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The lingering risk: Retaliation

By Selina Barth

In general terms, retaliation refers to any actions a person takes against someone who has harmed them. In the context of employee reporting, retaliation means any adverse action taken against an employee who reports misconduct, wrongdoing, or illegal activities within an organization.

Such adverse actions against an employee—usually referred to as the reporter—may include termination, demotion, a hostile work environment, harassment, and discrimination.

Retaliation is considered illegal under various employee reporting protection laws across the globe.

A prominent example is the 2002 Sarbanes–Oxley Act, which protects private sector reporters in the U.S. and provides legal remedies if retaliation occurs.^[1] In the EU, Directive (EU) 2019/1937 protects employees who report misconduct in relation to certain EU laws, such as money laundering and data protection.^[2]

According to the Parliamentary Assembly, Council of Europe:

Disclosing serious failings in the public interest must not remain the preserve of those citizens who are prepared to sacrifice their personal lives and those of their relatives, as has happened too often in the past. Sounding the alarm must become a normal reflex of every responsible citizen who has become aware of serious threats to the public interest.^[3]

In line with this statement, it is not acceptable that people risk their livelihoods to expose misconduct, wrongdoing, or illegal activities happening within an organization. However, this article argues that in a considerable number of cases of employee reporting, retaliation occurs. Hence, this lingering risk of retaliation needs to be adequately managed.

Acknowledge and manage retaliation

It is crucial to acknowledge the lingering risk of retaliation faced by potential reporters. This allows adequate management of retaliation as part of a company's compliance framework.

Employees will often be the ones to report misconduct, wrongdoing, or illegal activities occurring in an organization. There are three reasons employees are essential reporters:

1. They have an intimate knowledge of their organizations and are likely to be the first to identify illegal

activities.

2. They understand internal processes and activities, which is necessary to recognize wrongdoing.
3. Misconduct may have a significant impact on employee welfare, which motivates them to report it.

If a company's compliance framework does not acknowledge retaliation, employees are less likely to report misconduct or illegal activities. This may prevent misconduct or illegal activity from being reported or dealt with. Hence, it is necessary to adequately manage retaliation based on a robust nonretaliation program.

Such a program can be built upon five key elements:

1. Tone from the top
2. Reporting system
3. Nonretaliation system
4. Nonretaliation awareness
5. Program oversight^[4]

Tone from the top

Management and executives must demonstrate a culture of valuing reported concerns of misconduct or illegal activities and protecting reporters from retaliation. This commitment should not only be shown by a solid policy but also backed up by actions. Therefore, managers at all levels, up to executive management, must be held accountable for how to respond to concerns and protect reporters.

Managing retaliation starts by acknowledging that retaliation occurs within an organization and is not a theoretical risk. The ethics and compliance team within an organization is responsible for addressing the risk of retaliation to achieve open communication and, ideally, accomplish a retaliation-free reporting environment.

Reporters are often depicted as “troublemakers, difficult, or disloyal.” Take this statement by U.S. House Representative James Greenwood about Sherron S. Watkins, the reporter in the Enron scandal: “Ms. Watkins is not a whistleblower in the conventional sense. She was and is a loyal company employee.”^[5] This implies that a typical reporter is disloyal. This perception is imperfect, as reporters support an organization's culture of integrity and ethical behavior. This needs to be understood by management and executives.

Reporting system

A nonretaliation program should start with a reporting system offering various channels to report concerns, such as online forms, apps, and hotlines. These channels must ensure confidentiality and, if preferred, the anonymity of the reporter. It is a best practice that an external third party manages these channels.

The rules surrounding the reporting system need to be clearly outlined in policies that are easily understood and accessible to all employees.

To further encourage employees to report, the ethics and compliance team—or any other relevant team within an organization—should provide potential reporters with the opportunity to informally share information and ask questions at an early stage before “officially” reporting. Often, this helps employees and potential reporters cope with the stress of reporting illegal activities and misconduct and makes them more comfortable. Once a

report is made, the allegations need to be reviewed by an independent investigator or team of investigators in a prompt, comprehensive, confidential, objective, and transparent manner.

Nonretaliation system

Similar to reporting misconduct, incidents of retaliatory behavior need to be reported in a way that protects a reporter and makes them feel safe and heard. Often, the reporting system allows the reporter to flag the potential risk of retaliation to enable the ethics and compliance team or any other relevant team to act as necessary upon receiving a report.

In case incidents of retaliation are reported, the relevant teams within an organization must act promptly to investigate the retaliatory behavior because time is of the essence. Further, decisive action must be taken to put protective measures in place—such as temporarily changing reporting lines to remove the reporter from a retaliatory environment. To achieve swift and comprehensive decisions, collaboration between the relevant teams—such as ethics and compliance, human resources, and management—is critical.

Investigating retaliation can be difficult, depending on the form of retaliation. When investigating retaliation, it is important to keep the reporting employee as well as management—if not involved in the alleged retaliatory behavior—informed and to regularly assess how the reporter is coping. If retaliatory behavior is established, the retaliating party must be held accountable by facing adequate disciplinary action. To demonstrate a company's commitment to reporters and protect reporters from retaliation, termination of a retaliating party is often an adequate action to take. Taking decisive action against retaliating parties sends a strong message of a zero-tolerance approach regarding retaliation to all employees.

Further, it is imperative to hold managers who tolerate retaliation within their teams accountable and potentially impose disciplinary actions against them. To ensure continued protection from retaliation, regular check-ins with the reporter are advisable. The experience of an employee after making a report can have a significant effect on others' willingness to report. If employees observe that a reporter is effectively protected from retaliatory behavior, they will feel more comfortable and confident in reporting potential misconduct or illegal activities.

Nonretaliation awareness

All employees—irrelevant of their position within an organization—need to be aware of the zero-tolerance approach regarding retaliation. Employees should know:

- What retaliation is
- In what forms retaliation can present itself
- How retaliation is managed within the company
- That retaliation is never tolerated
- What to do in case they are subjected to retaliatory behavior

Depending on the organization's workforce, training and communication must be delivered in various languages and tailored to the different comprehension levels of employees to ensure a clear understanding of the previously mentioned aspects of nonretaliation.

Training the workforce can come in various forms, such as emails, digital and physical banners or posters, videos, town hall meetings, dedicated team meetings, and more. Irrespective of the channels used, the message

should be comprehensively understood—namely, a culture of valuing reported concerns of misconduct and protecting reporters from retaliation.

In addition to raising awareness, the ethics and compliance team and any other relevant teams involved in employee reporting need to engage in ongoing open communication with employees by actively listening to them, responding promptly and effectively to questions or concerns, and building trust; therefore, employees feel protected and safe to report misconduct or illegal activities without the fear of retaliation.

Understanding and trusting an organization's zero-tolerance approach regarding retaliation, employees feel more comfortable and confident speaking up.

Program oversight

Monitoring and auditing are effective means to oversee the nonretaliation program. While monitoring is an ongoing analysis, auditing is an independent, systematic approach to identifying gaps and formulating corrective actions. The following aspects should be assessed to ensure program oversight:

1. Reporting trends
2. Number of retaliation concerns raised in reports
3. Level of comfort to report

Measuring the level of comfort of employees to report is challenging since they may not answer truthfully due to perceived potential consequences; measuring the comfort level could be part of exit interviews.

The results of the oversight activities and consequences should be shared with executive management and the board of directors, if appropriate, to continuously improve the nonretaliation program.

To complement the previously stated key elements, a nonretaliation program should consider the characteristics that reporters have that make them more likely to be subjected to retaliation. Research suggests that employees with substantial experience, longevity with a company, a high or specific education, or senior positions are more likely to be retaliated against. The reason for this might be that a greater extent of organizational loyalty is expected from these employees. Further, if any of them report, others may feel a greater sense of betrayal, thus paving the way for retaliatory behavior.

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