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Compliance and Corporate Secretary Specialist

Monitoring for retaliation: Essentials for your ethics and compliance program

By Vicki Sweeney and Carrie Penman

Ethics and compliance professionals do not need to dig deep into their investigation files (or into the newspaper for that matter) to realize that oftentimes, when poor choices are being made and a problem is escalating into something that could cause legal, financial, reputational, or cultural harm to an organization, someone in the organization knew about it. The question is why those individuals did not raise their concerns early on, when the organization might have been able to prevent, or at least mitigate, some of the harm that resulted. The answer is complex to be sure, but research has shown there are two main reasons why individuals fail to report. The first is the belief that the organization won't take the matter seriously, and the second is a fear of retaliation.

Addressing fears of retaliation is one of the biggest challenges ethics and compliance (E&C) professionals face in their roles as stewards of ethical culture. Most organizations have implemented non-retaliation policies to try to protect those who report in good faith from suffering retribution for raising issues of wrongdoing. But often, E&C officers must rely on the reporter to come forward a second time to tell them about possible retaliation—an option which could

feel risky after already experiencing negative consequences from raising the initial concern.

So how can E&C officers address this challenge? The most effective approach is to build a culture less tolerant of retaliation, and one more likely to detect and even prevent retaliation in the first place. A second approach is one that few organizations have tried: proactively monitoring for retaliation. In this article, we will first discuss building a culture free from retaliation. Then, we will describe how one organization, KPMG LLP, uses existing company data to proactively identify potential retaliation, a leading practice for an E&C program.

Building a culture without retaliation

Most organizations formally communicate that they want employees to raise any concerns that could cause harm to the organization or its employees. Yet, employees often receive mixed messages from management or peers. Although most organizations require employees to certify they *will* report under their code of conduct or company policy, the culture may be sending a different message. “Shooting the messenger”



VICKI SWEENEY

is a frequent occurrence, whether intended or not. And often-used phrases, such as “Be a team player” or “This is how we do things,” may be code for “Don't ask any questions or challenge a decision,” whether it be about a financial entry, a conflict of interest, or bad behavior.

The culture of an organization defines whether wrongdoing is tolerated and whether it is reported. The importance of culture has been recognized by practitioners for many years and was formally addressed in the 2004 revisions to the US Federal Sentencing Guidelines. Although offering a hotline or helpline is a fairly straightforward operational decision, creating a culture where people feel comfortable raising a concern is a much more difficult undertaking. There are a number of reasons for this:



CARRIE PENMAN

- **“Don’t be a tattletale.”**

Most parents and teachers have said this to children and have done so with good intentions of helping children learn to resolve small differences by themselves. But even here, adults run the risk of confusing children. What should they handle themselves versus what should be brought to an adult immediately? The childhood lesson that “nobody likes a tattletale” carries into adulthood and the workplace, so often an employee experiences doubt about reporting potential wrongdoing, right from the start.

- **Folklore has the memory of an elephant.**

E&C officers and Human Resources (HR) personnel know well that the rumor mill can be an organization’s most effective communication vehicle. Most also know that the rumor mill is often taking issues out of context or embellishing the story with each telling. Often the stories are many years old and involve individuals who have long since left the organization. These stories are difficult to combat. When the Ethical Leadership Group™ conducts focus

groups, employees will often share the folklore as though it happened yesterday to their best friend. When asked probing questions like “When did this happen?” and “Did you actually witness the event?”, employees will often admit that they just “heard about it” and “it was a while ago.” None-the-less, folklore is a powerful deterrent to reporting and a major contributor to fear of retaliation.

- **Despite widespread employee concerns, actual reports of retaliation are low.**

Ethical Leadership Group recently reviewed the data of approximately 225,000 reports in the Global Compliance data base. As shown in figure 1 below, over the last three years, the average number of reports of retaliation remained below 1% of the total reports received. Of those reports, only 16%-20% were substantiated. The overall report substantiation rate in the database is 33%—a significant difference. It was also interesting to note that reports of retaliation decreased in 2009, a year of difficult economic times, when some would have expected the rate of this type of concern to increase.

<i>Figure 1</i>	2007	2008	2009
Rate of retaliation reports	0.90%	0.89%	0.67%
Substantiation rate of retaliation reports	20%	16%	19%

- **Even E&C officers fear retaliation**

The authors of this article presented this topic at two major ethics and compliance conferences over the last two years. During the sessions, we used anonymous electronic voting to ask the approximately 90 participants about their initiatives in this

area. As part of the voting, we also asked whether the attendees themselves believed they could raise an issue in their organization without fear of retaliation. Although this was not a scientific survey, the session results were concerning—33% of the E&C officers or other compliance professionals in these sessions said they could not raise an issue without fear of retaliation, and another 11% said they didn’t know. So, if 44% of the individuals responsible for overseeing the E&C program (including the non-retaliation policy) also share concerns about retaliation, we know this is still a major cultural challenge in the workplace today.

Addressing fear of retaliation

Multiple initiatives and processes are needed to address this complex issue. Most organizations use some steps to set the minimum standard, such as:

- **Specific policy on non-retaliation**

At a minimum, every organization should have a clear written policy against retaliation for raising honest issues in good faith. This policy should not just be a footnote or

afterthought in the code of conduct. It is best located in the discussion of reporting violations. Further, the policy should address sanctions for those who violate the policy. Voting in the conference sessions discussed earlier indicated that 88% of the

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participants said their organization had a specific policy against retaliation.

- **Training on non-retaliation**

Most E&C training includes a discussion of the various reporting options available. Only 57% of participants who voted in the conference sessions indicated that they conduct training on the non-retaliation policy. Typically, in program assessments conducted by Ethical Leadership Group, there is at least a statement about the non-retaliation policy in a live or online training program. Less typical is a more detailed discussion of retaliation in training sessions, for example, case study examples of how retaliation can occur.

Best practice training explains the various forms retaliation can take, describes how to recognize when it is happening, and offers guidance on what employees should do if they experience or witness it. Examples typically address retaliation by a manager or supervisor to a person reporting to them. This type of retaliation can have the greater impact on job assignments, pay raises, or promotions.

The more insidious and more feared form of retaliation happens peer to peer. It is also the most difficult to monitor and detect. Whether the result is a trashed locker or lost lunch partners, peer-to-peer retaliation is a major concern of many employees. Further, in a union environment, reporting on a co-worker can cause significant potential for retaliation. We are aware of one situation where a represented worker was fined by his union for violating the honor code and reporting on a fellow union member. We encourage

organizations to address both types of retaliation directly in training and other communications. If appropriate, initiate a conversation with union leadership about the issue as well.

- **Leadership tone and communications**

As with many elements of an E&C program, effectiveness of a non-retaliation policy depends on the organizational culture and the tone set by leadership. In our conference polling, 30% of the participants said their leaders “always” set a proper tone; another 55% said their leaders “sometimes” set a proper tone. Leadership should communicate periodically about the seriousness of the non-retaliation policy and, more importantly, act quickly and decisively when it occurs. Communications should include publication of case summaries (with identifying information removed) that deal with issues of retaliation and describe actions taken as a result of the findings.

- **Listen closely for instances of retaliation**

Sometimes retaliation may be difficult for reporters to articulate or recognize, and these allegations may be buried in a report about other matters. Investigators should watch carefully for potential retaliation, even in circumstances where the reporter is not making that claim. Additionally, some employees may choose to leave the organization rather than trying to resolve situations involving retaliation. Because they may feel more comfortable making these claims on their way out (when they are no longer worried about further retaliation), it is important to give them

the opportunity by using an exit survey or exit interview. HR personnel should be thoroughly trained to review resignation letters to identify potential issues. While it is better for the company to have this information before an individual leaves, at least this option captures the concern and allows for an investigation to identify and address retaliation in your organization.

- **Tracking reports and investigations of retaliation claims**

Most E&C officers report to management and the Board on case statistics and trends. Consider including a separate line item that specifically reports on allegations and outcomes of retaliation cases. Although there are likely to be fewer of these cases, keeping the issue at the forefront of the reviews will serve as a reminder that the organization is serious about enforcing this policy.

Despite best efforts, employees still don't always come forward. And when reporters, witnesses, or other participants in an investigation are identified, more can and should be done to protect them. Further, employees who have raised an issue and then experience retaliation may be less likely to raise the retaliation issue for fear of further consequences. So what more can be done?

Establishing a monitoring program

Very few organizations proactively monitor their cases for retaliation. Indeed, only 7% of the participants voting in the conference sessions said they actively monitor for retaliation on all cases. Another 8% said they conduct monitoring for some case

participants, leaving 85% who do no monitoring at all.

KPMG decided to directly address fears of retaliation by building a proactive retaliation monitoring program. This approach reinforces the firm's view that partners and employees not only need to feel comfortable raising issues, but they also need to feel protected from retaliation for all issues raised in good faith. The approach used by KPMG was to:

- **Start with education**

For KPMG, protecting individuals from retaliation begins with education on the firm's non-retaliation policy. Partners and employees learn about retaliation in training, including what it looks like and when and how it may occur. In 2010, the firm-wide mandatory E&C training devotes an entire module to subtle retaliation, such as exclusion from a team lunch. The module reminds individuals that subtle retaliation is just as impactful and wrong as more obvious retaliatory acts, such as termination. The firm also integrates learning points into technical and leadership training programs to help those who manage others identify and respond to concerns of retaliation. This approach empowers firm managers and leaders to identify and prevent retaliation—particularly peer-to-peer retaliation.

- **Acknowledge concerns about retaliation**

In addition to regular training and communications, creating as much transparency around how an organization deals with potentially retaliatory conduct can provide individuals confidence that such issues are taken seriously. KPMG provides

transparency around its response to reports of potential misconduct, including claims of retaliation, in "Ethics Cases," published in the Ethics and Compliance Annual Report, which is available to all personnel and external stakeholders at www.us.kpmg.com/about/. KPMG also communicates widely about the retaliation monitoring program so that personnel understand that the firm will protect them when they raise an issue in good faith. Still, individuals are often surprised to find real people at the other end of the monitoring process, and have expressed increased confidence after receiving personal contact.

- **Build a proactive monitoring program**

Education is only part of the solution. At KPMG, the other part is a robust retaliation monitoring program for identified reporters and participants in an investigation, which allows the firm to watch carefully for signs of retaliation over a period of time.

Case study

There are several steps in KPMG's monitoring process:

- **Assess likelihood of retaliation**

The first step in monitoring is assessing the likelihood of retaliation against each individual. Working from input given by the case manager and other members of the investigation team, the monitoring program manager assesses the likelihood of retaliation for each participant in an investigation. For example, someone who raises an issue about her immediate supervisor would generally be considered to be at more at risk for

retaliation than someone who raises an issue about a peer or subordinate.

- **Monitor key indicators**

Next, key performance data points should be monitored for individuals who are considered to be at risk of retaliation. At KPMG, individuals who are deemed at risk for retaliation are entered into the firm's monitoring program, which tracks a variety of information available through HR, Ethics and Compliance, and the individual's department or business function. The data points monitored vary depending on what is appropriate for each job function, but may include performance management documentation and compensation adjustments (with a comparison of year-to-year to monitor for a decline in job assessment/compensation); disciplinary actions; performance improvement plans; demotions; transfers; and terminations (which are monitored on a prospective basis to ensure that potentially adverse employment actions are reviewed prior to implementation); resignations (to ensure that an individual is not leaving his job due to real or perceived retaliation); and job assignments and utilization (to ensure that reporters and other participants are not being marginalized or denied opportunities for career growth).

Additionally, for high likelihood cases or where data raises concerns, the firm reaches out to individuals to remind them of its policy against retaliation and inquire as to whether the individuals have any concerns about retaliation.

The time period that the data points are monitored should reflect

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the information obtained through the monitoring program. For example, at KPMG, data points for all individuals in the monitoring program are reviewed on a daily, weekly, monthly, quarterly, or annual basis, depending on the type of data, for at least 12 months. The monitoring procedures may be extended beyond the one-year period for individuals who express a fear of retaliation or if the information obtained through the monitoring program so warrants.

- **Take action when retaliation is found**

An organization must respond quickly and fairly when a monitoring program uncovers evidence of potential retaliation. KPMG conducts a complete investigation when the monitoring program indicates that an individual may have been retaliated against—just as if the individual had reported this concern directly. This is the most important part of the process. Investigations need to be timely, thorough, and fair, because otherwise, no amount of training, communication, or monitoring will be effective. And, if the investigation substantiates retaliation, swift, consistent, and effective discipline must be imposed. A saying at KPMG is that “Retaliation is at war with our culture.” They have terminated individuals for acts of retaliation, making the message that the firm will not tolerate retaliatory behavior clearly and unequivocally.

- **Beware pitfalls**

No system is perfect. If you set out to build a retaliation monitoring program, you should also beware of some potential pitfalls:

- **Information requests may put a target on the reporter**

Requesting performance measurement documentation through HR could alert individuals who do not have a need to know that an employee is being monitored. The request through HR is a red flag that could indicate that the person raised an issue or participated in an investigation of some kind. To mitigate this concern, the individuals overseeing KPMG’s monitoring program have worked with HR to develop systems allowing direct access to the necessary information.

- **Protecting anonymous reporters is more challenging**

It is difficult for a monitoring program to protect anonymous reporters, who may be invisible to an organization’s E&C department, but could be more easily identified by those accused of wrongdoing or others involved in the matter. In these cases, you rely on individuals coming back to report retaliation, if it occurs. KPMG’s hotline system allows for communication with anonymous reporters through postings and confidential web chats, and the firm uses this technology to encourage self-reporting by posting the non-retaliation policy at the opening and closing of every matter.

- **It is difficult to prove that retaliation occurred**

It can be difficult to conclusively establish retaliation, especially subtle retaliation. Additionally, in tough economic times, the data being monitored is not always as clear. It can be difficult to determine whether an individual’s failure to receive a raise or bonus is indicative of retaliation or simply the result of the current

economic climate. These challenges underscore the need to have channels of communication available so that individuals may come forward and share what they know, and to build the capacity of managers, investigators, and others to recognize and address retaliation when it occurs.

- **Monitoring takes a commitment of time and resources**

There are no shortcuts to implementing an effective monitoring process. It takes a significant commitment of time and resources to build and maintain. The program cannot “kick in” annually; there could be daily, weekly, monthly, quarterly, and annual tasks depending on how you structure your monitoring protocol. And skill sets from HR, Legal, and Accounting, in addition to Ethics and Compliance, are often needed to monitor effectively.

Conclusion

Building a culture intolerant to retaliation is an important goal for E&C professionals. This begins with a clear, effective policy, which should be followed by training and communications.

Just as importantly, organizations need to actively monitor the employment information of individuals who raise issues and participate in investigations. Mining your existing HR, E&C, and other company data to identify issues that could indicate retaliation, and taking immediate action when evidence of potential retaliation is found, will align your organization’s words and actions and build trust in your program. Together with effective channels for raising issues and robust investigations, monitoring will help

to battle fears of retaliation, making it more likely that your employees will raise their hands when they see something that's not right. ✦

Editor's note: As the principal in charge of KPMG LLP's Ethics and Compliance Group in Montvale, NJ, Victoria Sweeney leads the day-to-day operations of a team that works to ensure compliance with firm policies and procedures, professional standards, and regulations. She may be contacted at vsweeney@kpmg.com.

Carrie Penman is President, Ethical Leadership Group™ at Global Compliance and does custom ethics consulting work for ELG clients in the areas of program and culture assessment, communications, executive and all-employee training, and program strategy and integration. She is located in Bedford, MA and may be contacted at carrie@ethicalleadershipgroup.com.

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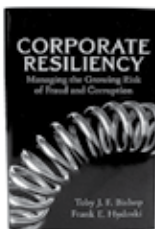
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