

# Thinking about compliance as an essential tool in our new business world

March 27, 2020

Business organizations' chief legal officers and compliance personnel face extraordinary challenges created by the coronavirus/COVID-19 pandemic as some organizations hope to participate in government programs as a means of accessing vital capital, and others react to their economic situation with employment actions.

Participation in government support programs can present a significant challenge, particularly for those organizations that have little or no experience with federal or state governments as a purchaser or financial supporter of their economic activity. Forecasted government financial support programs may be the first time organizations have found themselves needing to comply with the federal laws and regulations such as the civil False Claims Act and 18 U.S.C. § 1001, to name two that govern these programs.

At the same time, many global companies, to respond to the potential economic consequences of the pandemic, are preparing to take employment actions without having a plan in place to preserve ongoing internal investigations, compliance reviews and legal audits. Other business organizations, though fortunate enough to come out on the other side of this crisis with the ability to continue operations, or even to expand through mergers or acquisitions of other businesses, may not have the right team in place to avoid potential legal risk.

Our experience with similar actions in the past has taught us the importance of strategic planning and working closely with the organization's legal, compliance, audit and HR personnel to develop a plan and sequence to avoid losing opportunities to mitigate legal risk.

The COVID-19 pandemic is not the first time that organizations have faced the difficult process of winnowing their work force or restarting their business following an economic downturn or natural emergency. The 2008 economic downturn, which some call "the *Great Recession*," is the event many think about when asked to recall a time when layoffs took place at enormous levels. While that is certainly true, certain industries have had similar patterns of lost jobs since 2008 due to either an impactful event in their industry or a natural disaster, such as Hurricanes Katrina or Sandy.

## Maintaining your ability to continue conducting internal investigations and reviews is as important as planned employment actions

A recurring lesson from these economic stories is that business organizations often lose their ability to go to knowledgeable personnel to secure information that could be used to objectively evaluate events that create legal risk; the common refrain being "We could have talked to so-and-so but they were let go and we didn't interview them before they left." Alternatively, business leadership may try to move quickly and infuse needed revenue by accessing a government support program or government customer without first assessing their ability to comply with unfamiliar laws and regulations that govern the activity. The point person for the new enterprise may not have experience with compliance measures designed to promote compliance with these standards, or worse, is simply tasked to put his or her finger in the dam in a perfectly understandable effort to save the company and employees' jobs by agreeing to

rules the company does not understand or with which the company cannot possibly comply.

When everyone gets together to discuss the gaps in the internal review, a very frequent cause is that those conducting the review were not coordinating with those responsible for the employment actions or for implementing compliance controls around new buckets of risk. Once the employee(s) have left the organization their willingness to cooperate is rarely as great as when they were employed. The situation also further complicates the legal privilege picture, as interviewing former employees, depending on the particular circumstances, may not be recognized in a particular jurisdiction as a privileged conversation.

Given the potential impact on legal risk mitigation, organizations may want consider taking the following steps:

1. Declare the compliance officer an essential employee and not subject to any planned employment actions;
2. Call for a meeting with legal, compliance, internal audit and human resources to develop a list of all ongoing reviews and to identify the employees with critical information needed to complete them;
3. Consider whether the meeting should be covered by the attorney-client privilege, or whether the meeting instead, or also, has a business purpose. If the meeting has a dual purpose, make sure you take steps consistent with case law in your jurisdiction to avoid jeopardizing privilege.
4. Develop a schedule for information collection that is also used by the organization to determine how to proceed with employment actions; and
5. If an employee's status is going to change, consider setting up some type of arrangement where the employee is provided reasonable compensation for their support for ongoing investigations and reviews.

## **Business organizations can adopt well-established compliance approaches already in use in heavily regulated businesses**

Fortunately, businesses in sectors that routinely interact with government entities, such as health care, defense and aerospace, as well as a multitude of other businesses that do business with federal and state governments, have learned that a working partnership between an organization's compliance personnel and the balance of its business departments can prevent legal risk generated by negligence, fraud or other inappropriate conduct. The need to establish this partnership between an organization's compliance and business arms is particularly true for organizations that are new to a particular activity, where a compliant culture built over years is not present.

Without an integration plan accompanying the addition of a new business line, source of funding, or business entity, a company can fail to detect and mitigate a new industry sector, geographic or existing legal risks that may put the organization at risk of a future enforcement action. Planning here is tantamount, and every bit as important with employment actions, as there will be individuals and organizations that fail to do so on such a scale that it results in government enforcement agencies and departments could bring civil or criminal actions against the offenders.

1. Even before submitting the paperwork to apply for a federal or state relief program, organizational leadership should, "What are the rules, can we comply with them, and how will we comply with them?"
2. If the organization does not have an active compliance program, identify an individual with the necessary experience, training and authority to serve as a compliance officer for the new program. Depending on the complexity and length of the government program, it may be necessary to retain outside resources through legal counsel for help identifying and mitigating the risks of running afoul of program rules.
3. As part of the application process, compliance personnel should have a seat at the table from day one, as they will need time to put in place compliance education, evaluation and detection.

## **At some point, business organizations that are able to operate may try to jumpstart their business without appropriate compliance assessments**

History strongly suggests that those business organizations that restart business operations, including reopening

plants and manufacturing operations, may do so with incomplete staff, including legal departments and compliance functions. Also, there often is an incentive to take on more risk to make up for revenue shortfalls that occurred during the crisis. Recent media coverage has confirmed that this type of restart is underway in China and in small parts of Europe. Other business leaders optimistically will see opportunities to expand their businesses after the pandemic is wrestled to the ground. These actions, while laudatory, raise the question whether the legal risk function will be adequately paired with these actions. Much like the aforementioned situations, business leaders should take steps to have their legal and compliance teams, as well as outside counsel, included in these go-forward discussions at the outset, to assure well-intended efforts are not swallowed by unintended legal risk.

For information regarding Dentons' Compliance Agility Assessment, which Nextlaw In-House Solutions and Dentons developed to help companies identify control weaknesses and compliance failures, please reach out to the authors or your regular contact at Dentons.

## Your Key Contacts



**Stephen L. Hill, Jr.**  
Partner, Kansas City  
D +1 816 460 2494  
[stephen.hill@dentons.com](mailto:stephen.hill@dentons.com)



**Sara Holzschuh**  
Partner, Kansas City  
D +1 816 460 2631  
[sara.holzschuh@dentons.com](mailto:sara.holzschuh@dentons.com)



**Chris (Christopher) E. Pinnington**  
Dentons Canada Chair  
Chief Executive Officer,  
Nextlaw In-House Solutions,  
Toronto  
D +1 416 863 4409  
[chris.pinnington@dentons.com](mailto:chris.pinnington@dentons.com)