

Legal Alert: Sarbanes-Oxley Compliance Issues – Document Retention & Whistleblower

The **Sarbanes-Oxley Act** (commonly referred to as “SOX”) creates two relatively new requirements for tax-exempt organizations: (1) a prohibition on destroying, altering, or falsifying documents to prevent their use or discovery in an official proceeding; and (2) protections for whistle-blowers. Because violations of these provisions may trigger strict criminal and civil sanctions, boards must adopt written policies that provide for adequate document retention and protection of whistle-blowers.

(1) Written Document Retention & Destruction Policy

SOX prohibits destroying, altering, or falsifying documents to prevent their use or discovery in an official proceeding or to obstruct a federal investigation, and the Act imposes criminal liability on the tax-exempt organizations that fail to comply. And, importantly, an organization may even be held liable for the actions of its employees.

The Document Retention and Destruction Policy should be responsive to the types of written and electronic records that your organization uses and the document retention requirements that your activities and funding sources demand. When creating a policy, your organization should keep in mind that some types of documents must be retained under the law for a specified period of time. Additionally, it is important that any document retention policy provide that documents are not to be destroyed if your organization suspects or is aware that the documents are the subject of pending litigation or official investigations. Generally, it is a crime to destroy documents related to litigation and investigations, so, in such an event, organizations should suspend their normal document retention policies even if the policies would otherwise call for the destruction of these documents.

(2) Whistleblower Policy

Sarbanes-Oxley also requires organizations to protect whistle-blowers. It is illegal for a corporation to punish, in any manner, an employee who reports suspected illegal activity (Note: many organizations adopt policies that also cover the reporting of unethical activity). Such activity includes a wide variety of behavior, from financial fraud to sexual harassment. Those who retaliate against whistle-blowers—by harassing, firing, demoting, or otherwise punishing them—are subject to criminal penalties, and whistle-blowers who are retaliated against may seek civil damages from their employers. In “whistle-blowing,” whistle-blowers need not prove illegality or assert violations of specific laws. Rather, a whistle-blower need only allege a reasonable belief or suspicion of illegal behavior.

An appropriate Whistleblower Policy should include two main features. First, the policy should provide that whistleblowers shall not be retaliated against by other individuals within the organization. This means that a person should not be fired, demoted or suffer other negative treatment merely for being a whistleblower. Having a formal review policy for all employees and documenting reasons for changes to an employee’s position will help protect your organization from lawsuits if an employee later accuses the organization of retaliation. Second, the policy should provide that employees are given an effective mechanism for reporting suspected illegal acts.

Your organization should create and adopt both policies if it has not done so already. Beyond the requirements of SOX, the new Form 990 asks whether exempt organizations have these policies and many sources of funding are looking increasingly to compliance with the provisions of Sarbanes-Oxley as an indicator of good governance. Because of the severity of the liabilities possible for violations of either of these requirements, your organization should likely consult a lawyer for assistance with creating effective and protective policies.

Can The Law Project help my organization?

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