

## CEP Magazine – October 2018 Business crime law: The Parade of Horribles

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by Jeffrey M. Kaplan

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Most employees want to do the right thing for the right reasons. But for those who don't, the criminal law offers reasons of its own.

Compliance and ethics programs need to make appropriate use of this “fear factor” in training and communications. Some of the points that can be made along these lines (at least under US law) are as follows:

- Business-crime related laws are often drafted very broadly, meaning that relatively harmless behavior can be the basis for prosecution under them. “Trusting one’s gut” is not enough to be safe. You also need to know the law.
- Under traditional notions of conspiracy and accessorial liability (the latter is often referred to as “aiding and abetting” liability), “bit” players in a crime are essentially at risk to the same extent as the ringleaders. Low- or mid-level employees of a business organization acting on instructions from a superior to engage in a crime do not have a defense of “just following orders.”
- Traditional criminal intent (i.e., purposefully wrongful conduct) is not always required for prosecution. Some offenses can be charged based on recklessness (acting in disregard of a known risk). Others require mere negligence (carelessness). And a few are “strict liability” offenses, meaning prosecution is possible even in the absence of a wrongful state of mind of any sort.
- The liability of a corporation or other business organization can be based on the misconduct of a single, low-level employee or independent agent. This is particularly relevant to large, complex, and decentralized organizations that do not share a common ethical culture.
- For some offenses, regulatory penalties can be imposed in addition to criminal ones, and some liability to private parties is also possible. For antitrust, such liability can result in the imposition of treble damages.
- Prosecution by more than one sovereign is also possible. Although the U.S. Constitution prohibits double jeopardy, prosecutions based on the same conduct by more than one sovereign (e.g., by a state government or another national government, in addition to the U.S. government) are not barred.
- The costs of defense (i.e., fees paid to lawyers and investigators) can be very high. For instance, a Foreign Corrupt Practice Act investigation has cost Wal-Mart more than \$800 million in legal fees.

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