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Compliance Today - April 2020
Best practices for responding to internal whistleblowers

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While most compliance programs tout policies and procedures encouraging employees and contractors to internally report their concerns, the reality is that many businesses are unprepared to respond appropriately when they receive a complaint from a whistleblower. This lack of preparation often stems from a critical failure to understand the whistleblower's concerns and to train frontline managers and compliance professionals on how to speak with internal whistleblowers. As a result, internal whistleblowers are frequently forced to discuss their compliance concerns with managers or compliance professionals who are unsympathetic, offer excuses for the organization, or are judgmental of the whistleblower and their concerns. Not only does this deprive the organization of a critical opportunity to detect and stop compliance violations, but it also raises the risk that the internal whistleblower will file a qui tam complaint or take other action outside of the organization.

Such concerns are not merely anecdotal. According to a 2018 survey by the Ethics & Compliance Initiative, 69% of employees surveyed reported workplace misconduct they had observed.[1] While these results are encouraging, the same survey indicated that 44% of employees who reported misconduct suffered retaliation, with 72% experiencing such retaliation within three weeks of their initial report. These numbers reveal the glaring failure by many organizations to take full advantage of critical information that internal whistleblowers provide about potential misconduct.

Organizations that are truly committed to an effective compliance program are best served by adopting and training on best practices for responding to internal whistleblowers. Such best practices include (a) avoiding misconceptions about internal whistleblowers that can taint objectivity, (b) appreciating the concerns of internal whistleblowers, and (c) using communication skills that encourage internal whistleblowers to be forthcoming about their compliance concerns. Adopting these best practices, and training frontline managers on them, can transform a whistleblower program from one that just looks good on paper to one that actually enhances overall compliance.

Best practice step 1: Avoid misconceptions about internal whistleblowers

Despite the meteoric rise in the number of whistleblower lawsuits, many organizations still fail to train their frontline managers on understanding who can become an internal whistleblower and what their motives for reporting compliance concerns are. As a result, frontline managers often have misconceptions about internal whistleblowers that can lead them to discount credible compliance concerns and drive would-be whistleblowers to report their concerns to outside groups, including the government and private counsel. Given that most internal whistleblowers report their compliance concerns to their frontline managers, the need to avoid these damaging misconceptions cannot be understated.

One common misconception about internal whistleblowers is that true whistleblowers are people in senior levels of an organization who possess detailed and documented evidence of their compliance concerns. While such

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whistleblowers exist, it is wrong to assume that whistleblowers are all the same. In reality, whistleblowers can come from anywhere inside or outside of your organization. In my 20 years of experience working on whistleblower matters, I have seen them from current employees, former employees, independent contractors, executives, customers, patients, consultants, accountants, data miners, physicians, nurses, and even competitors. As a result, it is essential that frontline managers be trained to be aware that anyone can be an internal whistleblower and that everyone who raises a compliance concern must be treated seriously, regardless of their role within the organization.

Another common misconception is that credible whistleblowers back up their compliance concerns with documented evidence. In reality, many internal whistleblowers are focused on doing their jobs and do not have the time or training to gather evidence. The investigations are best left to compliance professionals and legal counsel. Frontline managers should be trained not to discount the credibility of an internal whistleblower merely because they lack documented support or because their report seems incomplete. Even an incomplete report of a compliance concern can provide the tip needed to begin a meaningful compliance investigation. The goal of frontline managers should be to listen to all compliance concerns without being judgmental and then report those concerns to the compliance department.

Perhaps the most damaging misconception about internal whistleblowers is that they are motivated by personal grievances or the prospect of personal gain. While these are possible motives, in my experience, the overwhelming majority of whistleblowers are motivated by the desire to right a wrong, be it improper billing or a patient safety concern. More importantly, frontline managers must treat all compliance concerns seriously, because even people with questionable motives can raise credible compliance issues. Frontline managers should be trained to focus on encouraging internal whistleblowers and learning as much information as the whistleblower is comfortable sharing about their concern. Questioning the whistleblower's motives sends the wrong signal and can defeat the goal of gathering information that is critical to assisting the compliance department.

Best practice step 2: Understand the challenges faced by internal whistleblowers

Reporting potential misconduct committed by your coworkers takes courage and should be viewed as a sign of loyalty to the organization. Nonetheless, internal whistleblowers frequently face questions about their motives, open themselves up to criticism from their colleagues, and risk their reputation and livelihoods. For example, in a June 2018 news report on whistleblowing within the Department of Veterans Affairs, one longtime employee of the Central Alabama Veterans Health Care System told National Public Radio, "If you say anything about patient care and the problems, you're quickly labeled a troublemaker and attacked by a clique that just promotes itself. Your life becomes hell."[2]

Despite written policies claiming to protect internal whistleblowers, many internal whistleblowers (42% in the 2018 survey by the Ethics & Compliance Initiative) suffer some form of workplace retaliation. Obviously, retaliating against internal whistleblowers is not just wrong, but it also sends a clear signal to all future whistleblowers that they too might suffer retaliation if they report compliance concerns.

In addition to enacting and implementing clear policies prohibiting retaliation, organizations should train frontline managers on the challenges that internal whistleblowers face and how to respond to whistleblowers who express a fear of retaliation. Often, whistleblowers who report compliance concerns to their managers are looking for reassurance that they did the right thing by raising their concerns and an acknowledgment of their courage in speaking out. Training frontline managers on the challenges that internal whistleblowers face makes them better equipped to respond effectively if and when someone approaches them with a compliance concern.

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Best practice step 3: Use communication skills that encourage reporting

Talking with an internal whistleblower about their compliance concerns is not just an ordinary workplace conversation. The whistleblower is often uncomfortable, because they are balancing their desire to do the right thing with concerns about retaliation and fear of losing their livelihood. As a result, frontline managers and other staff should be prepared to communicate in ways that encourage the whistleblower to share as much information as they feel comfortable with about their concerns.

Soft communication skills do not come naturally to everyone, especially in situations that involve allegations of improper and unethical conduct by their colleagues. In my experience, using the communication skills shared below can make a meaningful difference in creating a more comfortable environment for internal whistleblowers to share their compliance concerns.

Take every complaint seriously

While this may seem self-evident to some, many seem to forget this basic lesson in practice. Internal whistleblowers come in all varieties. Some can be difficult people, and others can come with a laundry list of seemingly insignificant or personal grievances that have nothing to do with compliance. However, important compliance concerns can be raised by anyone and are often raised as a part of a long list of other workplace concerns. The key is to take every concern seriously, and not to discount or prejudge a whistleblower's complaints for personality or other reasons.

Speak the reporter's language

While not always possible, it is best if the person speaking with the internal whistleblower is familiar with the medical or billing areas at issue and thus can speak the same language as the whistleblower. For example, if a whistleblower is concerned about anesthesia billing, it is best if the person speaking with them has experience and knowledge with that subject matter, thus being in the best position to understand the whistleblower's concerns and able to ask intelligent follow-up questions.

Don't offer excuses or play down the compliance concern

The primary goal in speaking with an internal whistleblower should be to learn as much information as possible without passing judgment or minimizing their concerns. In our everyday lives, we often confront stressful situations by attempting to play down fears and minimize concerns. However, when speaking with an internal whistleblower, following that path can have a negative effect. Internal whistleblowing takes great courage, and the whistleblowers are looking for someone to treat their concerns seriously. As a result, it is best to listen to the whistleblower without offering excuses or playing down the potential compliance concern.

Be patient and don't rush the whistleblower

Understanding that whistleblowing is stressful, it is important not to rush the whistleblower to share everything they know at once. It may take several meetings before the whistleblower feels comfortable with the person they are speaking with and believes that their concerns will be taken seriously. Therefore, depending on the issue (such as those that do not involve a risk to patient safety), the better approach is to be patient and to keep the door open to multiple meetings or conversations with the whistleblower to discuss their concerns.

Be sensitive to the whistleblower's concerns

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Along with not rushing the whistleblower, it is important to be sensitive to the their concerns and be prepared to answer their questions about the reporting process. In my experience, whistleblowers will often ask questions such as:

- Will my identity be protected?
- Will I be protected from retaliation?
- Can I be transferred to another department?
- Will I get in trouble?
- Will I get any feedback after my concerns are investigated?

Each organization may have its own policies on such questions and may not want frontline managers to provide substantive answers. However, frontline managers should at least learn how to respond to such questions—even if that response is to defer them to human resources or compliance—to avoid a deer-in-headlights look that can convey to the whistleblower that the frontline manager cannot be trusted with seriously pursuing their compliance concerns.

Express appreciation

Regardless of whether the concern raised by the whistleblower is a compliance issue or not, it is important to treat the whistleblower with respect and to express appreciation for the courage it took to raise their concern. A simple expression of gratitude can go a long way into building trust with an internal whistleblower. Also, it sends a signal that the organization values those who report compliance concerns, and that its whistleblower policy is more than words in a manual.

Best practice step 4: Avoid communication pitfalls that discourage reporting

Just as there are best practices that can encourage whistleblowers, there are some common communication pitfalls that can discourage whistleblowers from sharing details about their compliance concerns. Those pitfalls include:

- Pressuring the whistleblower to prove their concerns with documents;
- Pushing the whistleblower to disclose their identity to colleagues or management or to meet with others to repeat their concerns;
- Signaling a reluctance to escalate the whistleblower's concerns to the compliance department;
- Suggesting that the concern, if accurate, could be bad for the organization, colleagues, or the whistleblower;
- Signaling that you don't believe the whistleblower or are skeptical of their motives.

Conclusion

Internal whistleblowing can add a vital element to any compliance program. Encouraging whistleblowers can provide valuable insight into unknown compliance issues and can enable an organization to proactively address those issues, thereby minimizing the risk of external investigations and litigation. Training frontline managers on best practices for responding to internal whistleblowers is a critical element that often goes overlooked.

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Organizations that add such training to their compliance efforts will be better prepared and will ultimately increase the effectiveness of their compliance programs.

Takeaways

- Compliance programs are vulnerable if they fail to train managers on how to communicate with internal whistleblowers.
- Managers often have misconceptions about internal whistleblowers that can lead them to discount credible compliance concerns.
- Managers should be trained on best practices to encourage internal whistleblowers to share information regarding their compliance concerns.
- Using soft communication skills that demonstrate the organization takes every concern seriously and is committed to compliance can make a meaningful difference to internal whistleblowers.
- Managers should avoid sending negative signals by pressuring internal whistleblowers, prejudging their concerns, or questioning their motives for reporting.

1 Ethics & Compliance Initiative, *The State of Ethics & Compliance in the Workplace*, March 2018, available upon request at www.ethics.org.
2 National Public Radio, "For VA Whistleblowers, A Culture of Fear and Retaliation," June 21, 2018, https://n.pr/2GZ7C1A.

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