

# COMPLIANCE WEEK

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## **The Whistleblower Retaliation Epidemic**

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Whistleblowers have more reasons than ever to drop a dime on shady practices in the workplace, but those who do need to worry more about the threat of retaliation. According to a recent study by the Ethics Resource Center, retaliation rates against whistleblowers are reaching epidemic proportions. A full 15 percent of whistleblowers say they were passed over for raises and promotions, relocated, reassigned, or demoted because they called out wrongdoing in the organization. And even more alarming, nearly a third of those who reported retaliation say the retribution included physical attacks. “We normally think of retaliation in terms of the social aspects—people don't talk to you in the cafeteria, you are left out of work teams, or passed over for a promotion,” ERC President Patricia Harned says. “The physical aspect of it is worrisome.”

The Dodd-Frank Act's whistleblower provisions, which created the Whistleblower Office at the Securities and Exchange Commission and laid the groundwork for a reward system for those who report fraud to the agency, has put a spotlight on the system for reporting concerns both inside companies and to authorities such as the SEC. In late August the SEC's Whistleblower Office paid out its first bounty of \$50,000 to an unnamed whistleblower who provided documents and other information that helped the SEC obtain more than \$1 million in sanctions. In September, the Internal Revenue Service paid out a \$104 million award to a whistleblower that provided information about UBS's secret, tax-dodging offshore accounts—it was the largest amount ever paid out by the U.S. government to a whistleblower.

Such eye-popping awards are expected to provide increased incentives for employees to take their tips about corporate misdeeds to regulators. And companies, worried about hearing the allegations for the first time from federal agents, are revamping their internal hotlines other reporting mechanisms to make it easier for employees to report their concerns.

The Ethics Resource Center study found that legislative efforts to draw out more whistleblower complaints are indeed causing more to be filed. The study also identified a troubling increase in the number of whistleblowers who say they were retaliated against. In the last five years, there has been an 83 percent increase in the reported rate of retaliation according to the survey, while reporting only increased by

12 percent. The number of workers experiencing retaliation after reporting workplace misconduct jumped by 2.3 million (20 percent) since the 2009 survey, when 15 percent of whistleblowers said they were retaliated against.

The most dramatic increase involved physical attacks against whistleblowers or destruction of their property. Nearly a third (31 percent) of whistleblowers who experienced some form of retaliation say they endured physical harm or had their home or vehicle damaged after reporting wrongdoing in 2011, up from only 4 percent two years ago.

**“I was shocked by that,” says Gordon Schnell, a partner with the law firm Constantine Cannon specializes in whistleblower cases. “It’s very surprising because white-collar crime is typically ‘clean.’ It is not your physical, criminal type of behavior.”**

ERC's Harned says the category for physical retaliation was added after many took advantage of a “write-in” field to relay their stories. “Enough people indicated that their car had been damaged, or something had happened to their home or lawn, that someone threw rocks through their window, those kinds of things,” she says.

While not all events can be directly linked to whistleblowers' employers, the data is no less alarming. Harned said that future surveys will dig deeper into the details and agrees that skepticism may be a “fair response” because many of these cases depend on employee perceptions, not a verifiable account.

The increase in retaliation could set back corporate efforts to beef up reporting mechanisms, says Harned. “When it comes to these kinds of metrics, it doesn't really matter whether or not those incidents actually took place,” she says. “If employees believe they experience wrongdoing for having tried to report a problem, they will in turn tell their peers, who in turn will be far less likely to report again. All you need is that perception to be created in an organization and then you have a culture problem.”

The survey also revealed that ongoing efforts to encourage whistleblowers may actually be fueling retaliation. Whistleblowers who go to upper management, and especially those who use a company hotline, are significantly more likely to say they experienced retaliation (27 percent and 40 percent, respectively). By contrast, fewer employees (17 percent) who feel comfortable enough to report first to their supervisor end up experiencing it.

“We aren't ready to say at this point that the helpline process isn't safe,” Harned says, adding that the retaliation some reported may actually have taken place once an investigation was launched and details came to light, rather than the actual, initial hotline call.

Jordan Thomas, partner and chair of the Whistleblower Representation Practice at the law firm Labaton Sucharow, says that even these statistics may not show the full extent of the problem.

“Retaliation is underreported because people don't always want to speak candidly about problems they have,” says Thomas, a former assistant director and assistant chief litigation counsel in the SEC's Enforcement Division who had a leadership role in the development of its Whistleblower Program. “There is a natural under-reporting. The survey was focused on people who reported internally first and there are people who, because of harassment, were actually silenced before they reported.”

Thomas is troubled by the low number of employees who actually use company hotlines to report shady activity. Insider trading is first reported to the hotline at a much higher rate (22 percent) than many other kinds of misconduct, according to the ERC survey. By way of comparison, among all forms of misconduct only five percent are reported to the hotline first.

“It suggests that people don't trust their employer to do the right thing,” he says. “They fear that even if they report anonymously somehow their employer is going to get the information. If you have an organization where people believe that integrity and corporate ethics is important, will they feel comfortable calling an 800-number hotline? Absolutely. But when they don't trust the organization, they won't. It reflects a significant breakdown in the internal culture.”

Other findings in this year's survey are that retaliation is twice as high at companies involved in mergers and acquisitions. For the first time since the survey was initiated, managers were more likely than non-managers to experience retaliation. Retaliation rates are also higher when workers report pressure to compromise standards. More than half (52 percent) of workers who experienced such pressure and reported misconduct said they faced retaliation, compared to just 12 percent who didn't feel it.

**Protecting whistleblowers, thereby encouraging more to come forward, is a cultural challenge for companies. “Legislation has increased the penalties that are imposed on companies that retaliate, but whatever those penalties are they are really not deterring employers from trying to shut these whistleblowers down,” Schnell says. “I think the natural inclination [of management] is to close ranks, cover the wagons, and sweep it under the rug.”**

“Ethics and compliance practitioners need to be sure that they have a program in place, and a help line, and that they have done everything they need to do to comply with U.S. Sentencing Guidelines and other definitions of an effective program,” Harned says. “But they also have to focus on creating an environment where there is a tone set from the top that ethics matter. Supervisors need to reinforce that, support employees, and help them to come forward to report misconduct.”

Changing workplace culture may be far easier said than done, however. A survey this summer of 500 financial services professionals in the United States and Britain by Labaton Sucharow found that many feel unethical behavior may be a necessary evil. Twenty-four percent of respondents reported a belief that they or their

peers may need to engage in unethical or illegal conduct in order to be successful; 16 percent said they would commit a crime if they could get away with it. Pay plans are a common catalyst for unethical behavior, according to the survey. Thirty percent of respondents said their compensation or bonus plan created pressure to compromise ethical standards or violate the law, while 23 percent of respondents reported other pressures that may lead to unethical or illegal conduct.

“Retaliation grows as the risk of external reporting grows,” Thomas says. “There is a relationship between the extent of problems and the extent of retaliation.”

“I’m sure many of these companies have strong codes of conduct and policy statements regarding ethical behavior,” says Thomas. “The problem is there has been no integration of these concepts into the running of the business, and the people who are setting compensation and bonus plans are not focused on ensuring that ethical behavior occurs. There needs to be more integration of what organizations say and what they do.”