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# *Whistleblowing*

Understand the Real Risk and Cultivate a Culture of Reporting

# Embracing Whistleblowers

## *Understand the Real Risk and Cultivate a Culture of Reporting*

When most compliance practitioners think about whistleblowers, the last thing they think about is embracing them. After all, whistleblowers cost companies millions in fines, penalties, and legal fees and upend your life as a compliance professional. In a moment of frustration or anger, it is easy to imagine whistleblowers with a big smile on their face, waiting for a big payday under Dodd-Frank and gleeful at the cost and chaos they have caused.

But are they?

There are certainly whistleblowers whose intentions are questionable at best. However, the reality is that most whistleblowers are often simply trying to do the right thing and more likely than not tried to report their concerns to their companies long before they ever went to a government regulator. While it may seem unthinkable when you are in “the crisis,” one of the best ways to manage whistleblower risk is to understand and embrace whistleblowers, and most importantly to take their concerns seriously.

### Show Me the Risk

It's not a reach to question whistleblower motivations. In September of 2014, the SEC awarded more than \$30 million to a whistleblower, an amount that was more than double the next highest award.<sup>1</sup> With such potential payouts it's easy to imagine a long line of employees waiting to turn snitch. Indeed, the SEC even awarded a half million dollars to a corporate officer turned whistleblower this year.<sup>2</sup>

Aside from the hard money costs, the damage a single SEC inquiry can cause is significant, regardless of whether or not the claim ends up being substantiated. The sheer cost of time and labor required to produce documents alone is staggering, not to mention hiring additional legal support, reputational costs, etc.

Given all of this, it's also easy to think of whistleblower bounty programs as some kind of perverse practical joke. After all, the government first requires or incents you to put together a compliance program and then appears to pay people to circumvent it. Working in compliance certainly isn't for the faint of heart.

1 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>

2 SEC Gives Former Officer \$500,000 Whistleblower Award, Wall Street Journal, <http://blogs.wsj.com/riskandcompliance/2015/03/02/sec-gives-former-officer-half-million-dollar-whistleblower-award/?cb=logged0.872530589113012>

The first step in managing a risk is to understand it. Whistleblowers are not some juggernaut waiting to undo everything you are trying to achieve in compliance. For example, it's worth noting that the SEC has authorized awards for only fourteen whistleblowers in the history of the program. The statistics for 2014 are even more daunting for whistleblowers. In 2014, the SEC received 3,620 tips, but authorized just 9 awards to whistleblowers.<sup>3</sup>

It also turns out that financial incentives are not actually the primary motivator for external reporting. New research from the University of North Carolina reports that the primary reason whistleblowers go outside the company is a fear of retaliation—not a desire to cash in on bounty programs.<sup>4</sup> This supports earlier findings that monetary incentives are the least likely motivator of external reporting.<sup>5</sup>

Still, even if the barbarians are not at the gate, the risk is still real and potentially costly. You need a strategy that is effective, sustainable, and consistent with your values as an ethical organization.

Let's examine why that strategy should include embracing this person who has just upended your life as a compliance professional.

### The Average Whistleblower Isn't Who You Think

Managing the risk requires employers to understand who whistleblowers are and what motivates them ... and they might not be who you think they are.

Many seasoned compliance professionals and senior leaders will tell you with confidence that whistleblowers are most likely to be disgruntled employees out to get revenge for some perceived wrongdoing. However, data show that they are wrong. The average reporter is likely to be an actively engaged, well-performing employee, most likely a supervisor or higher-level manager.

3 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, [www.sec.gov/about/offices/owb/annual-report-2014.pdf](http://www.sec.gov/about/offices/owb/annual-report-2014.pdf)

4 Internal Corporate Whistleblowers Swayed by Protections, Not Pay: Study, Insurance Journal, <http://www.insurancejournal.com/news/national/2015/03/03/359116.htm>

5 Inside the Mind of a Whistleblower, [http://www.ethics.org/files/u5/reportingFinal\\_0.pdf](http://www.ethics.org/files/u5/reportingFinal_0.pdf)

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Most importantly, the average whistleblower is someone who most likely went to the company first. A staggering 92 percent of reporters turn to somebody inside the company when they first report misconduct.<sup>6</sup> Only 20 percent of reporters ever tell someone outside their company of their concerns, and only 9 percent of employees report to the government. That means you have a chance to uncover and address the vast majority of potential issues before regulators, the media, or lawyers ever get involved.

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However, the fact that whistleblowers may prefer to keep things in the company doesn't mean they won't turn to the government or media if they think it necessary. Sixty-five percent of surveyed employees would be willing to report externally, "if my company didn't do anything with my internal report." An even higher percentage would report externally, "if keeping quiet would cause possible harm to people" or "if it was a big enough crime."<sup>7</sup>

One other consideration is retaliation. One in five whistleblowers experienced retaliation after internally reporting misconduct.<sup>8</sup> For a frame of reference, that's 6.2 million people. Retaliation not only impacts the reporting party—but sends a powerful message to other employees. Indeed, just over 1 in 3 employees who declined to report a problem pointed to a fear

of payback from senior leadership as the primary reason they stayed out of things.<sup>9</sup>

The net result? Far from discouraging whistleblowing, retaliation drives employees into the arms of investigators—and makes it less likely that you will learn of a problem while there is still time to address it internally. That is why recent research suggests that "companies that want to encourage internal reporting of wrongdoing should focus on developing and implementing anti-retaliation policies to protect whistleblowers."<sup>10</sup>

## ... But Wait, There's Another Whistleblower Risk

One other thing to know about whistleblowers: They might not work for your company. Indeed, one in five whistleblowers are the consultants and contractors you hire.<sup>11</sup> This underscores the importance of making sure your internal reporting procedures are communicated to your extended enterprise, and, depending on the particular circumstances of your organization, published on either your investor relations page or a publicly available ethics and compliance page on your website.

This also highlights the importance of having adequate resources to communicate and train your extended enterprise regarding your reporting options. You should consider a Supplier Code of Conduct and make sure it provides suppliers with the information and guidance they need to use your internal reporting resources. Your contracts too should address the need to report concerns directly to the company. Finally, you should consider providing training for your third-party partners. While the cost and effort necessary to train third parties may be daunting, you should at least consider providing training on critical topics like your Code, ethical decision making, and high-risk areas like anti-bribery.

6 National Business Ethics Survey, <http://www.ethics.org/downloads/2013NBESFinalWeb.pdf>

7 Inside the Mind of a Whistleblower, [http://www.ethics.org/files/u5/reportingFinal\\_0.pdf](http://www.ethics.org/files/u5/reportingFinal_0.pdf)

8 National Business Ethics Survey, <http://www.ethics.org/downloads/2013NBESFinalWeb.pdf>

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10 Internal Corporate Whistleblowers Swayed by Protections, Not Pay: Study, Insurance Journal, <http://www.insurancejournal.com/news/national/2015/03/03/359116.htm>

11 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program, <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf>

## The Best Defense Is a Good Offense – Embrace a Culture of Reporting

What can you do to manage the risk? For most organizations, encouraging a speak-up culture (and ensuring it permeates your extended enterprise) is the most effective way to manage potential whistleblower liability—and the one factor entirely within your control. A strong reporting culture will not only make sure you learn about potential problems, studies show it will actually lead to a decline in misconduct.<sup>12</sup>

How do you build a strong ethical culture and encourage internal reporting?

### 1. Engage senior leaders: Talk means nothing if senior leaders don't take ethics and compliance seriously.

You're probably tired of hearing about tone from the top, but that doesn't make it any less effective or important. Your employees' perception of a senior leader's ethics depends upon three primary factors:

- The overall character of the leader, as experienced through personal interaction
- How the leader handles crises
- The policies and procedures the leader issues and adopts to manage his organization<sup>13</sup>

The fact is that employees look to leaders as role models who set the tone for the entire organization. This extends to your senior leaders' conduct outside of work. Leaders who practiced 24-7 integrity were correlated with a stronger employee commitment to ethical conduct and greater employee engagement.<sup>14</sup> These trends will only accelerate given the continuing rise of social media, mobility, and the blurring between public and private matters.

### 2. Give middle managers tools and training they need to support your ethics and compliance initiatives.

<sup>12</sup> National Business Ethics Survey, <http://www.ethics.org/downloads/2013NBESFinalWeb.pdf>

<sup>13</sup> Ethical Leadership: Every Leader Sets a Tone, <http://www.ethics.org/nbes/wp-content/uploads/2014/12/ExecSummaryLeadership.pdf>

<sup>14</sup> Ethical Leadership: Every Leader Sets a Tone, <http://www.ethics.org/nbes/wp-content/uploads/2014/12/ExecSummaryLeadership.pdf>

Middle managers are a critical but often overlooked and under-supported part of the solution. While nearly 70 percent of employees will report an incident to their direct supervisor, only 58 percent of managers feel prepared to handle employee reports of misconduct.<sup>15</sup>

To close this gap, you need to provide middle management with the support and guidance they need. First, make sure you train them on your Code and other critical risk areas. Middle managers can hardly be expected to address potential reports if they cannot spot the importance of the issue being reported.

Second, you should make sure that middle managers understand how to report an issue brought to them by an employee. While hotline and Web-based reporting mechanisms are familiar to many employers, many have not yet embraced leadership or “walk up forms.” These Web-based forms allow managers to document incidents that employees have brought to them, feed directly into your incident management system, and allow you to document and report on investigations.

Finally, and perhaps most importantly, you need to provide managers with training around how to have ethics- and compliance-related conversations. They may or may not know how or what to document, who to give it to, and what kind of incident reports meet your escalation criteria. The closeness and trust that employees feel toward their immediate supervisors makes these middle managers the ideal people to carry the message of ethics and compliance with authority.

### 3. Create and publicize a quality hotline reporting program.

Hotline programs have been around for years, but are more important than ever in today's regulatory and business environment. Compliance teams should stop thinking of hotlines as purely telephonic; they've grown to include mobile and Web-based reporting solutions that give employees and others a safe and reliable way to raise their concerns internally via whatever method is most comfortable for them. They also give the compliance team important insight into what is going on inside the company.

Hotline reporting programs are complex and there is a lot more to write on this topic, but keep four things in mind:

#### 1. Reporting programs are only effective if your employees

<sup>15</sup> Risk Intelligence Quarterly, Q1 2014, CEB, <http://ceb.uberflip.com/i/256261/25>

know they exist, when to use them, and what to expect. Effective communications are a critical part of program success.

2. Don't just sit there, do something. Nearly 60 percent of those who did not report cited a belief that the employer would not act on their concerns as reason for not reporting, while more than 80% of employees who called the hotline reported a belief that the employer would act as their reason for calling.<sup>16</sup> Make sure you

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have processes in place to investigate and resolve concerns. Many hotline providers have incident management solutions that will ensure reports don't fall through the cracks.

3. Educate employees about what happens when they file a report, so they understand the process and how reports will be investigated. Removing the mystery and fear surrounding the process will reinforce the perception that your company takes reports seriously.
4. Quality matters. Even in today's digital age, word of mouth is the second most common way your people learn about your hotline. A quality experience will communicate your commitment to hearing your employees' concerns. A bad experience undercuts everything you are trying to achieve.

For a more in-depth view, take a look at our [Comprehensive](#)

#### Guide to Ethics and Compliance Hotline Reporting Programs.

4. **Communicate the value your organization places on acting ethically in the workplace. Use a layered approach using different communication and training tools.**

Experienced compliance professionals will tell you that there is really only one way to effectively minimize the cost and disruption of a government investigation or lawsuit: avoid it in the first place. To do that, you need to provide your employees with the information and guidance they need to make good decisions.

A good training and communications program is layered and leverages different avenues to reach employees. Don't forget how quickly people become blind to messages they see frequently. Advertisers call this phenomenon "ad blindness". This same phenomenon affects us in compliance in that we face a similar battle with keeping our compliance communications fresh in our employees' minds.

5. **Train managers on what constitutes retaliation and why it matters.**

When it comes to whistleblowing risk, retaliation represents a triple threat:

- » It creates potential liability for employers, even when the underlying complaint is unfounded.
- » Most managers fail to understand retaliation and how to avoid it.
- » Fear of retaliation is strongly correlated with whether or not an employee will report internally.

Preventing retaliation starts with having a speak-up culture, but that's not enough. Create, communicate, and enforce an anti-retaliation policy, and remember it's especially important to train managers. Managers can only avoid or report retaliation if they know what retaliation looks like.

### In Conclusion: Make Lemonade.

Whistleblowers represent a real risk to your organization, and that risk needs to be addressed. However, most whistleblowers are often simply concerned employees. Embrace the idea of the whistleblower as the motivator for making your ethics and compliance program as strong as it can be, rather than as an enemy out for revenge. Create the culture and provide

<sup>16</sup> Inside the Mind of a Whistleblower, [http://www.ethics.org/files/u5/reportingFinal\\_0.pdf](http://www.ethics.org/files/u5/reportingFinal_0.pdf)