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BLJ: More regulations mean more scrutiny

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In the last seven years, government investigations into private and public entities have increased, according to attorneys who work in the practice area.

The reasons range from an increase in media coverage to an uptick in government regulation.

“We have evolved,” said Terrance Flynn, former U.S. Attorney for the Western District of New York and now a member at Harris Beach. “Through the media and through just evolution, we’ve become a much more educated public regarding the responsibilities that entities have. In many businesses 30, 40 years ago, a lot of things were condoned and accepted as just the way it is. In today’s society, we’re so well-informed that there are a lot of things that are no longer accepted. Things that are not appropriate or are not healthy or not acceptable products throughout the country.”

With more regulating agencies, he said more funding for investigators is available.

“The growth of those agencies and the growth in public awareness has increased the investigations going on,” Flynn said.

Another factor is a rising number of whistleblowers, Flynn said.

“In many offices now, you have hotlines, emails, all these different ways now as an employee to report something they see,” he said. “That wasn’t as prevalent 10 or 20 years ago in places of work.”

In some cases, the whistle-blower can be compensated under state and federal false claims acts.

Part of what he does is investigate entities that may have an issue that needs to be looked into. The company may become aware of an incident and wants it investigated or there could be pressure from the government to do so.

There are various reasons why a business would not conduct an investigation itself. First, it could involve the would-be investigator’s own colleagues and friends. Second, it may involve executives who pay the bills, thus creating a conflict. Third, outside counsel doesn’t want to be in a position to investigate its clients.

“They may have a conflict just by the nature of their day-to-day interaction,” Flynn said. “They may have been involved in some advice that was given, some guidance.”

When he is brought in, the entity has no connection to his firm and never will, aside from the investigation.

“They want someone independent to come in and give an assessment,” he said. “It gives cover to

the employees and executives because, in that case, no one can say, ‘Oh, you hired your own law firm. You hired the people who work for you every day.’”

When an outside investigator is brought in, companies can say that they conducted an independent investigation. If it’s a public matter, the company needs to show publicly that it’s an independent investigation.

Flynn pointed to cases where a minority-owned business is identified as such under state law but someone claims the company is not owned by a minority.

“You don’t want to hire the attorneys who set up the MBE or the people who authorized that company to be certified as an MBE,” he said. “They’re the ones who gave guidance to the business on what an MBE is and what percentage had to be done by somebody.”

In order to negotiate with the state, which could levy fines or suspensions for any breach, the company could bring in an outside attorney such as Flynn to assess the situation.

“Often my evaluation is shared with the government,” he said. “When you’re dealing with the government or another certifying entity, they may not have the resources to do a full-blown investigation, but they want one.

In those situations, the company will notify the government that, for instance, Flynn and his team are investigating the matter, with full access to emails, employees and any other relevant materials.

Said Flynn: “The government will quite often say, if they’re comfortable with who it is and what is being done, ‘OK, we will wait. We will wait to see what Mr. Flynn has to say and then we’ll decide what to do.’”

The investigation aspect is important because suspension, or possibly being de-barred by the state, could put a company out of business, he added.

Dennis Vacco, a partner at Lippes Mathias Wexler Friedman, said businesses don’t want to run afoul of the government, but that can be difficult with the amount of regulations and regulatory agencies.

“Sometimes that line is inadvertently crossed,” said Vacco, former state attorney general.

Good corporate governance is to have a plan in place for when the line is crossed, he said: “It’s prudent for a company that wants to be best in class.”

For instance, if an employee comes to a manager and claims that a fellow employee is dumping toxic chemicals in the river out back on the night shift, it’s up to the company to have a plan in place to deal with that.

“If the manager buries his head in the sand, pretty soon the EPA or DEC is going to descend upon

the place and say, ‘You guys have a major-league problem here. How did you not know about this?’ Best in class, the plan would be in place so that when you become aware of the violation, you have a response that says, ‘Let’s immediately contain the damage. Let’s immediately begin the process of discipline and respond to the harm.’ Self-disclosure is oftentimes the best course of action,” Vacco said.

But while self-disclosure can be beneficial to a company, it shouldn’t happen before an attorney is consulted.

Said Vacco: “Our plans for our clients start with, ‘Call me.’”

The idea is to show the government that there is a plan in place and that the company took action when an issue was discovered.

“We should avoid a criminal prosecution here because we followed all of these points, which were designed to mitigate the harm and to discipline the wrongdoer including possible termination,” he said. “A best-in-class plan would also have regular training.”

Mark Molloy, a partner with Nixon Peabody, said the Trump administration could play a role in there being fewer investigations at the federal level.

“In the new White House, I think there’s a view that’s probably less regulation and therefore less federal oversight and federal investigations into the types of matters we had been seeing prior to Trump coming on,” he said.

An interesting facet of governmental investigations involves the fallout from the opioid epidemic, according to Molloy.

“One area that I don’t think anyone would have predicted is how that health issue is now being turned into a government regulatory arena,” he said.

Recent charges against Dr. Eugene Gosy involving the death of six patients is “eye-opening,” Molloy said.

While the Gosy charges involve drugs, Vacco said it’s a “different kind” of white-collar crime. As the epidemic grows, Vacco said to expect more prosecutions, possibly involving manufacturers and distributors of drugs.

U.S. Attorney for the Western District James Kennedy Jr. is on the front line of prosecuting cases related to the opioid epidemic, Vacco said. Gosy had already been prosecuted once before he was brought up on the new charges, Vacco said.

“This is a statement indictment that they brought the second time around,” he said. “The statement Kennedy is trying to make here is that we’re not going to tolerate this. It’s a deterrent message being sent to other physicians who might be accused of the conduct Gosy is accused of.”