to consider. Was the employee a serial-embezzler, stealing from your company and several prior employers? Did the employee take a bribe to hire a subcontractor that produced inferior work that hurt both your company and your customer? Did the employee rip off your computer data and sabotage your computer systems? Most likely, you owe these employees no loyalty. Protect your company, not them.

In other cases, employees break the law but have all the best of intentions. Sometimes they aren't aware of new regulations. Other times, in their zeal to produce for you, they cut corners and fail to get necessary approvals. When the wrong-doing is a one-time occurrence, there is a much greater reason to stand by your employees, pay for their defense and, if they've truly cleaned up their act, keep them as employees. A side benefit to this approach is company morale. When employees act in good faith, believing that their conduct is in the best interest of the company, your loyalty to them will instill loyalty to your company in other employees. Understand that many of your employees, even those who always follow the rules, identify with the ones who get in trouble.

5. Managing information. Remember to limit who knows what went wrong. You also need to be prepared to respond

to media inquiries. If the public already knows or publicity is inevitable, work with your lawyers and public relations experts to issue a press release.

Remember that you also may need to communicate with a variety of constituencies, from customers to vendors, trade associations and even regulators. Think through what you need to say and then do so uniformly.

6. Contain the problem and put it past you. Some violations are really battles over what companies in your industry should be allowed to do as part of their regular business. Opticians and ophthalmologists have fought for years over whether opticians can prescribe medicine and perform certain procedures. Here, "crimes" are often policy disputes and turf battles. Fighting the charges may be good business.

But usually, that isn't the case. Often it's best to put aside pride, admit mistakes and take your lumps. Paying a fine and changing your ways is often a far better outcome than the expense, distraction, and uncertainty of a protracted legal battle, especially when you're fighting authorities that can call upon seemingly limitless resources. Moreover, some prosecutors have hidden agendas and would love nothing more than waging a big battle that produces publicity and will help them win re-election.

7. Prevention is the best cure. Most of all, avoid breaking the law in the first place. Like too many lessons in life, this is one you don't want to learn the hard way. It can take years to shake off the stigma of a criminal case, even when you prevail. Better to implement a program of legal compliance that monitors for new laws and complies with existing requirements.

Everybody makes mistakes. Smart executives avoid them when they can and swiftly fix them when they can't.

ABOUT JACK GARSON



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Jack Garson's practice focuses on Real Estate, Construction and Business law. He serves as a legal advisor for numerous local, regional and national companies. In his role as legal counsel, Jack also serves as a strategic advisor and lead negotiator. Further, Jack provides guidance on the structure of complex transactions, the resolution of business disputes, the growth and sale of companies, and the management of issues such as liability and risk reduction, employment practices, and enhancing profitability.

ABOUT OFFIT KURMAN

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In the past two years, we've grown by 50% through expansions in New York City and, most recently, Charlotte, North Carolina. This growth has provided immense value to our clients and attorneys.

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