

Whistleblower Shields and Swords

Handle reports in a proactive manner

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As social psychologists would have us believe, sometimes perceptions do matter more than reality. How organizations perceive and treat whistleblowers matters.

Whistleblower profile

As a 25-year veteran of the Federal Bureau of Investigation (FBI) who specialized in white-collar crime including healthcare fraud, I saw a common theme among those who brought allegations of fraud to management's attention. These individuals, disproportionately female, believed they had exhausted all internal avenues for resolution before coming to the FBI or the Securities and Exchange Commission (SEC). Recall that the three 2002 *Time* magazine Persons of the Year were women, and whistleblowers.

Whistleblowers' journeys often include a trip to an attorney's office where they learn of an increasing array of legal shields and swords. If still employed, the shields of anti-retaliation rules may be of help to the whistleblower. The still-employed whistleblower is also in a great self-help position as she may be able to collect real-time evidence including recorded conversations with corporate wrongdoers. Once actually or constructively fired, post-employment regulations exist to protect the whistleblower.

The whistleblower will inevitably become educated about a variety of reward programs where they can collect a bounty for reporting wrongdoing. The most commonly used sword for the whistleblower in the healthcare arena is the False Claims Act, first passed in 1863, hence often referred to as "the Lincoln Law."

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 includes both shields and swords

as well. That act gave the SEC the ability to pay bounties to whistleblowers for their knowledge of violations of federal securities laws. Like the Sarbanes Oxley Act of 2002, Dodd-Frank gives protection to whistleblowers against retaliation, and prohibits any action that prevents a whistleblower from contacting the government. Other swords include the Internal Revenue Service's whistleblower program and similar programs under state laws.

Every whistleblower has a different story. Many have uncovered blatant fraud, others are completely off the mark, and a considerable number have a blended story of being both a firsthand witness to corporate wrongdoing and a problematic employee. The last and common scenario often puts management, compliance officers, and legal counsel in a difficult, no-win situation. Firing the employee may trigger a retaliation claim. Retaining the employee can result in lack of productivity and morale issues.

The first roadblock to a successful outcome of a whistleblower report can be poor communication. Will the whistleblower's concerns ever reach the right decision maker within the organization? If they do, how will management react? The outcome will depend a lot more on organizational culture and the tone from the top than on the company's formal written policy. Dr. Sri Ramamoorti, the periodic co-author of this column, tells that a successful outcome may all come down to the perceived level of psychological safety in the organization.

The single biggest factor whether a whistleblower pursues internal corporate reporting or seeks external remedies such as the government's bounty programs depends on the whistleblower's feelings of acceptance. If the whistleblower feels the concerns have been heard and management

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continues a sustained dialogue from complaint through resolution, the internal process will be pursued.

Financial incentives

The incentives for employees to become whistleblowers are certainly not going away and will likely increase. The federal government has enjoyed remarkable success under its whistleblower programs especially the qui tam provisions under the False Claims Act. A qui tam action allows a whistleblower to bring a lawsuit alleging fraud on behalf of the government.

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The whistleblower can be paid up to 30 percent of the damages recovered from the defendant. These damages include actual losses plus treble damages and a penalty of \$21,916 for each false billing submitted to the government for payment. In the healthcare industry, penalties can accumulate to large sums because false claims submitted to Medicaid or Medicare often involve high-volume billings over a long period of time.

The size of the false claims reward a whistleblower can recover is staggering. Consider a scenario that can occur in the ambulance service industry. A Medicare recipient, otherwise healthy and completely ambulatory, needs dialysis three times a week. Despite being mobile, the patient likes the convenience of ambulance transportation for these recurring dialysis treatments.

The ambulance provider knows the patient does not qualify for the rides under the Medicare regulations but finds the allure of recurring high-dollar payments irresistible. Through marketing efforts around a dialysis treatment center, the ambulance service can easily recruit 20 similar dialysis patients.

Now, let us do the math under the False Claims Act. The 20 patients receive three two-way trips a week. The ambulance service provider bills Medicare \$400 for each one-way trip resulting in revenue of \$2.496 million annually and 6,240 false claims to Medicare each year.

The False Claims Act allows the government to recover three times the actual loss amount, which in this example would result in \$7.488 million, plus up to \$136.76 million (6,240 x \$21,916) for the false claims associated with the medically unnecessary ambulance rides. The total would be a whopping \$144.24 million for each year of false claims, from a patient base of only 20 individuals. The whistleblower is entitled up to 30 percent of this amount, or \$43.27 million for each year.

As this example shows, the potential damages under the False Claims Act can easily be more than the net worth of the bad actor. The solvency of the enterprise can quickly be put at risk. Accordingly, defendants often settle these claims and the whistleblower walks away with a large reward. Once the whistleblower understands these realities, a strong incentive exists to report fraud outside of the company.

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A whistleblower can bring a claim associated with any type of government fraud, including that associated with defense contractors or programs under the departments of Education, Agriculture or Transportation. However, the greatest recoveries continue to be from the healthcare industry due to the size of the Medicare and Medicaid programs.

Significance of fraud

The Centers for Medicare and Medicaid Services reports that U.S. healthcare expenditures have grown to an all-time high of 17.9 percent of gross domestic product, or \$3.3 trillion, equating to \$10,348 per person for 2016.¹ Just as alarming is the amount of fraud this may represent.

Those on the forefront of healthcare fraud prevention and investigation include the FBI, the Department of Health and Human Services, the Association of Certified Fraud Examiners, and the National Health Care Anti-Fraud Association. These organizations estimate that healthcare fraud results in 3 to 10 percent of U.S. healthcare

¹ www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nhe-fact-sheet.html

10 elements of an effective whistleblower program

1. Create a positive tone from the top.
2. Craft and communicate a whistleblower policy to all stakeholders.
3. Maintain open lines of communication, including a hot line.
4. Act on all reports of malfeasance and fraud.
5. Form an independent and adequately resourced investigative team.
6. Provide confidentiality to whistleblowers.
7. Assure whistleblowers that management cares about them and their claim.
8. Seek legal advice.
9. Keep whistleblowers informed of the status of the investigation.
10. Prohibit retaliation and do not ban reporting to the government in separation agreements.

expenditures, equating to \$99 billion to \$330 billion annually.

The size of fraud in the U.S. healthcare system should be a troubling statistic to all taxpayers—the trickle-down effect raises individual and family health insurance premiums, for instance. Further, Congress has effectively incentivized whistleblowers to resolve their complaints outside the corporate entity.

Effective programs

Given these realities, how do those in charge of corporate governance in healthcare organizations not only manage the fraud risk, but manage also the risk of not effectively dealing with a whistleblower? Organizational culture, good processes and keeping a positive relationship with

whistleblowers will allow organizations to investigate and proactively respond to reported problems.

Is the employee recognized for courage and adherence to the company's stated values?

A healthcare organization can assess the quality of its whistleblower program by how management reacts to those alleging wrongdoing. Is the employee a hero? Is the employee recognized for courage and adherence to the company's stated values? Or, is the employee viewed as one that is harming the reputation of executives, the company and its profitability?

Whether hero or hellion, what swords and shields do whistleblowers have? What defenses do organizations have?

Conclusion

Healthcare organizations need to proactively protect their reputations by addressing reports of fraud by whistleblowers. Issues can then be dealt with before they are reported to external parties and become the focus of costly, publicly reported investigations. **NP**

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There is no discovery without risk and what you risk reveals what you value. ~ Jeanette Winterson