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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.

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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.

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