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Retaliation: The not-so-silent killer of compliance and ethics

By Amii Barnard-Bahn, JD, CCEP, PCC and Joe Murphy, JD, CCEP

Of the many challenges facing the compliance profession, the hardest is protecting employees from retaliation. There's a reason for the phrase, "Don't shoot the messenger." History is populated with example after example: the Las Vegas reporter recently assassinated by the subject of his dogged investigation— a local politician taking bribes;^[1] Tyler Shultz in the Theranos case;^[2] and the Panama Papers journalist who was killed in Malta by a car bomb.^[3] Less frequently do you hear of just rewards, such as the Wells Fargo whistleblower awarded over \$20 million by the Occupational Safety and Health Administration (OSHA) for reporting concerns of financial misconduct (after attending his compliance training).^[4] One could reasonably conclude that you might get rewarded, but you're more likely to get shot.

Human beings instinctively know this, and that's why we are so reluctant to speak up. "Snitches get stitches and wind up in ditches," goes the ominous refrain. Retaliation can be peer-to-peer, not just reporting up and speaking truth to power. Perhaps worst of all, social science research shows we are predisposed to disliking and distrusting bad news messengers.^[5] Retaliation is, to some degree, a natural defensive response to unwelcome concerns. Hence the famous phrase, "The nail that sticks up gets hammered down."

When an issue of concern is reported, it's not unusual for the first reaction to mirror that of Barclays' CEO, which was essentially, "Who said this?"^[6] Such a reaction, however human, obviously has a chilling effect on any future reports.

We believe retaliation is such a serious threat to compliance and ethics programs that it should be treated as its own legal and regulatory risk. First, the legal consequences can be severe. Between Dodd-Frank, Sarbanes-Oxley, the European Union Whistleblower Protection Directive, and OSHA's enforcement of over 20-plus anti-retaliation laws, it is a fact that retaliation deserves its own category of risk. By way of example, in many Equal Employment Opportunity Commission discrimination cases, the primary cause of action may not prevail, but often the secondary cause of action for retaliation does.^[7]

Retaliation requires active intervention to prevent, detect, and deter. So how do we get people to speak up? Well, it's first important to understand why people don't speak up. The first major reason is that people expect that if they stick their necks out, nothing will happen. The second is fear of retaliation.

And there is good cause to be concerned. In a chance conversation years ago with Stephen Kohn, founding director of the National Whistleblower Center, he shared that the worst part of his job was warning whistleblowers with solid cases that they had to prepare themselves and their families for being vilified in the media, risking a high rate of divorce, and being unemployable. He knew he needed to educate them so they could evaluate if they could stomach the cost of being a whistleblower. He said the worst thing was that after that initial heart-to-heart, most of those people never walked back through his door again.

So, what's an organization to do if it wants to do the right thing?

1. Have a culture of habit around knowing how to respond to reports and concerns. Employees should be educated about how the reporting system works, who handles calls and investigations, how investigations work, and what feedback they will get. People who take such reports, including all members of leadership, need to understand how to respond to reports and handle bad news well. One way is to say, "Thank you for letting me know." Another is by understanding that fear and even resentment are natural defense responses of humans to negative news. Statistics from the Association of Certified Fraud Examiners (ACFE) show reports increase if people are trained to respond to concerns.^[8] Lastly, employees should never be required to report matters locally to their immediate boss. Reporting should be made easy and, wherever possible, free of fear. It should be open to third parties, including vendors, contract employees, and customers. ACFE statistics show that third parties make 25% of fraud reports.
2. Implement systems to protect those who report wrongdoing or potential wrongdoing. This requires thoughtful tracking.
3. Have a variety of reporting systems that all generations can use and understand. This means phone, email, web reporting, and texting.
4. Reporters should not be promised anonymity. You may have to disclose the report to the government, in litigation, or for voluntary disclosure reasons. And when you investigate, people will speculate. Tell reporters their concerns will be kept as confidential as possible to ensure a fair, prompt, and thorough investigation.
5. Don't wait for people to call you. Ask. One of the best ways to cultivate a speak-up culture is through "management by walking around" (MBWA). Most people will not "snitch," but they won't lie either. If you ask, you are giving them an out. Ask people what is happening, what concerns they have, and what problems they may see. Roy Snell, former CEO and co-founder of SCCE, shared a story in his book *The Accidental Compliance Professional* that demonstrated this point. He writes about asking an open-ended question to a staff member about anything she had seen that caused concern and immediately learned of a critical, unresolved issue that he was able to address—but only because he had asked her. He observed that asking people removes the "stigma" associated with reporting on your fellow workers.^[9] This became clear to one of the authors during an investigation when the investigators interviewed the last tier of potential witnesses. The next interview was with an employee from the group—many had already been interviewed—and likely everyone knew about the investigation. Yet when this witness walked in the door with a sheath of highly relevant documents, his first words were, "I've been waiting for you to call." He would not volunteer, but he also would not hold anything back. He simply wanted to be asked.
6. Management support. You need an ethical CEO and board asking the right questions for a non-retaliatory culture to work. That said, there can always be subcultures, especially in large organizations, where there are pockets of unethical behavior and a toxic work environment. You, therefore, need an empowered compliance officer to protect whistleblowers. The compliance officer must report to and be controlled by

the board. The board resolution should require the compliance officer to report on all retaliation and threats of retaliation without a materiality threshold. Remember that reports can be as simple as an email to the audit committee chair, or even a heads-up. The board needs to require the compliance officer to ensure that reports are investigated properly.

7. Communicate results. To cultivate a speak-up culture and keep it a living, breathing system, it is wise to publish the results of investigations or disciplinary action periodically, redacted to protect participants' privacy. That should include any discipline for managers who may have retaliated or threatened retaliation, demonstrating that the company does not tolerate this behavior. Bell Atlantic (now part of Verizon) had a quarterly newsletter called "Report on Integrity," which included edited reports on specific company cases. One case story reported on a senior manager who resigned because he violated a vital policy on retaining consultants (especially in an overseas context).^[10] That report resulted in 100 employees requesting copies of the policy at issue (pre-internet, so they could not just go online and look it up).
8. Recognize those who come forward, even if it does not result in a finding of misconduct. Employees may shed light on a process breakdown. If culturally appropriate, that should be the basis for some reward or recognition. Leadership on compliance and ethics issues should be a strong positive factor in personnel evaluations, rewards, and promotions.^[11] One creative program awarded stuffed giraffes to employees who "stuck their neck out." A key question on incentives: should you offer bounties? We know the U.S. Securities and Exchange Commission (SEC) provides major financial rewards for reporting violations. Should a company follow suit and offer money for employees to turn in their fellow coworkers? We don't think so. First, you will never be able to match the SEC's wallet. Second and most importantly, you risk poisoning your culture, and employees may no longer trust each other. We believe people should report because it is the right thing to do. We have concerns that money will shift this from a moral decision to a commercial one. There is, for example, the lesson from the Israeli childcare experiment: to deter parents from picking their children up late, the childcare facility imposed a charge for late pickups. The number of late parents increased since the fee changed a moral decision into a simple economic one: was it better to stay late and finish a project if it justified the financial cost of the late fee?^[12]

So, what are practical steps to prevent, detect, and deter retaliation?

1. Add retaliation to your risk-assessment process. It's a serious risk to your culture; the legal risks are significant and growing, and just saying you won't retaliate in your code of conduct won't cut it. Codes are not magical. It's critical to recognize how likely retaliation is. If you don't actively intervene, you will have retaliation. One consideration is to designate a retaliation subject-matter expert. At this point, there is quite a bit of law and guidance in the area, and someone on your team should have the expertise on this, just as you would with discrimination, antitrust, or anti-bribery.
 2. Complaint tracking systems: what works and what doesn't? If you want to help prevent retaliation, it's fundamental to privately and confidentially—with limited access—track reporting employees' careers and performance reviews for the length of their employment at your organization. Routinely follow up with whistleblowers and compare their treatment before and after they report. Ask how they have been treated, if they have experienced anything unusual in their treatment, and how others deal with them, any career opportunities they think they missed, and that sort of thing. This is a long-term concern. As they say, "Revenge is a dish best served cold." Plan to do this for the remainder of the person's employment at your organization.
 3. Where feasible, consider separating the reporting line of the whistleblower from the alleged violator. Ask
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the whistleblower first if this is something they want to consider. You will want to confirm that you are not disadvantaging them in their careers.

4. In exit interviews, ask about retaliation and whether that has been observed during the departing employee's tenure.
5. Assign compliance ambassadors in the field. These go by different names, but this can be a resource for whistleblowers and help protect those away from headquarters where there may be fewer resources and protection from the power hierarchy.
6. One controversial action we have proposed: hire a whistleblower. You may or may not hire them in a control function (they may wish to return to their functional area of expertise). But if they are well-known, this gives them a new start and sends a message to your organization that you value those who speak up. It demonstrates trust and that the company welcomes people who tell the truth. If your company has had issues with retaliatory action, you may wish to proactively search for whistleblowers, on LinkedIn or through key figures in the whistleblower field.

We know that the effectiveness of our compliance programs ultimately comes down to one thing: supporting people for speaking truth to power. While this may be easier said than done, it is critical that we build corporate cultures that will do so.

We should not be naïve about retaliation—it happens more than we may want to believe. Companies should treat it as the serious threat and manage it actively, just as they would with other serious risks. We outline here some of the practical management steps that can be taken to protect those who speak up and to protect the company as well.

Takeaways

- Retaliation is one of the most fundamental and omnipresent risks to effective compliance and ethics programs.
- People are predisposed to dislike and distrust bad news messengers, making retaliation a somewhat natural defensive response to unwelcome concerns.
- Retaliation is such a serious threat to compliance and ethics programs that it should be treated as its own legal and regulatory risk.
- We share multiple practical management steps to protect those who speak up and to protect the company as well.
- Retaliation happens more than we want to believe. Companies should treat it as a serious threat and manage it actively, as they would with other serious risks.

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<https://www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist>.

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<https://compliancecosmos.org/whistleblowing-changing>.

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10 Joseph E. Murphy and Douglass J. McCollum, “Communicating ‘In a Practical Manner:’ Bell Atlantic’s Report on Integrity,” 4 *Corporate Conduct Quarterly* 59 (Rutgers University; 1996).

11 For other ideas on rewards and recognition, see Joseph E. Murphy, *Using Incentives in Your Compliance and Ethics Program*, accessed December 9, 2022, <https://www.corporatecompliance.org/publications/library/using-incentives-your-compliance-and-ethics-program>.

12 Steven Levitt and Stephen J. Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything*, (New York: William Morrow, 2005), <https://www.nytimes.com/2005/05/15/books/chapters/freakonomics.html>.

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