



RICHARD T. PREISS

Compliance Programs – When They Work and When They Don’t

Introduction

In today’s regulated economy, compliance programs are a necessity across most industries. That is no less so for the construction industry.

How a compliance program is developed, whether it is tailored to a particular company, how it is viewed and supported by management, and whether it is “genuine” are all important considerations in determining whether a compliance program will be effective, whether it will protect the company and its employees, and whether it will create a culture of compliance.

There are two basic approaches in determining why a company should have a robust compliance program and they are not mutually exclusive. The first approach involves a company’s decision to define itself as a responsible corporate citizen because its leadership believes that is the appropriate way to conduct business. The other is self-protective—a company with a robust compliance program is more likely to benefit from employees who are aware of the risk of non-compliance and committed to avoiding the consequences of that risk.

Perhaps the most critical overall factor in developing a compliance program is to gain from the best in human motivation and avoid the consequences of the worst.

Why Have a Compliance Program?

Federal and state prevailing wage laws, false claims with both civil and criminal implications, OSHA, environmental regulations, building codes, set aside programs, and a host of other laws and regulations have made doing business more complicated and costly, and have placed construction companies and their employees in need of compliance programs that guide them through the regulatory maze and the accompanying legal risks. Any construction company that wants to conduct its business in compliance with all these laws and regulations and thus avoid costly mistakes and damage to its reputation has little choice but to put a compliance program into place. Any construction company that does not recognize the value of this approach is making a serious mistake as the costs of non-compliant conduct can reach shocking levels. Those costs can include the loss of business opportunities, the inability to work for government entities, civil lawsuits, and perhaps even criminal prosecution. Companies whose

Please Contact

Richard T. Preiss

rpreiss@pecklaw.com

C O U N S E L T O T H E C O N S T R U C T I O N I N D U S T R Y

NEW YORK • NEW JERSEY • FLORIDA • CALIFORNIA
WASHINGTON, D.C. • ILLINOIS • GEORGIA • PENNSYLVANIA

WWW.PECKLAW.COM

names appear in the media for the wrong reasons or who do not appear to do business in an honest and compliant way pay a high price for their failure to avoid non-compliance.

Compliance programs that are championed by management, professionally executed, and regularly updated keep a company and its employees away from legal risk. Through clarity of policy, company education, and active involvement in key regulatory issues, companies can save money and time, and protect their reputation. When each member of the company knows and understands the applicable rules, there is a significantly greater likelihood that the company will act in a compliant manner.

Those contractors who hope to compete for contracts with any federal agency *must* have a compliance program that satisfies the rigorous and specific requirements of the Federal Acquisition Regulation (FAR).

Companies that actively train their employees to comply with specific policies, obtain those employees' guarantees that they have read and understood the policies, and record their attendance at training sessions, can have an advantage when an employee uses bad judgment and causes the company to undergo regulatory scrutiny or criminal investigation. Such a compliance program could enable the company to persuade a regulator or prosecutor (or in some cases even a judge) that the company should not be penalized for the improper action of a properly trained rogue employee who committed a non-compliant act despite all the excellent efforts of the company to be sure none of its employees did so. Such circumstances are, of course, never pleasant for anyone; however, the protection of the company is directly linked to the protection of all its employees.

Finally, as stated earlier, having a genuine compliance program that sets forth what is expected of everyone, and explains why, is the right thing to do for both the company and the employees, and increases the likelihood that the company as a whole will understand and fully commit to the program.

The Elements of a Successful Compliance Program and the Culture of Compliance

A genuine and successful compliance program begins with the executive management's acceptance of the need to implement and support the program. That acceptance must be sincere and enthusiastic, for it is the responsibility of management to lead a culture of compliance. Any disparagement of the policy among management will be quickly detected by the employees and the program will almost certainly be doomed to failure.

A culture of compliance is one that unconditionally recognizes that compliance is as much a part of the business of the company as is, for example, business development. Without both, the company will not survive in a competitive and highly regulated construction market. Thereafter, executive management

must ensure that all levels of the company's management "buy in" to the program and take ownership of it, along with the employees. That means pushing down the expectation of a culture of compliance to everyone from the top level of the company to the bottom.

Any genuine compliance program and policy must be properly tailored to the individual company and the business it conducts. So called "off the shelf" programs are rarely effective and are quickly seen by employees for what they are – a haphazard and insincere solution that solely addresses appearances and has little to do with the actual business of the construction company. Such programs will not be taken seriously by the employees.

For example, a local builder of private homes has little use for a compliance program designed for a contractor that builds affordable housing financed by HUD. A civil contractor that builds roads and similar infrastructure and that obtains all of its business by competitive hard bidding for government financed contracts has very different compliance needs from a builder of private commercial buildings. And a national commercial building contractor has different compliance needs from a regional commercial building contractor doing business within one state.

An effective compliance program should begin with a risk assessment by the company, working with competent counsel, to determine potential legal risk based upon the company's line of business. A risk assessment is best performed by interviewing executive, middle, and lower level management to gain a complete understanding of the company's business and where its business intersects with compliance issues.

Once these steps have been taken, the company should adopt a written compliance policy that summarizes the company's compliance goals. It should clearly state that meeting the expectations in the compliance policy is an obligation of every employee at every level.

The policy should be written in plain English, without excessive legalese, and should be as concise as possible. After all, the policy is designed to communicate primarily with employees, not lawyers. Compliance policies that are overly complicated and recite at length the text of laws and regulations provide little useful guidance and are often viewed as indecipherable and impractical – and rightly so.

Policy rules should be set forth succinctly and should cross-reference other policy rules as necessary. In every instance, policies should include the expectation that business will be done honestly, carefully, transparently, and in full compliance with all applicable laws and regulations.

The compliance policy should specifically state that all employees are representatives of the company and that they are expected to act accordingly and to be compliant.

The policy should also include basic provisions that require, among other things: honest records; accurate recording and allocation of costs; transparency in dealing with clients and potential clients; definitions of a conflict of interest and an expectation of undivided loyalty to the company by all employees; special care on any publicly funded project with detailed guidance, as necessary; precise rules on the giving and receiving of gifts and other things of value to or from all categories of persons; policies on dealing with public officials and public employees including public clients, their representatives, and law enforcement; a detailed description of who employees should approach with compliance questions; and a requirement that any and all misconduct, violation of law, or violation of the compliance policy by anyone in the company or doing business with the company be reported to the company immediately.

Of course, specific additional policies and guidance will be necessary depending upon the needs and business of the company.

Managers and employees must also understand why a compliance program is necessary in the first place. Simply imposing a set of rules is not an effective way to encourage support for a policy and is less likely to result in a company that accepts a genuine culture of compliance that governs how the employees are expected to behave and provides them with an informed view of their compliance obligations. The reasons why a compliance program and a culture of compliance are expected and required should be explained in a training program specifically designed for the company.

Training programs should be carefully thought out, and the training materials should be closely related to the compliance concerns applicable to the company.

At the outset, training should be provided in person by competent trainers in the presence of respected members of management, who in turn show their support with their attendance and participation, as appropriate.

This training can consist of a combination of video presentations to a group of employees accompanied by discussion, and perhaps even a recitation of some of the basic principles of the compliance policy. The training should be designed to encourage employee participation and can be conducted with internal or external resources. It is also a good idea to use an appropriate method to test the employees' understanding of the compliance policies.

Training should be designed to address the actual risks facing the company and the employees. Trying to address every conceivable risk is not only nearly impossible, but would damage the credibility of the training program and take far too long.

Once training is completed, the sessions should be well documented, and all employees should be required to "sign off" on the compliance policy in writing or electronically, stating that they understand

and agree to follow the policy and that they understand there is zero tolerance for violations. This impresses upon the employees that they will be held accountable for any violation.

Once a compliance program is in effect, employees must be encouraged to ask questions. There should be a designated venue for employees to seek guidance or advice when they have a compliance question. The answers can be supplied by a well-trained compliance officer or an attorney, who should always be the one answering legal questions.

Obtaining answers to compliance questions can be as simple as walking into the designated person's office and having a conversation. It can also be done by phone or by email. Regardless of the manner in which an answer is sought, it must be easy to get a timely answer, the question and answer should be documented so it is clear the inquiry was addressed, and there should be no recriminations for asking a question. No matter how silly or uninformed the question might appear initially, it should be taken seriously and answered appropriately. What is critical is that the company encourages all employees to feel comfortable asking questions. This assurance is really in the company's interest, in that its employees will be less likely to make mistakes that could prove costly to the company.

The most important questions among employees are those that are asked before they take action that might constitute a violation. These types of inquiries must be encouraged. Equally important is the delivery of clear, concise, and prompt responses from those responsible for compliance. Unless the answers are provided promptly, the value is lost.

Imagine an employee who asks, "May I take this government employee out for dinner this week" and then receives an answer three weeks later saying, "No, you may not take that person to dinner." The employee will have already violated policies, perhaps violated the law, and will be unable to undue the harm. In such circumstances, the lack of prompt responses will result in little respect for the value of the compliance program.

Once the compliance program is in place, there must be a system by which employees of the company will be held accountable for compliance policy violations and where prompt corrective action will be taken. In addition, this prompt corrective action must apply to all employees and not just the ones at lower levels in the company. In short, everyone must be held accountable.

Disciplinary action may involve retraining, an oral or written reprimand, or, at worst, termination of employment for serious violations. Disciplinary action should be imposed by a respected manager at a higher level of the company so as to convey a strong message that the company takes violations seriously and will hold everyone accountable. The lack of credible discipline could haunt the company some day in the event of a violation that becomes the subject of a regulatory investigation or criminal

prosecution. One of the first questions posed about the efficacy of the company's compliance program is "And what did you do to the employees who violated your policy?" The lack of discipline among lower tier employees only gains little respect from regulators and prosecutors.

Finally, while management is wise to listen to concerns from employees about the compliance program and perhaps make changes based upon reasonable concerns, they should not tolerate any comments that claim that elements of the policy "don't make sense" or "are completely unrealistic." It should be made clear that this is the company's policy and it must be followed – like it or not. Similarly, complaints about compliance at "water cooler meetings" should be strongly discouraged.

When Compliance Programs Do Not Work

In his prior position as a public prosecutor, the author was able to observe many occasions when compliance programs ultimately failed. Several mistakes in approach that commonly occurred are discussed below.

The most obvious policy failures were those in which the compliance program was itself a fraud. This was often apparent, for example, in the cases of boiler room "pump and dump" operations designed to separate unsophisticated "would-be" investors from their money by unlawful manipulation of penny stocks and thinly capitalized companies. Those sorts of compliance programs were merely a front to regulators who were often not paying attention to the behavior of the persons running these dishonest firms. Indeed, proof that the compliance program was a fraud was used to persuade a jury of the guilt of the company and its employees.

Cases in which employees do not perceive management's strong support for a company's compliance programs are similarly problematic. For example, managers will often sympathize with their employees' complaints that the program is a nuisance and makes it more difficult to do business. However, these kinds of complaints should be rejected immediately and firmly.

Managers should explain to employees that the compliance program is an important part of doing business and is no less important than the other parts of the company's overall approach to running a successful business. Managers should also explain that the compliance program will also save the company money in the form of reduced legal fees for dealing with compliance violations.

Compliance programs also fail when the executive managers imposing the rules fail to recognize the perception among many employees that compliance rules are counterintuitive, unfair, and inappropriately limit an employee's freedom to apply their own set of personal "ethical standards" to situations.

In the construction industry, for example, some companies have recognized that employees who accept meals, gifts, and other items of value create legal risk for themselves and the company. For example, if a mistaken or fraudulent change order proposed by a subcontractor is then recommended by the construction manager (CM) or general contractor (GC) to the owner, the owner will be very suspicious of the motivations for the CM/GC's recommendation if the owner learns that the subcontractor has given things of value to the employees of the CM/GC. When the compliance policy says that employees cannot accept such things, it naturally creates some resentment at the concept that an otherwise ethical employee would allow herself to be "bought off" with a meal. Accordingly, there should be a detailed explanation of the legal risks to both the company and the employee when such gifts are accepted. This explanation should be provided anytime there is a chance that an employee perceives that something is being taken away by a compliance rule.

Some companies also denigrate the effectiveness of their compliance programs by treating compliance training as a chore and appointing lower level employees to conduct the training. Ideally, the trainers should be people well-respected within the company who know and understand the company's business. When time, money, or resources are a concern, such that a senior person cannot perform the training, a respected manager should attend the training session as a participant and lead by example.

Perhaps one of the most important factors that cause a compliance program to fail is the lack of consequences and accountability for employees who violate the compliance policy. There is no better way to ensure that a compliance program will fail as when there is no prompt corrective action taken in response to a compliance violation. The company is sending an implicit message to its employees that the program and the policy are mere window dressing, and they will not be held accountable for violations.

The failure to maintain a zero tolerance policy for compliance violations, combined with a failure to have documented reasonable disciplinary action for those violations, also guarantees that the program will be of little use as a defensive mechanism and will be viewed by regulators, prosecutors, and judges as being in bad faith.

Disciplinary action must be fairly imposed upon all employees, both management and non-management, for violations of the compliance policy. Enforcement of the compliance policy upon the lower level employees without holding all employees (including managers) at all levels accountable for their compliance violations will breed cynicism, and a regulator or prosecutor will spot such unfairness immediately. That unfairness will be held against the company, especially if the person whose actions are in question is a manager who has a track record of not following the rules and not being held accountable. In such situations, regulators, prosecutors, and judges will view the compliance program as ineffective.

Final Thoughts

Compliance programs, by necessity, have to consider that employees all have their unique sets of values that they learn from their parents, their clergy, their professors, and from life experience, and that those values may allow actions that are innocent enough but still constitute a violation of regulations and law placing the company at legal risk. A genuine culture of compliance recognizes the employees' prior life experience and the existence of personal ethical codes, but it also recognizes that it is the company's compliance rules, and not individual standards of ethics, that must guide employee actions in conducting the business of the company.

Compliance programs are far more likely to be effective if the basic approaches suggested here are adopted by a company that is serious about its compliance program and creating a culture of compliance.

"5 Takeways"

- Within today's highly regulatory environment, construction companies must develop a structured and well-defined compliance program to avoid legal risk.
- A genuine compliance program and policy must be specifically tailored to the individual company and the business it conducts.
- Compliance programs must be championed by upper management, who establish a strong culture of compliance among company managers and employees alike.
- Companies must encourage employees to ask any questions concerning the policy, provide prompt and thorough responses, and establish mandatory in-person training sessions to ensure that each member of the company fully understands the policy rules and the importance of acting in compliance with the program.
- Once the compliance program is in place, a company must hold all employees accountable for compliance policy violations and take prompt and fair corrective action.

The information provided in this Bulletin does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Bulletin without first seeking legal advice.

The author is a partner at Peckar & Abramson P.C. in New York and advises companies on compliance matters. He was a prosecutor in the Manhattan District Attorney's Office from 1980 to 2011 and handled numerous white collar investigations and prosecutions. The author is grateful to Peckar & Abramson's founding partner, Robert S. Peckar, for his valuable assistance in preparing this article.