



Whistleblowing and the Food Industry

Summary

In today's complex and globalized world, assuring food safety is a daunting task. Nevertheless, major advances in food safety management have made the benefits of a safe and nutritious food supply available to a significant portion of world's population, especially in the industrialized regions of the world. However, the food industry, government and consumers have recognized that constant vigilance is essential because new risks are constantly emerging and old threats are ever present. One of the most insidious threats to our food supply is related to illegal or immoral practices of a small number of persons that are often motivated by greed. Many of these practices may go undetected by regulatory authorities and even by upper management in the food industry. Often discovery of such practices has relied on honest and courageous individuals who have internally or externally informed those in authority to put an end to such practices. These so-called "whistleblowers" are now recognized by both regulators and upper management in the food industry as being essential for maintaining the safety of the food supply and both have taken measures to encourage and protect them from retaliation. This Scientific Information Bulletin is intended to discuss the subject of whistleblowing as it relates to the food science and technology community and to generally inform all parties of their rights and responsibilities under various whistleblowing legislation.

Introduction

While the majority of food companies comply with the law and observe ethical values, the misconduct of a few can threaten public health and safety and damage the image and reputation of food sector. Because of the interconnected 24/7 news cycle, any non-compliance or mismanagement, even if it occurs infrequently, can have significant consequences at the national, regional and international levels. Illegal and immoral practices by those in the food industry can also jeopardize the reputation and credibility of those in the food science and technology community.

It is not possible for food safety management systems to prevent all such threats, no matter how tight the regulatory and internal supervision. Food fraud, negligence and mismanagement are extremely difficult to identify, especially if there is active deception. Only ethical behavior by food industry personnel themselves, from employees to managers, can uncover and report such wrongdoing. To encourage them to report potential threats or violations, many jurisdictions have required companies to establish effective internal whistleblowing procedures. Legislation has also been developed to protect whistleblowers from retaliation for revealing illegal practices. Because of incidents in the financial sector, whistleblowing is now viewed as an essential component in any food safety assurance system and perhaps, the last line of defense when all other components fail.

What is whistleblowing?

The International Labour Organization (ILO) defines whistleblowing as “the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers.”¹ The employer may be a government agency or a corporation. A whistleblower may have observed wrongdoing or even participated in the wrongdoing itself, but because of personal and professional ethics, the whistleblower feels a duty to report the wrongdoing to a higher authority.

In most cases, the whistleblower will seek resolution of the issue within the organization by alerting upper management to the problem. This is referred to as “internal whistleblowing” and in most cases, such whistleblowing is expected or required of all employees. If the system does not respond to this internal whistleblowing and especially if the whistleblower is subjected to retaliation, the whistleblower may in good faith approach an external authority, such as a government regulatory body or the media. This is referred to as “external whistleblowing”.

With the revelations of Edward Snowden, whistleblowing has been brought to the public attention. Now it is generally recognized that whistleblowing is perhaps the only means of uncovering misconduct that is instigated or condoned by upper management. Today most developed countries recognize the significant and unique contributions of whistleblowers and are enacting legislation to encourage and protect them. While high profile cases of whistleblowing have involved financial sector wrongdoing, the food industry has also been the subject of disclosures by whistleblowers. The true extent of internal whistleblowing in the food industry is unknown as this information is usually considered confidential. In addition, many internal whistleblowers would prefer to remain anonymous rather than risk retaliation, often in spite of assurances by management.

From a management perspective, a good internal whistleblowing system can help to overcome the “filter bubble” that has led to many bad practices and decisions. To some extent, it is the failure of the internal whistleblowing systems that drives the whistleblower to an external authority. On the other hand, there is always a small number of high level managers who believe that compliance with the law is secondary to their pursuit of profit and market share. In either case, employees may feel compelled to report externally, which can lead to prosecution and adverse media coverage.

In the food sector, whistleblowers have revealed many incidents of health risks and economic fraud caused by illegal or unethical practices. In these cases, whistleblowing is and should be seen as a courageous civic action. A true whistleblower is motivated by a high moral purpose and professional integrity. On the other hand, an “informant” is not usually considered a whistleblower because the prime motivation is for personal gain, such as a financial reward or a reduced criminal penalty.

History of whistleblowing in the food industry

From antiquity to the present time, certain food producers, processors, wholesalers, retailers and caterers have at times tried to maximize their profits by engaging in practices that were illegal, unsafe or unethical.² While the notion that “one bad apple can spoil the barrel” applies to the corrosive effects of corruption, a single unscrupulous trader can damage an entire industry if the food product’s safety and quality come into question. Early trade guilds in Europe were an attempt by industry to deal with this

problem through self-regulation. Because of widespread adulteration, the German Beer Purity Law was adopted in 1487, which limited ingredients in beer to “water, malt and hops” and is still in practice today. Today, many countries have enacted food legislation to ensure the safety and honest production and presentation of the food supply. Food safety law and its enforcement are now seen as an essential public health function of government. In some cases, the food industry recognizes a food safety issue as a pre-competitive matter, such as BSE, and freely shares food safety knowledge and expertise among companies.

The media has also played a major role in promoting food safety by alerting the public to unsafe food products and fraudulent practices. At times, investigations were initiated by information provided by whistleblowers. The media has also precipitated legal reforms with far-reaching consequences. For example, based on an investigation into the conditions in the American meatpacking industry, a newspaper serial written by the journalist Upton Sinclair (later published as the book “The Jungle”) is credited with sparking public outrage that led to the adoption of the Federal Food and Drug Act of 1906.³

Food that is honestly presented and ethically produced is also implicitly expected by most consumers. Recent examples of food fraud are melamine adulteration of milk and pet food, horse meat substitution for beef, diethylene glycol in wine, mineral oil in sunflower oil, textile dye in spices, relabeling of expired products, mislabelling of products, and counterfeiting of products. In addition, a number of major food manufacturers were reported as violating their own ethical policies such as the exploitation of children in cocoa production, health and safety protections for their personnel, protection of environment and rain forests, or other ethical issues such as violating basic human rights.

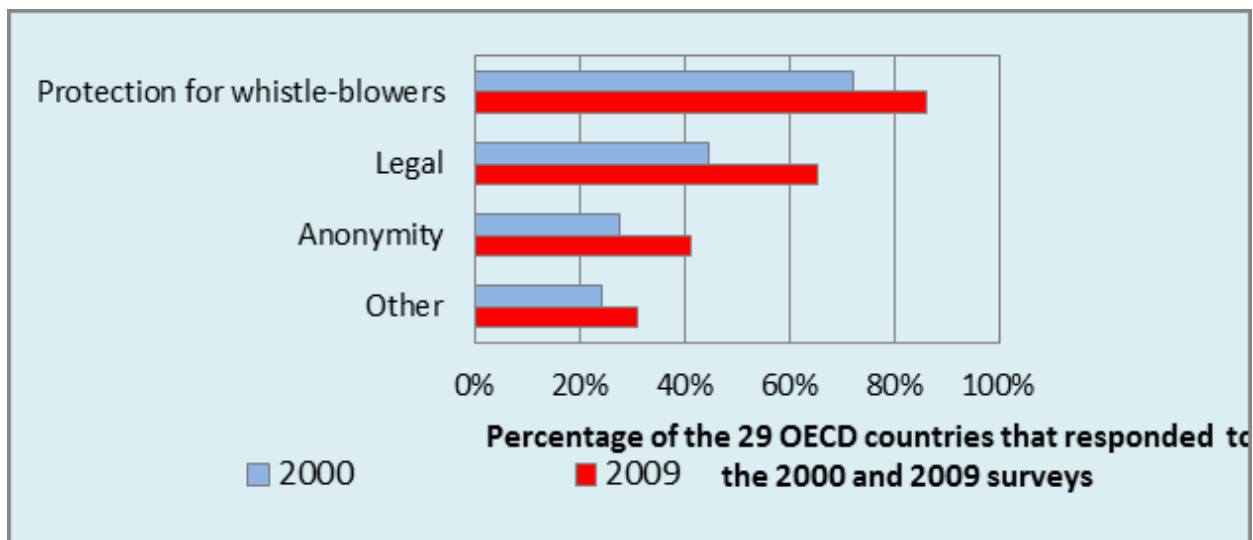
In most countries, managers in the food industry, as in other sectors, are employed to maximize profit and increase market share. A critical difference, however, is that those operating in the food sector have a daily responsibility to ensure that their products do not cause illness or death. Numerous food companies have gone bankrupt or were sold because of violations of food safety norms. Examples include the milk business of Snow Brand and the Peanut Butter Corporation of America whose managers were convicted of fraud and food hygiene violations. Some companies may lose substantial market share. Following the violation of iodine standards for infant formula in China, Nestle lost significant market share in one of its most important markets.⁴ Arguably, these business failures might have been avoided if effective internal whistleblowing procedures and reporting channels were in place. For companies with brand names to protect, long-standing favorable reputations may be lost in an instant if managers neglect their primary responsibilities for public health and safety.

Knowledge of whistleblowing procedures and reporting channels is particularly important for food science and technology professionals because they often have supervisory responsibilities for major food operations. At times, these individuals are specifically employed for assuring safety and quality of the processes and final products. While an internal whistleblowing system is often the first to be used, disclosures to regulatory authorities and the media are made when the internal system fails to correct the problem or in cases where upper management is directly involved in wrongdoing.

Legal protections for whistleblowers

Recognizing the importance of whistleblowers in combatting wrongdoing in both the public and private sectors, the G-20 countries adopted an action plan to protect whistleblowers from discriminatory and retaliatory actions. The plan called for the G-20 countries to enact and implement whistleblower protection rules by the end of 2012. To facilitate this, the Organisation for Economic Cooperation and Development (OECD) undertook a study that summarized existing whistleblower protection legislation and enforcement mechanisms, and proposed best practices on whistleblower protection legislation.⁵

Most developed countries have now introduced laws and regulations to generally encourage whistleblowers and to protect them from retribution by their employers (see below). However, much of the legislation is fragmented and only addresses one area, such as the financial sector. Only a few developing countries have laws to protect whistleblowers.



Paradoxically, while the U.S. government is seeking the arrest of Mr. Snowden for compromising national security, USA has perhaps one of the most comprehensive whistleblower provisions that was developed in relation to the Sarbanes and Oxley Act (SOX Act).⁶ In response to the Enron scandal which was uncovered by whistleblowing, the U.S. Congress adopted the SOX Act in 2002, which encourages and protects whistleblowers in a variety of ways by providing channels for anonymous whistleblowing, establishing criminal penalties for retaliation against whistleblowers, and protecting whistleblowers to preserve their work status. While the SOX Act applies to domestic companies, foreign companies might also be subject to the whistleblowing provisions. However, both the New York Stock Exchange and the NASDAQ have provisions for whistleblowing that mirror those of the SOX Act so that all companies listed on those exchanges are technically required to comply.

More specific to the food industry, the Food Safety Modernization Act of 2011 in the USA has provisions for whistleblowing that would, in principle, apply to both domestic and foreign food companies that do business in the United States.⁷ In February 2014, the U.S. Food and Drug Administration has promulgated regulations⁸ that prohibit retaliation by food business against whistleblowers who have:

- provided information relating to any violation of the Food, Drug and Cosmetic Act (FD&C) or any act that he or she reasonably believed to be a violation of the FD&C to the employer, the Federal Government, or the attorney general of a state;
- testified, assisted, or participated in a proceeding concerning a violation of the FD&C; and
- objected to or refused to participate in any activity that he or she reasonably believed to be in violation of the FD&C.

Under the regulations, retaliation against an employee for whistleblowing is prohibited, which includes several types of actions, such as:

- firing or laying off
- reducing pay or hours
- blacklisting
- demoting
- denying overtime or promotion
- disciplining
- denying benefits
- failing to hire or rehire
- intimidating
- making threats
- reassigning

A whistleblower may file a complaint concerning retaliation which then triggers the protection provisions of the Act, which may include an investigation concerning the circumstances, a hearing before an administrative law judge, an appeal to the Labor Department and even a complaint to a Federal court.

It should also be mentioned that under a U.S. law enacted over 150 years ago, a whistleblower who discloses that a company has made a false claim or committed fraud against the Federal government in the USA is entitled to a monetary reward proportion to the abuse committed.⁹

The Council of Europe has developed recommendations on protection of whistleblowers, which were adopted by the Committee of Ministers in 2014. The recommendations were prepared by the European Committee on Legal Cooperation and sets forth a series of principles to guide EU countries in reviewing their national laws on whistleblowing or when introducing new legislation and regulations.¹⁰

The United Kingdom prohibits retaliation against whistleblowers under the Public Interest Disclosure Act (1998).¹¹ The UK Food Standards Agency has promulgated regulations under the Act to cover whistleblowers in the food industry. It should be noted that the regulations cover wrongdoing even if it occurs outside the UK. Beside violations of the food laws, whistleblower protections are also extended to disclosures of breaches of legal obligations, miscarriages of justice, hazards posed to the health and safety of individuals, harm to the environment and intentional suppression of information related to such matters.

There are also a number of other countries with dedicated legislation on whistleblower protection, such as Japan's Whistleblower Protection Act¹² and South Africa's Protected Disclosures Act¹³, but some are more limited in scope to anticorruption, or they do not have the infrastructure in place to handle such complaints. In general, the provisions for whistleblowers in the food sector need to be strengthened in most countries to encourage and protect individuals with the courage and conviction to expose illegal and unethical practices in this critical area of public health.

Why internal whistleblowing fails

The internal whistleblowing system works best when the issue of concern is of direct interest to the management of the company. For instance, employees might steal money, materials, or other valuable assets, such as trade secrets, and whistleblowers would certainly be encouraged, or even required, to report these to management. However, when the matter concerns improper practices and decisions, internal whistleblowing procedures may not always be followed and the whistleblower may be harassed and the issue raised by the whistleblower may be ignored. It is recognized that in many cases, the procedures and channels for internal whistleblowing are often used to raise personnel matters. This tends to delay any response to bona fide whistleblowing concerns and may serve to discourage internal whistleblowing.

But what if upper management chooses not to respond to an internal whistleblower? Ignoring and suppressing whistleblowers is misguided at best and at worst, can lead to career-ending or company-ending disasters. Investigations into decision-making that led to the Space Shuttle Challenger disaster in 1986 have revealed a pattern that is all too often repeated.¹⁴ Different factors can lead to such a situation. First is the elitist attitude of some managers who tend to minimize the concerns of expert staff and impose a "business decision" rather than an "ethical decision". A second problem is the failure by certain management to seriously investigate the whistleblowers' concerns to determine the validity of their allegations. In this regard, examination of only "bounded" data can be a major error by both management and expert staff. A third feature is the influence of rewards. Perhaps to justify their high salaries, some high-level managers in both government and the private sector often ignore whistleblowers to avoid scrutiny, criticism, personal responsibility and in some cases, to preserve their bonuses. A fourth common problem is to discount any information that is not known to a high degree of certainty. This is often used as a false argument to dismiss the whistleblower's concern since nothing is known with absolute certainty. Finally, although it is counterintuitive, the more serious the whistleblower's concern, the more likely that it will be ignored. This "blind spot" effect is the result of poor communication about the likelihood and seriousness of the potential risk. The last point recognizes that modern management needs better procedures and more direct communication channels so that internal whistleblowers can penetrate the "filter bubble" that often insulates upper management.

Conclusions

With the extensive globalization and complexity of the food supply network, the resources of government authorities are not sufficient to control the safety and integrity of the many domestic and imported food products on the market. The food industry itself has made great efforts to maintain

consumer confidence in a safe and honestly produced and presented food supply. But today's consumers are more sensitive to media reports of contaminated food, especially if it involves wrongdoing or negligence. Therefore, to protect against unscrupulous food companies, whistleblowers should be viewed by governments, the food industry and consumers as providing an essential safeguard to complement existing mandatory and voluntary programs of governments and the food industry. Trust that the food supply is safe and honestly produced and presented is also dependent on the competence and integrity of food science and technology professionals working in the food industry. It is their responsibility to internally report illegal or unethical practices. If this fails, external disclosures to other authorities may be required. But any whistleblowing rests on the protection from retaliation of whistleblowers both by the law and the culture of the company.

Accordingly, the enactment of a comprehensive, dedicated whistleblower law is one of the most effective legislative means of providing such protection. Comprehensive and stand-alone legislation may give the law heightened visibility, thereby making its promotion easier for governments and employers. This approach also allows for the same rules and procedures to apply to public and private sector employees, rather than the more piecemeal approach of specific laws that only apply to certain employees and to the disclosure of certain types of wrongdoing. The enactment of stand-alone legislation could also contribute to ensuring legal certainty and clarity.

Many food businesses have established internal whistleblowing policies and procedures, but their implementation has been ad hoc and subject to conflicts of interest. In the best case, the chief executive officer of the company has the overall responsibility for food safety and, therefore, procedures for internal whistleblowing provide a direct communication channel to the upper management. As with food safety management systems, companies may require that whistleblower procedures and protections be established by their suppliers and distributors. To streamline internal whistleblowing systems, an Ombudsman may be designated to handle all personnel issues unrelated to whistleblowing matters. Smaller companies might simply use the well-established "suggestion box" (or "email suggestion box") to encourage internal whistleblowing. All staff, but especially food science and technology professionals, should be informed of their rights and protections as potential whistleblowers and be encouraged to report any possible violation of applicable laws and regulation as well as deviation from company policies and procedures that might endanger the public.

Finally, in many work places where the management culture is rigid and inflexible, internal whistleblowing is not encouraged and retaliation is often an automatic response. Some managers have succeeded in altering this negative culture after a disaster had already occurred. While learning from one's mistakes is intelligence, learning from the mistakes of others is wisdom. An open and responsive internal whistleblowing system will not only improve the trust and morale of the staff, but will also have benefits for the company, the shareholders and society as a whole.¹⁵ Barring this, external whistleblowing will be necessary for the foreseeable future to deal with systematic wrongdoing.

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ABOUT IUFOST

The International Union of Food Science and Technology (IUFOST) is the global scientific organisation representing more than 300,000 food scientists and technologists from over 75 countries. IUFOST is a full scientific member of ICSU (International Council for Science) and it represents food science and technology to international organizations such as WHO, FAO, UNDP, The World Bank, and others. IUFOST organises world food congresses, among many other activities, to stimulate the ongoing exchange of knowledge and to develop strategies in those scientific disciplines and technologies relating to the expansion, improvement, distribution and conservation of the world's food supply. IUFOST Contact: General Secretariat, IUFOST, 112 Bronte Road, Oakville, Ontario, Canada, L6L 3C1, Telephone: + 1 905 815 1926, e-mail: secretariat@iufost.org, www.iufost.org

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