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OSHA's Response to Public Comments for *Recommended Practices for Anti-Retaliation Programs*

BACKGROUND

On November 6, 2015, OSHA requested public comments on a draft guidance document titled *Protecting Whistleblowers: Recommended Practices for Employers for Preventing and Addressing Retaliation*. The purpose of the voluntary guidance is to help employers in developing anti-retaliation programs to protect employees who raise concerns 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. OSHA enforces twenty-two whistleblower protection statutes and recognizes the importance of employers' efforts to prevent retaliation from occurring in the workplace. OSHA believes that many employers wish to implement effective approaches to engage positively with employees who raise or report concerns and issues in the workplace, to prevent those employees from being retaliated against for making such reports, and to address constructively incidents of retaliation.

While OSHA recognizes that the types of programs employers need to develop depends on their industry, size, and workforce, this voluntary guidance is designed to generally inform employers of recommended practices and approaches to consider when developing new programs or improving existing policies.

OSHA sought general comments from the public on the draft guidance and also provided several questions for consideration:

1. Are there any important features that employers should include in an anti-retaliation program not addressed in the document? If so, please describe what additional features you think should be included.
2. Are there any concepts in the document that are difficult to understand? If so, please describe them and, if possible, how you would recommend that OSHA make these concepts more clear.
3. What are the challenges to implementing the recommendations in the document? Please describe those challenges and, if possible, how you would recommend that OSHA address them in this guidance document.
4. Are there issues specific to small businesses that need to be addressed? If so, please describe those issues and, if possible, how you would recommend that OSHA address them in this or a separate guidance document.
5. Are there industry-specific issues in developing an anti-retaliation program that you would like to see addressed, possibly in a separate document? If so, please describe those issues and, if possible, how you would recommend that OSHA address them in this or a separate guidance document.

OSHA also posted a document produced by the Whistleblower Protection Advisory Committee ("WPAC"), titled *Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation*. The WPAC was established to advise, consult with, and make recommendations to the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health

on ways to improve the fairness, efficiency, effectiveness, and transparency of OSHA’s administration of whistleblower protections. A subcommittee of the WPAC—the “Best Practices and Corporate Culture” work group—was established to identify and evaluate employer programs to prevent retaliation against whistleblowers and to advise OSHA about the effectiveness of those practices. Through that subcommittee, WPAC developed recommended best practices that OSHA considered along with the public comments in developing the final guidance.

OSHA received more than 3,700 comments from participants in a write-in campaign coordinated by the National Whistleblower Center (NWC), and approximately 45 other substantive comments. Commenters included individuals, employers, whistleblower advocates, industry groups, labor unions, and consultants, among others. Comments are available at www.regulations.gov (docket number OSHA-2015-0025). OSHA greatly appreciates the time and attention taken by each commenter and has considered each of the comments submitted when revising the guidance. OSHA has now finalized the guidance document. In this summary response, OSHA will identify the major themes in the comments and summarize OSHA’s response to the comments in the final guidance. OSHA was not required to seek public comments or specifically respond to comments because this is voluntary guidance that creates no new legal obligations. Nonetheless, OSHA values the public input it received on this guidance and is providing this summary response in recognition of the significant public interest in these and other whistleblower matters.

SUMMARY AND GENERAL RESPONSE TO ISSUES RAISED IN THE COMMENTS

After considering all of the comments, OSHA has made substantive and formatting revisions to the guidance document, including changing the title of the document. The final guidance document, “Recommended Practices for Anti-Retaliation Programs,” is available at http://www.whistleblowers.gov/recommended_practices.html. A section-by-section summary of the comments received, OSHA’s general responses, and changes made in the final guidance is set forth below.

I. Comments That Apply to the Guidance Overall

A. Employees’ rights to report to government agencies

OSHA received a detailed comment from the NWC along with a large number of comments and sign-on letters from a campaign that generally endorsed the points raised in NWC’s in-depth submission. NWC’s primary concern was that whistleblowers are most vulnerable when they report compliance concerns to their employer, and employees must be free to exercise their right to report concerns about violations of the law directly to an appropriate government agency without first reporting to the employer. The comment asserted that OSHA’s draft guidance could mislead employers and employees into believing that employers can require employees to first report concerns to the employer before reporting to a government agency or that OSHA would support such an employer policy. Because of these concerns, NWC urged OSHA not to publish this guidance or, at minimum, to take certain steps to clarify that internal reporting systems and resulting investigations should not be abused by employers.

1. Concerns with internal reporting and employer investigations

NWC pointed to several specific concerns with regard to internal reporting and employer investigations. The comment expressed alarm that the WPAC's recommendations, which OSHA relied on in crafting the draft guidance, suggested that employers may want to create internal reporting programs to avoid external reports that could create legal and public relations costs. NWC noted that several whistleblower statutes and regulatory schemes—for example, the Securities and Exchange Commission's Dodd-Frank Act regulations—do not require internal reporting because external reporting may be preferable for both law enforcement and whistleblowers. In addition, NWC noted that several whistleblower-protection statutes, not enforced by OSHA, either have been found not to protect internal reports or are aimed at rewarding reports to government agencies that lead to successful enforcement actions. NWC asserted that, at a minimum, employees should be explicitly trained on their rights to report externally without reporting internally and that employers should not discourage external reporting. In addition, NWC suggested that employers should provide employees with contact information for applicable government agencies and information on the rules permitting anonymous and confidential reporting to those agencies, in particular the law enforcement agencies that address financial and fraud-related issues. Relatedly, NWC expressed concern with the concept of a "speak up culture" as described in the OSHA guidance, and posited that a true "speak up culture" should actively encourage employees to report violations of the law to the government.

2. Concerns with the structure of internal compliance programs

NWC further suggested that OSHA should be more specific regarding how employers would need to structure internal compliance programs in order to ensure that those programs could address employees' compliance concerns in an effective and transparent way. In particular, NWC commented that OSHA's guidance failed to specify who should run employers' internal compliance programs and what would qualify as an "independent" compliance department. NWC noted that employers have successfully argued that internal compliance investigations conducted under the direction of an employer's general counsel or outside counsel are attorney-client privileged and not subject to legal discovery. As a result, employees' and law enforcement's ability to address violations of the law has been substantially hindered. NWC commented that OSHA's draft guidance did not sufficiently discourage employers from operating their compliance departments under the direction of their general counsel's office in order to use the attorney-client privilege to obscure corporate wrongdoing and punish whistleblowers. NWC also urged OSHA to advise employers to make clear to employees participating in an investigation conducted at the direction of the employer's counsel that counsel represents the employer's interests and not the employee's and to advise employers that they cannot require employees to sign confidentiality agreements, in such investigations or otherwise, that limit employees' right to report corporate wrongdoing to the government.

3. Concerns about how OSHA's guidance will be used

NWC also asserted that employers have argued, with some success, that employee complaints made only internally are not protected activity under some statutes, such as the Dodd-Frank Act's whistleblower provision and the False Claims Act. NWC expressed concern that if OSHA's guidance encourages employee participation in internal reporting programs, it could be misused in an attempt to support employers' arguments that (a) employees can be required to make internal reports, or (b) that employees who only report internally should not be protected.

NWC emphasized its concern that potential whistleblowers may think OSHA's guidance supports internal reporting to the exclusion of external reporting and indicates that whistleblowers will be always be protected if they only report internally, although that is not true under some statutes that are not enforced by OSHA. NWC asserted that anonymous or confidential reporting to a government agency is the safest method of whistleblowing, and employees should be informed of their rights and options for external reporting, including awards regimes under certain statutes. NWC further pointed out that the various federal whistleblower protection regimes are complex, and that the industries and employers covered by these laws differ substantially, such that establishing general rules for internal programs is not feasible. Similarly, another whistleblower advocate commenter also asked OSHA to clarify that reports to the government are protected and that employees need to be able to make external reports when the perpetrators of the alleged wrongdoing are at the top of the organization. That commenter emphasized that in some cases both the underlying misconduct and any retaliation may be best addressed by reporting the issue(s) to a government law enforcement agency, and employees will know best whether they are safer reporting concerns internally or externally.

4. OSHA's Response to NWC's comments

OSHA acknowledges that the concerns that NWC and other commenters raised are well-founded. In addition, OSHA emphasizes that reporting safety concerns and potential violations of the law to regulators and law enforcement agencies, as well as testifying, participating and assisting in investigations or proceedings, is protected under all of the twenty-two whistleblower protection statutes that OSHA enforces. Moreover, DOL and the courts have long provided protection for internal complaints under the whistleblower statutes enforced by OSHA. Employers should not interpret OSHA's guidance as suggesting that they may require internal reporting either as a necessary precursor to or as an alternative to reporting safety concerns or potential violations of the law to the government. OSHA agrees with the commenters that employees have the right to choose whether to blow the whistle to the employer or to the government. Employers must refrain from retaliating against employees regardless of whether they report internally or externally. OSHA also agrees with NWC and other commenters that an effective compliance and anti-retaliation program should educate employees regarding their right to report externally, as well as internally, and should ensure that employees are not penalized for choosing to report externally rather than internally. OSHA has made changes throughout the revised guidance document, including adding a new introductory section, to highlight whistleblower protection for external reporting and to give guidance to employers aimed at ensuring that employees are free to report safety concerns and potential violations of the law to the government without fear of retaliation.

OSHA has also revised the guidance to address NWC and other commenters' suggestions aimed at ensuring the independence of internal investigations into compliance concerns and ensuring that confidentiality agreements and attorney-client privilege are not abused in internal investigations. Those changes are noted in the section-by-section review of comments below.

B. Collaboration with employees and collective bargaining units

Numerous commenters representing workers emphasized the importance of employers proactively engaging workers and their representatives (including bargaining unit leaders) at all stages of program development, training, implementation, and evaluation of program effectiveness. Commenters specifically urged employers to seek worker feedback and, if retaliation takes place, to work with employees to identify where the system failed. One commenter suggested that joint labor-management health and safety committees are one way to collaborate. A large employer with several collective bargaining agreements commented that these are challenging issues to bargain over and some collective bargaining agreements may already provide for channels to address retaliation.

OSHA agrees that employees and their representatives (if applicable), should be included in every element of an anti-retaliation program. The final guidance includes this point in each section.

C. Needs of small businesses

Several commenters advised OSHA to ensure that the guidance is inclusive of small businesses and to provide specific suggestions for small businesses either in each section of this guidance or a separate publication. Commenters pointed out that programs for small businesses will differ from those that large companies can implement, particularly the role of top leadership, program evaluation and auditing, as well as certain program features like anonymous reporting. Commenters also noted that programs will necessarily differ by industry and type of entity and small businesses may not be able to adopt every element in the guidance. Commenters recommended that OSHA avoid references to specific leadership positions, such as "CEO" and "board," since small businesses, public sector entities, or non-profits may not have those positions.

OSHA agrees that this guidance should be relevant to employers of all sizes, including small businesses. The final guidance seeks to be inclusive by indicating that references to the board are only relevant where applicable, and by emphasizing that program elements can and should be adapted to be appropriate to the size of the employer and resources available.

D. Programs should be proactive and integrated

Several commenters stressed that OSHA's guidance should strongly communicate the need for employers to take a proactive approach when developing systems to prevent retaliation. Commenters explained that proactive programs should involve integrated systems including all of the elements described in the guidance to encourage reporting of compliance issues as well as to prevent and respond to incidents of retaliation against employees who report compliance issues. Several commenters also asserted that OSHA should advise employers to view establishing a system for employees to report compliance concerns as a preventive anti-

retaliation measure to avoid situations where retaliation may occur. OSHA was also urged to advise employers that they should not be reactive and should not use employee reporting programs defensively, i.e. to gather evidence for a legal case against the whistleblower, but instead to fairly and proactively address concerns raised by whistleblowers.

OSHA concurs that an anti-retaliation program will be most effective if it integrates all of the elements discussed in the guidance, and that proactively responding to employee concerns is a key factor to preventing retaliation. As discussed below, this point is incorporated throughout the final guidance.

E. Sample program materials

Several commenters asserted that OSHA should include sample program materials, company policy documents, training materials, and/or reference materials produced by outside entities (including materials produced by the commenters). As discussed above, this guidance is intended to be broadly applicable to employers covered by the twenty-two whistleblower statutes enforced by OSHA and the specific details of employer programs will necessarily differ based on factors such as industry and company size. Therefore, OSHA has not provided sample program materials or policy documents at this time.

F. Comment on the Interplay Between OSHA Recordkeeping Rule and This Guidance

One employer group noted its view that some issues raised in this guidance are related to those addressed in OSHA's recordkeeping rule, "Improve Tracking of Workplace Injuries and Illnesses," and requested that OSHA accept additional comments on this guidance following the issuance of the final recordkeeping rule, which was published on May 12, 2016. See 81 FR 29623. The commenter further explained its view that the proposed recordkeeping rule's prohibition on employers from taking adverse action against employees for reporting injuries and illnesses was not consistent with the recommendation in this guidance that employers review any disciplinary actions taken after an employee reports an issue or injury to ensure they are not retaliatory.

OSHA does not find it necessary to request additional comments on this guidance following issuance of the final recordkeeping rule. This guidance is intended to address the broad range of employee protections from retaliation under the twenty-two whistleblower statutes that OSHA enforces, while the recordkeeping rule specifically addresses injury and illness reporting protected under the Occupational Safety and Health Act. Also, this guidance is entirely consistent with the recordkeeping rule. The rule prohibits employers from retaliating against employees for reporting workplace injuries or illnesses. The guidance explains that it is a recommended practice for employers to review any disciplinary action taken against an employee who has made a report (of an injury, illness, or any other issue related to safety, health, or well-being of employees or members of the public) to ensure that it is not retaliatory. Additional commentary relating to the rule would not make a substantive contribution to this final guidance.

II. Comments and Responses Related to Specific Sections of the Guidance

A. Title

Two commenters made suggestions regarding the title of the document to catch the attention of individuals tasked with carrying out this type of program, such as a chief compliance officer (suggested titles included “Best Practice Guidelines to Implement an Effective Compliance Program and Avoid Retaliation,” and “Guidelines for an Effective Compliance Program and to Ensure Against Retaliation”). OSHA decided to instead adopt the title, “Recommended Practices for Anti-Retaliation Programs,” because it better aligns with the final document’s scope and is consistent with other OSHA guidance documents.

B. Introduction

OSHA added several substantive points and created new headings in the introductory section.

1. Retaliation is Against the Law

Employee advocates critiqued language in the draft document stating that the target audience for the guidance is employers that “wish to” protect whistleblowers, because it could suggest that compliance with whistleblower protections is optional. Commenters asked OSHA to clarify that all employers covered by whistleblower statutes are required to comply with those laws. In response to these comments, the final guidance includes the heading “Retaliation is Against the Law” as well as stronger language in the first two paragraphs emphasizing that protecting whistleblowers is not optional and that employers are prohibited from retaliating against employees who report safety concerns and potential violations of the law. The final guidance also includes an expanded description of types of activities that may be protected under the whistleblower statutes enforced by OSHA, including internal and external reports.

2. Preventing Retaliation is Good for Workers and Good for Business

OSHA received a number of comments on the “program benefits” subsection, which OSHA has re-titled “Preventing Retaliation is Good for Workers and Good for Business” in the final guidance. One commenter suggested including in the introduction that employers can gain from implementing these programs because problems will be addressed more quickly and constructively if employees are encouraged to come forward, it is the right thing to do, and improving compliance can reduce liability and risk. While OSHA generally agrees with this comment, OSHA also agrees with comments it received that urged OSHA not to encourage employers to view these programs as an avenue for avoiding public relations or litigation costs. While such benefits may result from effective implementation of these programs, OSHA believes that many employers want to comply with the law and understand that listening to workers’ concerns and preventing retaliation against whistleblowers is in the best interest of their organizations. OSHA also notes that this guidance is directed at employers that want to develop new programs or improve existing programs.

Additionally, OSHA made changes to this section to address comments that employers need to be proactive and integrate all of the program elements discussed in the guidance in order to

successfully prevent retaliation, and that employers should not be reactive and defensive when employees report compliance concerns or retaliation. Thus, this section of OSHA's final guidance emphasizes that employers should create proactive programs to achieve two related aims: (a) responding appropriately to employee's compliance concerns, and (b) preventing and/or constructively responding to retaliation against employees who raise compliance concerns. OSHA has clarified in the final guidance that "compliance concerns" broadly refers to any potential violation of one of the twenty-two laws for which OSHA enforces the related whistleblower protection provision. Also, in response to a comment, OSHA has added in this section that employers should ensure that their anti-retaliation programs enable all members of the workforce, including employees, contractors, and temporary workers, to voice their concerns without fear of retaliation.

3. Employees' Rights to Report to the Government

OSHA added this section in response to the NWC and related comments (discussed above) that expressed concern about preserving employees' rights to report to the government. OSHA agrees with these comments that employees should know about and have the option to exercise their right to report suspected violations of the law and/or retaliation to the appropriate government agency without first reporting the issue to their employer. OSHA also agrees that employers should not discourage such external reporting and has added material under this heading to clarify that OSHA's guidance is not intended to suggest that employers can require employees to participate in internal reporting programs prior to reporting to a law enforcement agency, or that OSHA condones any program that discourages employees from exercising their right to make external reports.

4. How to Use These Recommended Practices

Several employer commenters urged OSHA to emphasize that this guidance is not mandatory for employers and that programs need to be tailored to each employer's circumstances based on size, industry, and other factors. OSHA responded to these concerns by moving the disclaimer that was included at the end of the draft guidance to a more prominent location in the introduction under a new subheading titled "How to Use These Recommended Practices." OSHA clarified that this guidance does not interpret or create any new legal obligations for employers because it only provides advice and information to assist employers in complying with their existing obligations under the whistleblower laws that OSHA enforces. OSHA also clarified that employers may need to adjust these guidelines for their circumstances such as organizational structure, size, budget and industry. OSHA agrees that programs should be tailored to the specific needs of an employer's workforce and has clarified in the final guidance that this guidance is broadly applicable to employers that are covered by any of the whistleblower statutes that OSHA enforces and that employers may need to adapt these guidelines. Comments also pointed out that smaller businesses in particular may use this guidance to create new programs, while larger businesses may already have programs in place. The final guidance now states that this framework can either be used to create a new program or to enhance an existing program.

OSHA also clarified in this subsection that these recommendations are directed at employers that are covered by the twenty-two whistleblower statutes that OSHA enforces, although the basic principles could apply in other circumstances. OSHA included this clarification in response to concerns raised by the NWC and related comments regarding whistleblower protection statutes

not enforced by OSHA, such as the Dodd-Frank Act and False Claims Act, that may not protect internal complaints or that require employees to report to law enforcement in order to receive a reward. In response to related concerns about employees possibly being misled by this guidance, OSHA further clarified in this section that this guidance is for employers and does not intend to provide specific information about employee rights, which can be found in other OSHA guidance at www.whistleblowers.gov.

Relatedly, some employers noted that OSHA should clarify that the guidance is illustrative and employers can have an effective program to prevent retaliation even if they do not implement all of the specific recommendations. In particular, one employer commenter expressed concern that whistleblower complainants may argue that not adopting all of the recommended practices is evidence that the employer is not committed to compliance or even acts in bad faith. Two employers commented that large employers and public employers should not be expected to establish separate reporting and whistleblower protection programs, in part because those entities already have processes, such as through an Office of Inspector General or union contracts, to address these issues. In contrast, at least one whistleblower advocate expressed concern that employers might argue that the adoption of a program based on OSHA's recommendations should be viewed as a defense against employees' retaliation claims, but that such programs may not be implemented in good faith. Some whistleblower advocates also urged OSHA to establish an enforcement mechanism for these guidelines. As previously noted, these guidelines are voluntary. While employers are prohibited from retaliating against employees who engage in whistleblowing protected under the twenty-two statutes that OSHA enforces, employers are not required to implement these guidelines in order to comply with that obligation. Neither implementing nor failing to implement these recommendations is an indication of the employers' good faith or lack thereof in a particular case. Thus, OSHA has emphasized the voluntary nature of the guidance in advising employers how to use these recommended practices.

5. What is Retaliation?

OSHA made several revisions in response to comments on the "What is Retaliation?" section. Numerous worker advocates proposed revisions or additions to the examples of retaliatory acts. OSHA incorporated some of these suggestions in order to note the types of retaliation that OSHA sees most frequently in the complaints it receives and to reinforce that unlawful retaliation is not limited to actions that directly impact an employee's pay or benefits but can also include more subtle actions that could nonetheless dissuade or intimidate employees from engaging in protected whistleblowing. The list in the final guidance consists of examples of acts that may constitute retaliation but is not an exhaustive list of all possible adverse actions.

OSHA also received several comments advocating that OSHA use or refrain from using legal terms of art in this section of the guidance that are typically used in litigation of retaliation cases under the statutes that OSHA enforces, including a comment that OSHA should refrain from using the term "reasonable worker" to describe the test for whether an employer action is an adverse action, and a comment that it should describe retaliation as occurring when protected activity is a "contributing factor" in an adverse action. OSHA has not revised the guidance in response to these comments because it believes its existing description of retaliation is written in a way that can be easily understood by its employer audience.

C. Creating an Anti-Retaliation Program

In response to comments that urged OSHA to emphasize that creating an effective anti-retaliation program is not intuitive and must be undertaken holistically, OSHA has clarified in the first paragraph of this section of the final guidance that an effective program requires employer commitment and integration of all of the program elements.

1. Management Leadership, Commitment, and Accountability

a. Comments on the role of top leadership

Commenters urged OSHA to emphasize that top leadership in a company or organization needs to fully understand retaliation and actively take responsibility for preventing and addressing it. One commenter noted that an organization's leaders should continuously model a positive attitude about reporting, treat concerns raised by employees as high priority, lead by example, and ensure policies are applied and are not only on paper. Relatedly, another commenter suggested that leadership should use positive reinforcement, such as a public award, to support employees who raise concerns that have helped the employer. One whistleblower advocate expressed concern, however, that OSHA does not provide guidance on how to hold top management accountable in circumstances where top management is responsible for the compliance issue and/or the retaliation.

Several commenters preferred the checklist about the role of leadership included in the WPAC's document, and particularly the statement that leadership should understand to what degree employees are willing to make reports and the organization's track record in response to reports, and that the board should receive regular updates on reported issues, retaliation, and program results. Commenters that preferred the WPAC's list also stated that employer leadership needs to ensure that the organization regularly tracks changes in public policies and updates training based on any changes in the law. Another commenter suggested that the introduction to this section should emphasize the benefits of whistleblower protection on safety. Relatedly, commenters also encouraged OSHA to state that company managers and board members should be trained on the organizational benefits of preventing retaliation. Several commenters pointed out that an anti-retaliation program needs to be run by a manager who is empowered to run the program independently and who has access to the company leadership and the board; one employer noted, however, that employers should be permitted to determine the most appropriate title and role for managing the program.

OSHA generally agrees with the comments regarding the active role that senior management should take in setting the tone necessary to implement successful compliance and anti-retaliation programs. The final guidance clarifies that senior management not only should take an active leadership role and show commitment to implementing the policies, but also should hold themselves and managers at all levels accountable for responding constructively to employee reports. In referencing an employer's board, OSHA agrees with comments that suggested that some small businesses may not have a board, and therefore OSHA clarifies in the final guidance that references to the board are only relevant where applicable.

OSHA especially agrees with the comments suggesting that employers should lead by demonstrating that employee concerns are valued. The final guidance includes a recommendation from the comments that employers should consider giving awards to employees whose reports of compliance issues have helped the employer. While OSHA agrees with employer groups' comments that employers should be able to determine the most appropriate title and role for the program manager, OSHA also agrees with the recommendation that the employer should ensure that the programs, including systems for maintaining employee confidentiality, are led by a manager responsible for implementation, enforcement, and evaluation, and that the program manager should have access to the organization's top leadership, and has incorporated those points into the final guidance. Similarly, OSHA agrees with commenters that suggested that employers will benefit from conferring with employees and their representatives (including bargaining unit leaders in unionized workplaces), and has incorporated that recommendation. In response to comments, OSHA included in the final guidance a recommendation that senior management should be trained on the benefits to the organization of preventing retaliation, the organization's and their own legal obligations (including their obligation to maintain confidentiality of employees who make reports), and what effective compliance and anti-retaliation programs look like. Relatedly, the final guidance emphasizes that senior management should ensure that the program is rigorously evaluated and take responsibility for the outcomes.

b. Comments on the role of managers and supervisors

Several commenters emphasized that employers' anti-retaliation programs should set high expectations for managers and supervisors' actions and enforce policies of manager accountability. One commenter urged OSHA to advise that managers and supervisors at all levels should communicate to employees that they want to hear about problems. Another commenter suggested that employers should make it clear to managers and supervisors that retaliation should not be the response to employee concerns and that managers and supervisors will face consequences if they retaliate. Several commenters specified that employers should include retaliation as official misconduct in their codes of conduct, with sufficient consequences for violations that the employer can deter managers and supervisors from taking retaliatory actions and hold those who retaliate responsible under the organization's standards. Another commenter suggested that supervisors should receive ongoing feedback from employees and management about how they have handled reports of concerns. Numerous commenters strongly urged OSHA to clarify that retraining alone is not a sufficient response to a manager who is found to have retaliated against an employee. One commenter suggested that OSHA should include examples of discipline that could be applied to managers who have retaliated.

OSHA agrees with the comments that holding managers and supervisors accountable is important. The final guidance includes a new subheading on how to hold managers accountable, to highlight that senior management should make codes of conduct enforceable, so that managers and supervisors who retaliate are subject to consequences sufficient to deter such actions. Because several comments indicated that "retraining" managers that retaliate is an insufficient response, OSHA revised the final guidance to focus instead on the recommendation that employers should appropriately discipline managers who retaliate against or violate the confidentiality of whistleblowers. OSHA did not, however, include specific examples of discipline that could be applied, as suggested by commenters, because OSHA believes that the

appropriate consequences are case-specific and that level of detail is not appropriate for this guidance. OSHA also did not adopt verbatim the list of bullet points from the WPAC document's version of this section because OSHA determined that the key points are represented in OSHA's final guidance.

2. System for Listening to and Resolving Employees' Compliance Concerns

a. Comments related to creating a workplace culture that supports reporting

Several commenters responded to the concept of creating an anti-retaliation workplace culture in this section of the guidance. One commenter urged OSHA to describe the ideal workplace culture as "speak-up culture" because it indicates that employers should invite employees to come forward, and that employers should take a proactive approach to workplace culture. In contrast, another commenter asserted that "speak up culture" conflicts with whistleblower laws because it could be interpreted to mean that the employer can discourage employees from filing complaints of compliance concerns with government agencies. Similarly, OSHA was advised that employers should create a "listen and respond" culture in which employee concerns receive fair and transparent evaluation, because retaliation is not prevented by workers speaking up, but rather by non-retaliatory employer response. A related comment encouraged employers to establish a culture where employees not only know they can raise ideas and concerns, but also feel sufficiently safe to consider it their responsibility to raise ideas and concerns as "citizens of the organization."

Several advocates also noted that to support these values, employers need to show employees that concerns will be taken seriously by investigating reports transparently, ensuring that the managers understand the process and benefits of responding constructively to a concern and the need to prevent retaliation, and enforcing these policies. One commenter asserted that an anti-retaliation program's success is entirely dependent on the corporate culture, regardless of what is in the employer's written policies. Another commenter specified that an employer with a "speak up culture" should inform employees of their rights to report concerns directly to the government in addition to or instead of reporting the concern to the employer. Similarly, a commenter asserted that employers should have a policy of protecting employees who refuse to violate the law. Another commenter suggested that employers can show they are serious about whistleblower protection by explicitly protecting employees who refuse to violate the law.

OSHA considered the various points of view regarding the phrase "speak-up culture" and the values that it expresses. While OSHA agrees with the concept behind the term "speak-up culture," meaning that employers should proactively invite employees to come forward with concerns, OSHA also understands the comments that suggested that this phrase seems to place the burden to act (by speaking up) on employees, rather than employers, and seems to emphasize internal over external reporting. The final guidance conveys to employers that they should proactively create an environment where employees know that their concerns will not only be listened to, but also receive a fair and transparent response leading to resolution of the issue. In the final guidance, OSHA has also emphasized that proactively preventing retaliation includes creating a workplace culture that values and constructively responds to employees who report compliance concerns. As discussed below, OSHA concurs with the comments that two key

elements of a program to prevent retaliation are reflected in sections 2 and 3, i.e., responding constructively to employee concerns and having a process for addressing incidents of retaliation.

b. OSHA's response to comments regarding the need for multiple channels for employees to report compliance concerns.

OSHA incorporated examples suggested by commenters of channels for reporting issues confidentially or anonymously, including: helplines (an alternative name for telephone hotlines that encourages employees to call to report any issue or ask questions, not just report urgent matters), anonymous email boxes, and websites. OSHA also noted that employees must not be penalized for reporting concerns to the employer through means other than these channels. Other commenters suggested that anonymity could be achieved by employing an independent and neutral ombudsman to receive complaints and discuss how to address them with management without the employee's involvement. OSHA also included in the final guidance the suggestion to consider using an ombudsman to accept reports. In addition, one employer commented that it is unreasonable that employers should be expected to help employees obtain confidential advice concerning their whistleblower rights, especially if the employer already has a confidential system to accept reports. OSHA disagrees with this comment because this guidance is not mandatory and the recommendation is clear that providing a list of resources may be sufficient.

c. Comments regarding the role of workplace incentive programs in retaliation.

Several insurance and employer groups urged OSHA not to limit employers' use of incentive programs, specifically in the context of workplace safety and health programs. These commenters asserted that OSHA should not discourage incentive programs, including those that are based on recordable injury and illness frequency rates, because the commenters contend that these programs are effective at improving workplace safety. One commenter asserted that incentive programs rewarding groups of workers for achieving a consecutive number of days without a "lost workday" do not lead to under-reporting of injuries and illnesses, and do not result in retaliation against employees who make reports. Commenters also urged that incentive programs that consider recordable injury and illness rates along with other factors should not be assumed to increase retaliation. Another commenter asserted that OSHA lacks a basis for the policies on incentive programs in the 2012 memorandum on Employer Safety Incentive and Disincentive Policies and Practices and the 2016 final rule, Improve Tracking of Workplace Injuries and Illnesses, 81 Fed. Reg. 29624 (May 12, 2016). A commenter also urged OSHA to reference its 2014 Revised VPP Policy Memorandum #5: Further Improvements to the Voluntary Protection Programs (VPP) instead of the 2012 memorandum because the commenter preferred the method for evaluating incentive programs in the 2014 memorandum.

In contrast, other commenters noted that incentive programs that are not structured properly and monitored closely can limit employees' motivation to report issues because of fear of losing a reward in a group-based incentive program. Commenters asserted that employers should not focus on measures that discourage reporting of underlying concerns or retaliation, including "trailing indicators" such as numbers of complaints or injuries. Commenters also advised OSHA to include guidance that employers should evaluate their measurement and incentive programs to determine whether they are working or if they suppress reporting of concerns or retaliation. Two

commenters suggested that programs to reward positive employee and manager behaviors can improve safety outcomes, and that OSHA should recommend that rewards should be used to incentivize reporting concerns and positive management response to whistleblower reports.

Regarding the use of incentive programs, OSHA's recommendations in this guidance are the same as those reflected in previously released OSHA guidance, including the 2012 memorandum on Employer Safety Incentive and Disincentive Policies and Practices, the Revised Voluntary Protection Program (VPP) Memorandum #5: Further Improvements to the Voluntary Protection Programs, and related OSHA guidance on incentive programs.¹ OSHA added a reference to the VPP memorandum in the final guidance; however, OSHA did not remove the reference to the 2012 memorandum because it remains OSHA's policy. While OSHA recognizes that some commenters have found that safety incentive programs based on group rewards for low recordable injury and illness rates can achieve desired outcomes, OSHA continues to recommend that employers review all incentive programs to ensure their design does not discourage employee reporting or encourage retaliation. Contrary to some commenters' apparent concerns, OSHA does not seek to limit employers' use of incentive programs generally, but rather urges employers to analyze the impact of incentive programs on employees' willingness to make reports and supervisors' reasons to retaliate, and adjust programs to avoid those outcomes. While OSHA does not include additional specific recommendations for incentive programs in the final guidance, OSHA generally agrees with the comments that suggested that employers should consider rewarding positive behaviors such as employee reports and positive manager responses.

d. Comments regarding the importance of confidentiality for employees who report compliance concerns.

Numerous commenters urged OSHA to note that confidentiality and/or anonymity are extremely important for encouraging employee reporting of workplace concerns and suspected violations of the law, and are very important to preventing retaliation. One commenter added that employees should not be restricted from seeking advice or making reports to lawmakers, union or other representatives, and medical professionals (unless prohibited by federal or state law). Another commenter posited that investigating reports reduces the possibility of maintaining confidentiality for the reporting employee. In addition, a commenter asserted that anonymous reporting of concerns should always be an option and is not a burden on employers. Several commenters expressed concern that employers might use confidentiality provisions in employment agreements to bring disciplinary or legal action against whistleblowers for disclosing information covered by the non-disclosure provision to the whistleblower's attorney or to the government when either preparing or making a report. Commenters asserted that a system to protect employees who report to the employer should also protect the employee from such harassing conduct. Another commenter raised concerns about employers requiring employees who have raised compliance issues to the employer to sign a non-disclosure agreement applicable to the internal investigation of the issue, and subsequently refusing to produce information from the internal investigation of the compliance issue in legal discovery.

¹ Available at: <http://www.osha.gov/as/opa/whistleblowermemo.html>;
https://www.osha.gov/dcspp/vpp/policy_memo5.html;
https://www.osha.gov/recordkeeping/modernization_guidance.html

OSHA made several revisions to the final guidance in response to comments regarding confidentiality and related issues. OSHA agrees and emphasizes that employers should ensure the confidentiality of employees who report concerns, and should not use confidentiality in an investigation (either the employee's confidentiality or the employer's attorney-client privilege) to keep employees from having access to information they need to exercise their rights. The final guidance therefore cautions that employers should not use confidentiality as a shield to keep information from employees who have made reports. OSHA also agrees that employers should not use confidentiality provisions signed by employees to penalize, including through lawsuits, employees who take the steps necessary to make a report to a government agency. The final guidance explains that employees need to be able to take necessary steps, including seeking advice from legal counsel, union representatives, or medical professionals, prior to reporting what they believe is a violation of the law in the workplace to either the government or the employer. As commenters indicated, employees should not be restricted by an employer's confidentiality agreement from exercising those rights, even if the necessary steps involve reporting information reasonably related to the concern about violations of the law.

e. Comments regarding the format and terminology used in this section.

Two commenters expressed a preference for the bullet points and “dos and don'ts” from the section of the WPAC's document that addresses anti-retaliation culture. Those commenters preferred several points in the WPAC document, including that: anti-retaliation programs can help employers avoid litigation and public relations costs; employees need multiple avenues to report issues; employers can prevent retaliation by avoiding incentives that discourage reporting; employers should have an official policy of not punishing employees who make reports; employers should investigate with a blank page, and should not create false narratives to discredit the employee or justify retaliation. The final guidance includes nearly all of the same substantive points from the WPAC document's version of this section, although OSHA chose not to adopt the list verbatim. For example, as commenters suggested, the final guidance recommends that employers have multiple channels for reporting issues, avoid incentive programs that may discourage reporting, and have an official policy of not punishing employees who make reports. With respect to “not creating false narratives to discredit the employee,” OSHA disagrees with this phrasing because it negatively assumes that employers will take an adversarial stance toward employees who make reports. However, OSHA has included the more general point that employers should conduct investigations transparently, without preconceptions, and should assign an independent investigator, which would also serve to address the commenters' concerns about bias. Similarly, because, as discussed above, employees should not be discouraged from reporting externally, OSHA chose not to say in the final guidance that employers should encourage employee reporting because it can avoid external legal and public relations costs, but the final guidance notes that employers should provide opportunities for employees to informally report early before the issue becomes more difficult to resolve.

Commenters also recommended that instead of using the term “legitimate business reasons” to describe when an employer may change the employment status of an employee who has raised a concern, OSHA should use the WPAC document's language which stated that employers should

ensure that all employment status changes are made for “non-retaliatory and non-discriminatory” business reasons. Alternatively, another commenter recommended that employment status changes should not be “a pretext for retaliating against whistleblowers.” Worker advocates recommended that employers should ensure that decisions to hire or not hire are made for legitimate business reasons. OSHA considered these various points of view, and in an effort to use a simple and broadly defined phrase, the final guidance states that employers should ensure that employment status changes are made only for “legitimate non-retaliatory reasons.”

Relatedly, one commenter noted that OSHA should clarify that employers should be aware of actions, such as discipline of an employee after reporting an issue, that could be perceived as retaliatory, because such actions could contribute to a chilling effect among employees. The commenter urged that employers should consider whether disciplinary action against an employee who has made a report could be perceived by other workers as retaliatory, and take steps to mitigate the potential chilling effect. Another commenter suggested that employers may help limit retaliation or the appearance of retaliation by providing employees with notice of their legal rights each time there is a change in employment status. An employer group asserted that application of a progressive disciplinary policy is appropriate if it is not retaliatory, even if the employee has made a report, because employers need to have the option to discipline an employee who has violated a consistently enforced work rule or intentionally misreports facts.

OSHA agrees that employers should avoid any potential chilling effect by analyzing whether management’s actions may be retaliatory or perceived as retaliatory and addressing the potential chilling effect through effective communication or other methods; this point is incorporated in the final guidance. While OSHA agrees that progressive disciplinary policies may be appropriate if not retaliatory, the final guidance retains the recommendation to ensure that progressive disciplinary policies are consistently applied.

3. System for Receiving and Responding to Reports of Retaliation

One commenter suggested that OSHA revise the heading to this section to “Ensure Appropriate Response to Retaliation” to shift the emphasis from the employee’s complaint to the employer’s response. OSHA chose not to accept the suggested change to the heading of this section because OSHA believes the revised heading in the final guidance appropriately emphasizes that employers should create a programmatic structure to receive and respond to complaints of retaliation.

Another commenter preferred the WPAC document’s introduction to this section because it explained that retaliation results from failure to address issues raised by employees, that it is the responsibility of leadership to create a retaliation response system that employees trust and that is known and accessible to all, and that the system should allow an employee to report directly to the board if necessary. OSHA concurs generally with the comment suggesting that retaliation results in part from a failure to constructively address concerns raised by employees. As discussed above, the final guidance emphasizes this point in section 2, which focuses on practices to support employee engagement and positively address employees’ concerns about violations of the law and other issues. Section 3 focuses on how employers can respond constructively to incidents of retaliation. While OSHA generally agrees with the comment that the recommendations in this section should apply to addressing employees’ underlying

compliance concerns as well as reports of retaliation, the recommendations in element 3 of the final guidance highlight practices that are especially relevant to addressing incidents of retaliation. The final guidance specifies that procedures for addressing retaliation should be known and accessible to everyone in the organization. OSHA also concurs that employees should be able to elevate reports of retaliation if necessary to have the report addressed constructively, and this point is included in the final guidance.

Several commenters emphasized that employers should investigate without preconceptions, let employees make a case in their own defense, avoid conflicts of interest in investigations by assigning investigators who are not in the chain of command, be transparent about the process, be transparent about the roles and independence of investigators (including whether they are an attorney representing the employer), and have a separate independent channel for investigating “polarizing” issues. In addition, one commenter noted that employers should follow up with whistleblowers to ensure they are not experiencing retaliation even several years after the incident. Other commenters were skeptical that any investigation overseen by any part of the employer’s management could truly be impartial or independent, especially if the issue is high stakes, such as a possible regulatory or statutory violation. Those commenters recommended that a solution to the difficulty of employers actually providing transparent and impartial investigations would be to hire an outside contractor to perform those activities. Two commenters suggested that the field of “ethics and compliance” personnel should generally be acknowledged in OSHA’s guidance, and in particular in this section as individuals who may be involved in response to incidents of retaliation.

Other commenters raised concerns about employers using their general counsel or outside counsel who is obligated to protect the employer’s interests to conduct investigations of compliance issues, and then invoking attorney-client or attorney work-product privileges to avoid disclosing information from the internal investigation if the employee or the government bring a legal claim against the employer. The commenters asserted that internal investigations should not be conducted by the employer’s legal counsel, and documents created in internal investigations should be subject to legal discovery unless to protect the confidentiality of the employee, but even then, the employee should be able to choose to waive confidentiality so that information relevant to their report or retaliation can be shared with the government or the employee’s legal counsel.

OSHA understands that many whistleblowers who commented have had negative experiences with reporting possible legal violations or retaliation to their employers. OSHA agrees that employers may improve their responses by using independent third-party investigators, especially to address high-stakes issues. The final guidance retains this recommendation, as well as the recommendation that employers should create a system to investigate retaliation without conflicts of interest by assigning investigators who are not in the chain of command, and be transparent not only about how investigations are conducted but also about the roles and independence of those assigned to investigate. The guidance emphasizes that employee confidentiality should be maintained as much as possible to prevent further retaliation. OSHA did not include a reference to the field of “ethics and compliance” personnel in this section, as comments suggested, because this guidance is broadly applicable to any type of employer covered under one of the twenty-two whistleblower statutes that OSHA enforces, and the

reference to senior managers and others who understand the need to prevent retaliation more broadly describes who should be involved in responding to allegations of retaliation.

Similar to section 2, this section reiterates that employers should make sure their retaliation response program does not discourage employees from reporting retaliation to an appropriate government agency. And in response to comments discussed above relating to employee non-disclosure agreements, this section reinforces that while employers should ideally maintain confidentiality to the extent possible in a retaliation investigation, employers should not use confidentiality as a shield to impede employees' ability to exercise their rights. Relatedly, OSHA concurs with the comments stating that if employers use their own legal counsel to investigate retaliation, the investigation is not independent, and employees need to be informed that the investigator represents the employer's interests and attorney-client privilege extends only to the employer.

One commenter suggested that employers should consider using "early mediation or other dispute resolution mechanisms" to resolve significant disputes relating to an employee's whistleblower disclosures. Other commenters, however, urged OSHA to clarify that employers should inform employees that internal investigations and resolution of retaliation allegations do not toll the statute of limitations for an employee to file a complaint of retaliation with OSHA or another government agency. OSHA agrees that early voluntary dispute resolution methods may be useful in some cases, but OSHA also agrees that employees should be informed of the time limit to file any retaliation complaint with OSHA or another government agency and that participating in a dispute resolution process will not automatically toll those deadlines.

One commenter additionally asserted that employers wishing to resolve retaliation allegations internally should waive, in writing, any statute of limitations defense. In the final guidance, OSHA incorporated a suggestion that employers should consider formally tolling the employee's deadline to file a complaint where appropriate. Moreover, that commenter suggested that employees should be advised to retain their own attorney at the company's expense. OSHA has not incorporated this suggestion because the situations in which an employer might choose to voluntarily pay an employee's attorney fees are likely too fact-specific for inclusion in this general guidance.

4. Conduct Anti-Retaliation Training

OSHA received contradictory comments regarding the level of detail in this section. One whistleblower advocate generally commented that OSHA's guidance lacks sufficient details about what training should entail. An employer group expressed concern that the guidelines for training are too specific and may discourage employers from developing different, perhaps more effective, methods. OSHA believes the general points outlined in the final guidance are useful for all training programs and also incorporated the comment that employers should tailor training to the specific laws that apply in that workplace. OSHA disagrees that this guidance may stifle innovation because the guidance is voluntary and employers remain free to design effective training methods specific to their own workplaces.

Two commenters preferred some elements from the WPAC document's guidance on training, particularly that this training should be taken as seriously as other training, and that it is needed because these concepts are not intuitive for most managers. The final guidance includes concepts

reflected in the WPAC document that training is essential to provide all levels of management and employees with the tools and knowledge necessary to report and respond to compliance issues and instances of retaliation, as well as an understanding of the organizational benefits of the program.

Two commenters noted that employers should use appropriate language(s) and literacy level for employee training and other communications. One of those commenters also recommended that employers tailor training to the specific laws and company policies that apply to each position within the company, including employees' rights under those laws. Other commenters emphasized that employers need to make sure training is simple and clear, explain why these concepts matter, and deliver the message in regular communications, using all available tools of communication, not just training sessions. One commenter also suggested that employers use real examples of retaliation and the actions taken by management in response to enhance training.

In response to these comments, OSHA added to this section that, in addition to being in languages spoken by the employees, training should be at a level that can be easily understood by the intended audience. OSHA also added at the end of this section in the final guidance that training should be reinforced with regular communications. OSHA did not incorporate the comment that employers should use real examples to enhance training because only some larger employers may be able to do this without violating employee confidentiality or anonymity, and the guidance is intended to be relevant to a broad set of employers.

The final guidance includes additions to the recommended training topics for employees. Several commenters emphasized that employees must be fully informed about their options for reporting concerns and retaliation externally, and expressed concern that without such training employees may not know that under certain laws they are not protected for complaints made only to the employer or that a time limit applies to their report. These commenters also strongly asserted that employees must be trained on their rights (and obligations if applicable) to report potential violations of the law to the government. The commenters further urged that employees be trained on how to make confidential or anonymous complaints to the government under the substantive provisions of the federal laws that contain whistleblower provisions enforced by OSHA or those enforced by other agencies, including the False Claims Act, the Internal Revenue Code, the Securities and Exchange Act, and the Commodity Exchange Act. In response to these concerns, OSHA added that employee training should include the rights and obligations, if any, of employees to report externally without first reporting to the employer.

Also, in response to several comments generally promoting the benefits of creating a workplace culture of civics that values compliance with the law, OSHA recommended that employers explain the employer's commitment to creating a culture of compliance with the law, implementing a strong code of ethics, and addressing concerns raised by employees.

OSHA clarified in the final guidance that managers should receive all of the same training as other employees, as well as additional training on how to constructively respond to employee reports. Several commenters recommended that training for managers should include the following topics: the benefits to the organization of preventing retaliation; the core ethical values

of the company; legal obligations “in the context of citizenship and responsibility”; how the organization as a whole responds to retaliation; what constitutes “notice” of a complaint; problems with using discipline and litigation to respond to complaints; separating annoying behavior from the substance of the report. Each of these comments on managerial training is addressed either directly or indirectly in the final guidance, including that supervisors should be clearly informed of the consequences for failing to follow anti-retaliation policies. Another commenter noted that managers and supervisors need to be trained specifically on how to respond properly to complaints because doing so is not intuitive and most managers do not have the tools to avoid retaliation unless they are trained. OSHA agrees that these skills are not intuitive, and believes this point is made through the recommendation that employers cover specific skills on how to avoid responding in a retaliatory manner to employee reports, including by protecting employee confidentiality. Commenters also recommended that supervisors be told during training that they will be evaluated on how they handle reports of concerns and held accountable for implementing anti-retaliation policies. The final guidance clarifies that managers should be trained on the potential legal consequences of retaliating or failing to respond to retaliation for the employer as well as the individual manager.

5. Program Oversight

OSHA received contradictory comments regarding the details of program oversight, but commenters agreed that oversight is necessary. One individual commenter asserted that OSHA should clarify that auditing is distinct from monitoring, and that the two concepts should not be discussed under the same heading. The commenter explained that monitoring should be used to track and monitor cases and incidents. Auditing, the commenter noted, should check how monitoring and data collection are affecting the culture of the organization, and whether the program elements are working, namely, whether employees are willing to report concerns. In contrast, an employer group asserted that OSHA should not prescribe what an audit should include because audits need to be tailored to each employer’s specific circumstances.

Consistent with the comments, OSHA emphasizes in the final guidance that program oversight is necessary to ensure the policies are working as intended. To that end, the guidance recognizes that there are many tools for program oversight, including but not limited to monitoring and audits, and employers should use the tools that make sense for their program. Because the comments indicated that there are various perspectives on effective oversight and the use of specific tools, the final guidance encourages employers to broadly consider the sources of information and assessment techniques that may be useful to evaluating and improving the program. The final guidance also notes that cross-checking information obtained from monitoring and auditing with other sources, such as exit interviews or grievance reports, could reveal whether a policy is creating a chilling effect.

One commenter advised employers that after implementing a new program to encourage reporting, monitoring may indicate an increase in the number of complaints, but that an early increase should indicate that the program is effective and the number of reports should level off and eventually decrease if the root causes of the complaints are addressed. OSHA agrees that an initial increase in reports after implementing a new reporting program may indicate that the program is working and reports should level off if the underlying issues are addressed; this point has been retained in the final guidance.

A worker advocacy group emphasized that audits of program data should be performed from outside the immediate business unit, i.e. externally and independently. Similarly, a worker advocacy group recommended revising the title of the section to “ongoing monitoring and independent audits” to highlight the importance of continuously monitoring the program and using independent auditors when feasible. Another commenter noted that smaller employers may not have the resources to hire an independent auditor, but could have a board member who is not involved in day-to-day operations conduct the audit. OSHA retained the recommendation that audits should be conducted independently, from outside the immediate business unit; however, in the final guidance OSHA explains that oversight tools need to be tailored to meet an organization’s specific needs.

Commenters further noted that the guidance should recommend that the audit report go to the top managers and the board. One commenter specified that leadership should pay attention to audit results and take responsibility for determining whether the program is working. Commenters emphasized that employers should use exit interviews to identify people leaving because of retaliation. As this section of the final guidance reiterates, OSHA generally concurs with the comments that employers should review reports on all measurements and oversight activities, and has retained this point in the final guidance. The final guidance recommends that top-level managers review in-depth results from oversight activities, including “dashboard reports” on program measures. Relatedly, OSHA has retained and added new language emphasizing use of that information to make program improvements and hold management accountable for the program’s effectiveness.

OSHA also agrees with comments that employers should seek the input of employees and employee representatives (if applicable). While employee engagement is important for every element of an anti-retaliation program, it is especially important in program oversight, because the overall goal is to determine whether the program is successfully creating an environment in which employees feel safe reporting issues about compliance and are in fact safe from retaliatory actions in response to those reports.