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Increasing Levels of Workplace Retaliation Reported in National Survey

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The 2011 National Business Ethics Survey[®] was published last week by the Ethics Resource Center. Over the last two decades this biannual report has become a mainstay for tracking trends, assessing data and gathering research on the state of ethics in the American workplace. It has also served as an effective gauge for monitoring hot-button issues in the employment law field. This year's survey continues that trend.

The Survey, which asked nearly 4,700 U.S. employees about the culture of their workplaces, presented a mixed bag of ethical findings. The good news:

- The overall percentage of observed ethical misconduct went down (45% of respondents stated they had witnessed misconduct in 2011, compared to 49% in 2009 and 55% in 2007).
- The percentage of employees who reported ethical misconduct that they witnessed increased to a record high of 65%.
- Employees working for organizations that have implemented effective ethics and compliance programs feel less pressure to compromise standards, see less misconduct, report misconduct more frequently, and are not as likely to suffer retaliation for reporting.

However, other data reflect ominous trends that may portend a gathering storm of liability exposure in the employment context. Among negative indicators outlined in the report:

- Retaliation against employee whistleblowers rose sharply. More than one in five employees (22%) who reported misconduct say they experienced some form of retaliation in return, up from 15% in 2009 and only 12% in 2007.
- The percentage of employees who perceived pressure to compromise standards in order to do their jobs rose from 8% to 13%.
- 34% of employees said their managers do not display ethical behavior, up from 24% in 2009.

These are alarming statistics, when viewed in light of the recent expansion of whistleblower protections afforded through such legislation as the Dodd–Frank Wall Street Reform and Consumer Protection Act (providing monetary awards for whistleblowers who provide incriminating information to the Securities and Exchange Commission (SEC) or Commodity Futures Trading Commission (CFTC)) and U.S. Supreme Court decisions such as *Thompson v. North American*

Stainless, LP, 131 S. Ct. 863 (2011) (whistleblower protection provided to third party considered to be within the “zone of interests” sought to be protected by Title VII). Indeed, the variety of ways in which the NBES respondents perceived retaliation reads like a top ten list of conduct that gives rise to actionable claims of retaliation. Included in the list of examples of retaliatory conduct were the following:

- 64% of respondents said they had been excluded from decisions and work activity by a supervisor or management;
- 64% allegedly suffered verbal abuse by a supervisor or someone else in management;
- 46% perceived a cut in hours or pay; and
- 32% believed they had been demoted.

What does this suggest in the employment law context? A perfect storm – workers are witnessing violations of company rules but they are feeling pressure not to say anything. Coming on the heels of an economic meltdown in the U.S., this combined tension between increased reporting and widespread perceived retaliation presents an environment ripe for disaster. According to Patricia Harned, president of the Ethics Resource Center, which conducted the survey, “There’s every reason to believe . . . that things will take a bad turn.” In order to combat the increased risk of liability that invariably accompanies such growing areas of concern, organizations will need to remain vigilant in their commitment to ethical practices and compliance.

Recommendations for Employers

In the face of increasing trends in perceived retaliation and heightening pressure to compromise standards, employers will be well served to set standards that keep managers focused on using best practices in navigating the critical moments accompanying an employee complaint:

- *Know the right response.* Beyond “knowing what not to do,” managers must know how to react when they receive a complaint, report or serious expression of concern from an employee. The actions taken in those crucial, first few moments can dramatically affect every subsequent step in the process. Make available, through training and policy distribution, a readily accessible set of decision points to help managers act in the way that best responds to a given concern, while also protecting the long term interests of the employer.
- *Do not tolerate poor management.* As many other studies have shown, how direct supervisors act and behave will determine how employees perceive the organization’s ethical culture. Employees who see supervisors breaking the rules, treating people unfairly, being abusive, etc., will take those observations and conclude that the entire organization operates in a similar unethical manner. When the perception of the ethical culture is weak, misconduct is much more prevalent. Supervisors and managers who do not abide by the employer’s values must be quickly reformed or exited from the organization.
- *Conduct fair investigations before reacting.* Make sure that performance management practices remain fair and based solely on fact. Remember that an employee has engaged in protected activity by making a complaint – but that is not to say that he or she is now immune from discipline. Ensure that systematic, detailed and accurate documentation of performance problems is taking place. Consistently doing what is required demonstrates that the employer is treating all employees in an evenhanded way.
- *Stay cool.* Avoid any expression of hurt, anger, or resentment about an employee’s complaint. If a complaint is directed at you, remain professional and above the fray. Do not argue, fight back or try to dissuade them from their version of events. Attempt to clarify any perceived misunderstandings, but be just as vigilant in seeking out HR and letting it know what has transpired. Indeed, a complaint about a manager may well also be a report to the manager – do not forget a manager’s responsibilities as a member of management to ensure that reported concerns receive a proper response.
- *Stay vigilant against unethical conduct.* As the economy improves, do not allow a decreased focus on ethics and values to infect the workplace. Continued fostering of an ethical culture through training, codes of conduct, and executive involvement is always the best defense to concerns of corporate misconduct.
- *Establish, post and publicize strong internal reporting procedures.* The more transparent and visible these procedures are, the less likely is it that they will be disregarded or unfulfilled. Push hard at all levels to ensure employees have confidence in the organization’s internal reporting systems.

- *Understand the culture.* The data and findings presented in the NBES are very helpful in understanding what is happening in our society; however, what is more important is knowing the culture of your organization. What do employees think of management? Are they willing to report misconduct? Do they believe management will react appropriately if misconduct is reported? A well-planned and executed culture survey will enable the organization to implement remedial programs to build the right ethical culture and reduce the chance of misconduct occurring.

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