

INSIGHT: The Hidden Magic of Mandatory Crime Reporting Laws

By T. Markus Funk, Lilian Timmermann, and Marcus Haggard

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White collar attorneys regularly discover crimes like theft, bribery, and embezzlement committed by current or former employees and competitors. Perkins Coie attorneys say state mandatory reporting laws, like Colorado's, provide formal legal "cover" for disclosure of suspected misconduct. They offer best practices for reporting crimes to authorities on behalf of clients.

First, a basic reality. All of us, as attorneys counseling companies on white collar matters, are likely to have discovered crimes such as theft, bribery, and embezzlement committed by current and former employees, as well as by competitors. We also know that such bad acts (and bad actors) are not regularly reported to law enforcement.

In fact, what prevents more widespread reporting is the understandable fear that the "whistleblowing" company—or individual—may face civil exposure for, say, defamation or tortious interference, not to mention the potential negative publicity accompanying such law enforcement outreach.

As experienced white collar practitioners can appreciate, however, having the formal legal "cover" of a mandatory reporting statute to report suspected misconduct can be exceptionally valuable. Yet many states do not have such a requirement—and even in those that do, few practitioners are aware of them.

AN ALTERNATIVE TO THE TRADITIONAL MODEL: COLORADO'S BROAD MANDATORY REPORTING LAW

Broadly speaking, and as most of us vaguely remember from law school, there is no general duty to report crime. Yet all states have enacted some limited form of mandatory reporting laws. Every state, for example, requires government-regulated professions—licensed counselors, doctors, or public officials—to report certain crimes committed against vulnerable populations they encounter in their profession.

Mandatory reporting requirements for the general public, in contrast, are considerably rarer. And those states with such statutes (including Florida, Alaska, Massachusetts, Rhode Island, Texas, Washington, and Ohio) require reporting only of violent crimes (such as armed robbery or sexual battery).

Finally, these mandatory reporting statutes almost universally limit the duty to report to situations where a person has a high quantum of certainty that a crime has been committed: for instance, most statutes require direct knowledge of the crime and many require that the individual have directly witnessed the crime.

Thus, while it largely remains correct that no "general duty" to report crime exists, a patchwork of state laws creates duties for certain people to report certain crimes in certain circumstances. In addition to criminalizing the failure to report a crime, many states' mandatory reporting statutes provide immunity from civil suit for reporting the specified alleged crimes.

Unlike the limited mandatory reporting laws described above, Colorado has a uniquely broad mandatory reporting statute. Colorado Revised Statute § 18-8-115 requires "every corporation or person who has reasonable grounds to believe that a crime has been committed" to report the crime to authorities and other potential victims. If the corporation or person does so in "good faith," they are shielded from civil liability related to the reporting.

In sharp contrast to the patchwork approach most states have adopted, Colorado's broad mandatory reporting statute can be very valuable to companies. Most significantly, the civil immunity provision gives cover to anyone making a good-faith report. From a white collar practitioner's perspective, this is great news.

BEST PRACTICES WHEN REPORTING CRIMINAL ACTIVITY

While likely old hat for many of our experienced peers, it still is worth noting that there are certain best practices that must be kept in mind when reporting crimes to authorities on behalf of clients.

1. Conduct Careful Due Diligence, Ensure Credibility by Presenting the Mandatory Referral ‘With a Bow’

The reputation an attorney has with local law enforcement will carry great weight when it comes to how they view a referral. In the spirit of maintaining (or, as the case may be, helping develop) a reputation for reliability and professionalism with the authorities, practitioners should first always fully investigate the matters they are referring.

They should also take care to not inappropriately shade their findings. The facts must be fully and accurately developed, gaps should be filled to the extent possible, and any tricky legal issues should be identified.

Also be sure to make clear how the authority being addressed has jurisdiction over the matter. After all, the objective is to make it easy for the busy prosecutor or regulator receiving the information to quickly assess the strength of the potential case, identify any thorny issues, and feel that the referral is in fact made in good faith (and that you, as the referring party, will be a trustworthy partner with whom the prosecutor or regulator can work on the matter).

2. Document Critical Steps, Identify Statutory Basis/Motivation for Referral

To limit any allegation that the referral was not, in fact, made in good faith (or that the facts were somehow developed in an inaccurate or biased manner), always document both the process and the findings. Such documentation could include a written investigative work plan, memoranda of interview, and a summary of the facts (which leaves out any privileged communications/observations).

Similarly, when the report is being made under a statutory obligation, the referring party should include “Disclosure Made Pursuant to [Applicable Statute]” in all subject headers (which will also be critical should the referring party later be questioned about the motivation for reporting).

3. Do Not Damage Your Reputation

Related to the first point above, busy white collar practitioners will interact frequently with law enforcement. If an attorney gets a reputation for filing non-meritorious or misleading reports, law enforcement will undoubtedly lose interest.

LOOKING AHEAD

State mandatory reporting laws have created limited exceptions to the general rule that there is no duty to report. Building on that, broader mandatory reporting laws can incentivize the disclosure of suspected misconduct by reducing the potential for formal and informal adverse consequences.

There is much to be said for the broader adoption of such beneficial legislation, and practitioners should keep a keen eye on developments in mandatory reporting requirements within their state. As more states (as well as lawyers and their counsel) appreciate the benefits of Colorado-style reporting requirements, the landscape of mandatory reporting laws in the U.S. may shift.

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CONTACTS



T. MARKUS FUNK
PARTNER
DENVER
D +1.303.291.2371
MFunk@perkinscoie.com



LILIAN M. TIMMERMANN
ASSOCIATE
DENVER
D +1.303.291.2354
LTimmermann@perkinscoie.com



MARCUS A. HAGGARD
ASSOCIATE
DENVER
D +1.303.291.2370
MHaggard@perkinscoie.com