Protecting Whistleblowers:
Recommended Practices for Employers for Preventing and Addressing Retaliation

Five key steps to creating an effective anti-retaliation program:

1. Ensure leadership commitment

2. Foster an anti-retaliation culture

3. Implement a system for responding to reports of retaliation

4. Conduct anti-retaliation training

5. Monitor progress and program improvement

Retaliation against employees who report concerns is bad for workers and bad for business. Without an effective whistleblower protection and anti-retaliation system in place, problems in the workplace may go unreported because workers fear retaliation for reporting concerns or feel frustration over the lack of effective resolution of their concerns. Creating a workplace environment in which workers feel comfortable voicing their concerns avoids the external legal and public relations problems that can arise when concerns go unreported and improves employee satisfaction and engagement. The program elements recommended below provide practical guidance on protecting whistleblower rights for public, private, and non-profit employers. While adaptable to most workplaces, these guidelines may need to be adjusted for such variables as employer size, the makeup of the workforce, and the type of work performed.[1]

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[1] The core recommendations presented in this document were recommended unanimously by the Secretary of Labor's Whistleblower Protection Advisory Committee. The committee's recommendations entitled *Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation* can be found at http://www.whistleblowers.gov/wpac/WPAC_BPR_42115.html.

What Is Retaliation?

Retaliation occurs when an employer takes an adverse action against an employee because the employee raises a concern about a workplace condition or activity that could have an adverse impact on the safety, health, or well-being of the reporting employee, other workers, or members of the public. An adverse action is an action that could dissuade a reasonable worker from raising a concern about a workplace condition or activity. Because adverse action can be subtle, it may not always be easy to spot. Examples of adverse action include:

- Firing or laying off
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Making threats
- Reassignment or other actions (such as excluding an employee from training meetings) affecting prospects for promotion
- Reducing pay or hours

Program Benefits

There are many benefits to an effective anti-retaliation program. Instituting an effective anti-retaliation program can improve employee morale by ensuring that employees can report concerns without fear of retaliation, helping employees to feel safer and more invested in the workplace. Effective anti-retaliation programs can also help employers learn of employee concerns and appropriately address them before they escalate and become more costly to correct.

Creating an Effective Anti-Retaliation Program

An effective whistleblower anti-retaliation program requires senior leadership commitment to and accountability for making retaliation prevention and compliance with the law an integral aspect of the workplace culture. Some essential elements of an effective anti-retaliation program are not intuitive but require specific policies and programs.

1. Ensure Leadership Commitment

In an effective anti-retaliation program, managers lead by example. Top management, including the CEO and board, should demonstrate commitment to, and respect for, whistleblowing. To demonstrate commitment, management should back up words with actions; written policies that are not actively enforced are ineffective. Management at all levels should demonstrate support for policies that ensure whistleblower rights and should be held accountable for the quality of the employer's response to employees' concerns, including reports of potential violations of the law and reports of retaliation.

How can employers create leadership commitment?
- Require training for managers and board members to make certain they understand what retaliation is, the employer's and their own legal obligations, and what it takes programmatically to prevent retaliation. Re-train managers who retaliate. (For more information, see the Conduct Anti-Retaliation Training section.)
- Incorporate anti-retaliation measures (e.g., constructively addressing concerns, attending training, and championing compliance initiatives) in management performance standards and reviews.
- Apply appropriate consequences, such as discipline and penalties, sufficient to serve as a deterrent when acts of retaliation are confirmed.
- Ensure that someone in management has the duties of implementing, enforcing, and evaluating the anti-retaliation program.
- Ensure that there is a mechanism for accurately evaluating employees' willingness to report concerns about the workplace and the employer's actual record in preventing retaliation against employees who report, and ensure that there is a means for accurately reporting to top leaders the results of such evaluation.
- Implement strong codes of conduct and ethics programs.

2. Foster an Anti-Retaliation Culture

The best way to prevent retaliation is to foster an organizational culture in which raising concerns about workplace conditions and activities is valued. Employers should cultivate an organizational culture that encourages reporting, provides for fair evaluation of concerns raised by employees, offers a timely response, and ensures effective resolution of concerns.

Employers can help foster such a culture by:

- Creating at least one or, if feasible, multiple channels for reporting workplace concerns and retaliation. Channels can include hotlines, anonymous email boxes, or reporting to a trusted official.
- Giving employees clear instructions on how they can report concerns or incidents.
- Providing confidentiality or anonymity for employees who report concerns.
- Encouraging employees to report concerns early, before they become more difficult to resolve, and investigating those concerns promptly.
- Ensuring that any employment agreement or policy that requires employees to keep employer information confidential makes clear that it does not prohibit employees from reporting or communicating with any government agency regarding any concerns that the employee has that there may be an unsafe working condition or a violation of the law in the workplace.
- Eliminating all formal and informal workplace incentives that encourage or allow retaliation or discourage reporting. Examples of problematic incentives include rewarding employee work units with prizes for low injury rates or linking supervisory bonuses to lower reported injury rates. (For additional information on incentive programs, see OSHA's memorandum on Employer Safety Incentive and Disincentive Policies and Practices, http://www.osha.gov/as/opa/whistleblowermemo.html.)
- Investigating reports of concerns promptly, thoroughly, and with transparency, including responding to the employee who brought forward the initial concern.
- Ensuring that supervisors or managers respond in a constructive manner upon receiving reports of concerns or retaliation from employees.
- Guaranteeing that employee rights are protected even if the person is incorrect or unpleasant in raising a concern.
- Following through on employee concerns, even if they appear to be trivial.
- Having a strong policy of not punishing employees for reporting concerns or incidents.
- Affording ways for employees to get unbiased, confidential advice about exercising whistleblower rights and coping with the stress of reporting concerns.
- Ensuring that employment status changes, such as demotions, are made for legitimate business reasons.

In developing these policies, employers should work with employees or, in a unionized workplace, union leadership.

3. Implement a System for Responding to Reports of Retaliation

When retaliation is reported, employers should promptly and thoroughly investigate the claim, utilizing an effective retaliation response system. Such investigations should:
- Take all reports of retaliation seriously.
- Be transparent to the employee alleging retaliation about how investigations are conducted.
- Investigate claims utilizing an objective, independent complaint review process; focus on the facts and the underlying concern rather than on defending against the claim; and listen to all sides before making a judgment.
- Utilize conflict of interest protections and include senior managers and others who recognize the organizational

impact, benefits, risks, and policy ramifications of the complaint.
- Maintain employee confidentiality, to the extent practicable, along with rumor control in order to protect the reporting party from further retaliation.
- Keep the reporting employee informed of developments throughout the investigation and ensure respectful, proper closure of the issue.
- Use third-party, independent investigators if the employer can support it and the circumstances warrant it.

> Communication is the key to an effective anti-retaliation program. Managers should discuss the program with their employees regularly. Consider publicly acknowledging any benefits or improvements made by employees who speak up.

Employers should respond quickly to reports of retaliation. Failure to do so can discourage employees from reporting concerns about workplace conditions or activities.

Employees who experience retaliation should have independent channels for reporting the retaliation; they should not be required to report to a manager who engaged in retaliation against them. The reporting employee should also have the ability to elevate the matter to higher levels, if necessary. There should be clearly defined roles for managers and others, such as human resources personnel, who are involved in responding to reports of retaliation.

If an employee is disciplined after reporting a concern/injury/issue, the punishment should be reviewed to ensure that it is not retaliatory. Ask questions such as:
- Did the employee's report influence the decision to initiate disciplinary action in any way?
- Has the employer disciplined other employees who engaged in the same conduct as the employee but who did not report a concern?
- Is the discipline imposed on the employee in line with the employer's response to the same conduct by other employees who did not report a concern?
- Has the disciplinary action been independently assessed?
- If the employer uses progressive discipline, has it been appropriately used up to this point?

If the employer confirms that retaliation took place, it should review its anti-retaliation program to determine whether changes need to be made to prevent future retaliation.

4. Conduct Anti-Retaliation Training

Effective training of employees as well as leaders, managers, supervisors, and the board (if applicable) is key to any anti-retaliation program. Training should teach workers and managers about their rights and available internal and external protection programs. Managers should learn these concepts, along with related skills, behaviors, and obligations to act.

Anti-retaliation training, at a minimum, should include coverage of:
- Relevant laws.
- Employee rights and activities protected by statute.
- The elements of the anti-retaliation program, including roles and responsibilities, how to report concerns

- internally and externally, and how to elevate a concern internally when supervisors or others do not respond.
- What constitutes retaliation, including actions such as firing or laying off, demoting, denying overtime or promotion, disciplining, denying benefits, failure to hire or rehire, reducing pay or hours, and blacklisting, along with common but less overt behaviors such as peer pressure, ostracizing, mocking, and exclusion from meetings.
- Skills for defusing conflict, problem solving, and stopping retaliation in a work group.
- How to respond to a report of a workplace concern without engaging in retaliation, appearing to engage in retaliation, or questioning the motives for the report.
- How to separate, if present, annoying or inappropriate behavior from the concern itself.
- Consequences for managers who fail to follow anti-retaliation policies and respond to concerns inappropriately.
- What constitutes "notice" to an employer that an employee believes there has been retaliation, when employers are required to act, and the legal exposure and penalties they face for inaction.
- Other issues specific to the employer.

Legal requirements can change. Employers should create a process for staying up to date on changes to anti-retaliation laws and regulations and update their training and policies accordingly. Refresher training should be conducted on a regular basis or when a change in legal requirements occurs.

5. Monitor Progress and Program Improvement

Tracking progress is crucial to ensuring that the anti-retaliation program works. By discussing the program with employees and getting their feedback, employers can gauge how well the program is working.

When new anti-retaliation programs are implemented, the numbers of reported incidents may rise at first. This often means that employees are more comfortable reporting, not that there are a larger number of concerns to report.

When reviewing progress, employers should focus on leading indicators (such as problem solving, encouraging compliance with safety, financial, or other regulations, and reporting near misses) rather than trailing indicators (such as the number of retaliation complaints, OSHA recordable injuries, and other reported incidents). Top-level managers should receive dashboard reports on concerns reported, retaliation allegations, and concern resolution, along with in-depth results of independent audits, if any.

Concerns not reported through compliance and ethics channels may be reported to workers' compensation, in grievances, to outside agencies, or in exit interviews. Employers should look at a variety of sources, such as employee injury reports, case studies, claims department/risk management case files related to employee injuries, and complaint files relating to reporting requirements, to ensure compliance with anti-retaliation policies. It is also critical for employers to track emerging issues and incidents. Incident investigations and changes in personnel practices should be examined. Managers should create plans to improve delinquent work groups or facilities. All assessments and audits should be reported to top management and the board, if relevant.

Audits

Independent audits can be a useful tool for tracking progress and program implementation, although they may not be financially feasible for all employers. Employers should work with

their employees and bargaining unit leaders (if any) on elements of the audit.

Audits can provide an independent assessment of whether workers are unafraid of retaliation and coming forward with concerns. Audits of program data should be done from outside of the immediate business unit.

The auditing process should include anonymous employee surveys and confidential interviews that take a robust sample to track behavior and perception. Auditing should also be done across a wide range of employees, facilities, and functions to gain a full picture of the effectiveness of the anti-retaliation program.

How OSHA Can Help

The Occupational Safety and Health Act (OSH Act) prohibits employers from retaliating against employees for exercising their rights under the OSH Act. These rights include raising a workplace health and safety concern with an employer, reporting an injury or illness, filing an OSHA complaint, and participating in an inspection or talking to an inspector. If workers have been retaliated against for exercising their rights, they must file a complaint with OSHA within 30 days of the alleged adverse action. OSHA also enforces the whistleblower protection provisions of 21 other statutes relating to asbestos in schools, cargo container safety, aviation safety, commercial motor carrier safety, consumer product safety, environmental protection, consumer financial protection, food safety, health insurance reform, motor vehicle safety, nuclear safety, pipeline safety, public transportation safety, railroad safety, maritime safety, and securities laws. For more information, please visit www.whistleblowers.gov.

OSHA has other materials to assist employers in complying with their responsibilities under the law. Information on OSHA requirements and additional health and safety information is available on the agency's website, www.osha.gov.

Workers have a right to a safe workplace (http://www.osha.gov/workers/index.html). The law requires employers to provide their employees with working conditions that are free of serious known dangers and to comply with applicable OSHA standards and regulations.

Workers who believe that they have been exposed to a hazard or who just have a question about workplace safety or health should contact OSHA. For example, workers may file a complaint to have OSHA inspect their workplace if they believe that their workplace is unsafe or that their employer is not following OSHA standards. Just contact OSHA at: 1-800-321-OSHA (6742), or visit www.osha.gov. We can help.

OSHA can also help answer questions or concerns from employers. To reach the closest OSHA regional or area office, go to OSHA's Regional and Area Offices webpage (www.osha.gov/html/RAmap.html) or call 1-800-321-OSHA (6742). OSHA also provides free, confidential on-site assistance and advice to small and medium-sized employers in all states across the country, with priority given to high-hazard worksites. On-site Consultation services are separate from enforcement activities and do not result in penalties or citations. To contact OSHA's free consultation program, or for additional compliance assistance, call OSHA at 1-800-321-OSHA (6742).

Disclaimer: This document is not a standard or regulation, and it creates no new legal obligations. These recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace that is free of retaliation against employees who report concerns protected under the whistleblower laws that OSHA enforces. The Occupational Safety and Health Act requires employers to comply with safety and health standards and regulations promulgated by OSHA or by a state with an OSHA-approved state plan. In addition, the Act's General Duty Clause, Section 5(a)(1), requires employers to provide their employees with a workplace free from recognized hazards likely to cause death or

serious physical harm, and the Act's anti-retaliation provision, Section 11(c), prohibits employers from retaliating against employees to exercise any right afforded by the Act. In addition to Section 11(c), OSHA enforces the whistleblower provisions of 21 laws protecting employees who report concerns related to various commercial motor carrier, airline, nuclear, pipeline, environmental, public transportation agency, consumer product, motor vehicle safety, railroad, maritime, health care reform, food safety, securities and financial reform laws.