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The DOJ's Newest Pilot Program on Compensation and Clawbacks: Executives and Employees Should Reap What They Sow

Employers will not be able to take full advantage of the DOJ's new program if their compensation systems do not permit clawbacks from wrongdoer employees. Companies should review their existing compensation systems and consider updating them before problems arise, so that they will be in a position to take full advantage of the DOJ program should it become necessary to do so. In updating compensation systems to permit clawbacks, or expand the scope of existing clawback provisions, employers must also take appropriate steps to maintain compliance with the wage and hour laws in the jurisdictions in which they operate. Navigating these sensitive issues will be complicated and will require more coordination between employment counsel and white-collar counsel than ever before.

The Roman lawyer and orator Cicero phrased personal responsibility thus in his *De Oratore*: “*ut sementem feceris, ita metes*”—“*just as you sow, so you shall reap*”. This turned out to be particularly fitting for Cicero himself—after his death at the hands of Mark Antony, Antony’s wife Fulvia took Cicero’s severed head and stabbed his tongue repeatedly with her hairpin to exact revenge for his barbed attacks on her and her husband. It appears that the Department of Justice (“DOJ”) has taken Cicero’s advice to heart when drafting the revised corporate compliance policies unveiled last week at the ABA White Collar Crime Conference in Miami. The revisions reflect an ethos that corporate employees who engage in misconduct, as well as the supervisors who enable such conduct, should suffer the consequences of their misdeeds. Accordingly, the DOJ will now reward corporations

for clawing back compensation from both corporate wrongdoers and their supervisors.

On March 2, Deputy Attorney General Lisa Monaco both cemented the DOJ’s recent amendments to its corporate self-disclosure program (for more detail, please see [here](#)) and announced the launch of a novel pilot program on compensation incentives and clawbacks.

Under the pilot program:

- Every corporate resolution involving the Criminal Division will now include a requirement that the resolving company develop compliance-promoting criteria within its compensation and bonus system. Companies subject to a resolution will need to

revise their performance and bonus metrics to include compliance-related components. Companies may implement a system whereby executives and employees are required to forfeit their bonuses if they fail to meet certain compliance-related objectives.

- The Criminal Division will reduce fines for companies who seek to claw back compensation from corporate wrongdoers. Companies that pursue clawbacks in good faith, but are unsuccessful, may receive a fine reduction of up to 25 percent of the amount of compensation sought.

In other words, companies will be able to reduce criminal fines by clawing back, or attempting in good faith to claw back, compensation from wrongdoers and their supervisors, and the companies will be able to keep any recovered funds.

On March 3, Assistant Attorney General Kenneth Polite [gave more information](#) about the pilot program. AAG Polite explained that the Criminal Division has made significant revisions to its Evaluation of Corporate Compliance Programs (“ECCP”), including additions that more explicitly consider whether a company’s compensation and bonus program is designed to incentivize compliance. AAG Polite explained that the DOJ expects companies to recover compensation from not only employees who engage in wrongdoing in connection with the conduct under investigation, but also those who have supervisory authority over the employees or business area engaged in the misconduct and knew of, or were willfully blind to, the misconduct.

This is a significant new expectation, which will almost certainly put companies in a difficult position of having to determine whether it would be more costly to engage in potentially unsuccessful clawback litigation or lose the benefit of a reduced fine in a resolution with the DOJ.

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