

April 21, 2015

Recommendations from Work Group as amended by WPAC and transmitted to OSHA

Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation

Introduction

Retaliation against employees who report issues is all too common. The program structure and elements recommended below can provide practical and current guidance for organizations—public, private and non-profit—that wish to provide protections for whistleblower rights. These recommendations may be of assistance to provide a refresher to large employers or others already working at whistleblower protections. For others, especially small and medium-sized organizations that have not had access to the requisite guidance or expertise, these guidelines can help them construct and carry out a program.

Factors beyond the scope of these recommendations, some structural and intentional, some not, may affect an organization's willingness or ability to assure that employees have a right to be heard. These guidelines do not attempt to address those factors. Used fully and in combination, these programs and practices can make a specific and positive difference in organizations that are ready and able to improve communication with employees and eliminate the occurrence of retaliation in the workplace. By doing so, an organization can better ensure the exercise of whistleblower rights and thereby gain the benefits that ensuring these rights can bring to the work place and the success of the organization.

These suggestions are drawn from practices found and lessons learned in a range of industries. They are presented in a generic form, adaptable to most workplaces, but must be adjusted to variables like size, history, and applicable law.

An effective whistleblower protection and anti-retaliation system requires senior leadership commitment and accountability, and making anti-retaliation and prevention a proactive rather than a defensive aspect of the organization. Most needed elements are not intuitive, but require specific policies, accountabilities and programs. Key elements, as summarized in the following sections, include:

1. Leadership commitment
2. A true "speak up" organizational culture that is the basis of a prevention-oriented program that encourages raising and fair resolution of issues
3. Independent, protected resolution systems for allegations of retaliation
4. Specific training to teach workers their rights and about available internal and external protection programs, and for managers to learn these along with related skills, behaviors and obligations to act
5. Monitoring and measurements that don't contribute to suppression of reporting and which measure the effort and effectiveness of inputs to a speak-up and non-retaliation culture
6. Independent auditing to determine if the program is actually working

This summary of best practices for whistleblower protections was developed at the invitation of the Assistant Secretary for OSHA by a group consisting of union representatives, legal experts from labor and management perspectives, corporate safety and compliance directors, public policy professionals, academics and present and former regulators.

1. The Role of Leadership

The best way to avoid retaliation and external airing of employee concerns about safety or organizational integrity is to address the concerns internally in a timely and effective manner and to have a strong program to prevent and correct any retaliatory actions. Chief executives and boards of directors must take the lead in implementing a whistleblower-protection and anti-retaliation system that includes training in how to identify retaliation, carry out independent and thorough investigations, and, as necessary, undertake corrective actions. Creating a non-retaliatory environment avoids external legal and public relations risks, and improves employee satisfaction and involvement. There are business leaders whose experience shows that organizational effectiveness and profitability improve when these whistleblower protection actions are put in place. To gain these benefits, organizations need to move from defense and reaction to proactive programs to hear and resolve issues and to otherwise prevent retaliation.

- ✓ The chief executive and management* at all levels should be held accountable for the quality of response to issues, to reports of retaliation, and for supporting policies that ensure whistleblower rights.
- ✓ Top leaders and the board should understand the statutory definition of retaliation, legal obligations and what it takes programmatically to prevent it, and know employees' real willingness to report issues and the organization's present actual record in preventing retaliation and fear thereof.
- ✓ Board members should understand their risks, responsibilities under Sarbanes-Oxley, other statutes.
- ✓ Organizations should have a chief compliance officer whose job is to enact, enforce, and evaluate anti-retaliation policies and programs. This person should report to the chief executive and have a separate reporting responsibility to the board (or an appropriate board subcommittee).
- ✓ Performance reviews for leaders and managers should support anti-retaliation behavior (including attending training, championing compliance initiatives, and constructively addressing concerns).
- ✓ With represented employees, bargaining unit leaders can also play a valuable role in creating management awareness and strengthening the willingness of employees to come forward.
- ✓ Companies should enact strong codes of conduct and ethics programs to support fair treatment of employees who report issues internally, to agencies, and in response to government inquiries.
- ✓ Appropriate consequences (i.e., discipline, penalties, etc.) should be imposed when acts of retaliation are confirmed, and be sufficient to serve as a deterrent.
- ✓ Employers need a mechanism to track changes in public policies and laws and to update internal training, auditing and other internal policies and practices.

****These leadership terms refer to the highest ranking corporate and agency officials and governing boards in the organization. This, therefore, encompasses public, private and non-profit entities.***

DO	DON'T
Give the board training, case studies, and monitoring data (including industry-specific data)	...provide the board with only general policies or cursory summaries
Give the board regular updates—at least annually—on reported issues, retaliation incidents, and program results	...shield the board or senior leaders from employee concerns or issues of retaliation. Don't ignore unaddressed issues or retaliation claims
Assure that employees have adequate channels for reporting and resolving issues or retaliation.	...assume policies and statements are enough.

Small business considerations: The board or owner may serve as the locus for employee reporting and for investigating allegations of retaliation. The chief compliance functions may unknowingly reside with the owner or manager, though that person may not realize it, may feel ill-equipped to handle the responsibility, or may not believe that the role is essential to the business.

Statute-or industry-specific considerations: Boards have accountability under Sarbanes-Oxley and other statutes. In addition to OSHA responsibilities, multinational companies should be aware of relevant differences in cultures and requirements, as well as obligations under the Foreign Corrupt Practices Act.

2. Prevention: Fostering a “Speak Up” Culture

The best way to preclude retaliation is to take a preventive approach, starting with a real program to assure employees can raise issues of concern. The seeds of retaliation are planted when employee issues are unwelcome or go unaddressed. Therefore, employers should foster a “speak up” culture that encourages reporting, provides for fair evaluation, and for just and effective resolution of concerns.

- ✓ Encouraging employees to raise concerns in a non-retaliatory environment fosters cost-effective remedies, avoids external legal and public relations risks, and improves employee involvement and ability to contribute to organizational success.
- ✓ Employees usually report first to the supervisor. Be sure they know how to constructively respond.
- ✓ Ensure all issues can be reported, evaluated and get an honest, timely response in a structured, known and transparent system, free of conflict of interest or bias; ensure that the employee is protected for reporting.
- ✓ Multiple avenues should be available for reporting issues. Everyone should see a channel they trust.
- ✓ The earlier an issue is raised, the easier it usually will be to resolve. Have early, non-emergency options.
- ✓ To assure issues are not missed, anonymous reporting should be available.
- ✓ Employers should eliminate all workplace incentives, whether formal or informal, that discourage reporting of concerns. The most important encouragement is to follow through and fairly address the issue without being defensive or retaliatory.
- ✓ Employers should have a policy of no punishment, explicit or implied, for reporting concerns or incidents. Be alert also to punishments for unrelated reasons, including retaliatory changes in employee status (e.g., changes in hours, duties, assignments, vacations, etc.) or other retaliatory actions soon after a reported incident or injury.
- ✓ Employer should have a procedure to ensure that any employment status changes are undertaken for legitimate non-retaliatory, non-discriminatory business reasons.
- ✓ Organizations should provide ways for employees to get unbiased, confidential advice about exercising whistleblower rights and how to cope with the stress of reporting concerns.
- ✓ To help gain a real “speak up” culture, seek the input and involvement of workers and union leaders in design and operation of reporting channels and anti-retaliation programs.
- ✓ Employee rights must be protected even if the person is incorrect or unpleasant in raising the issue. Negative or false narratives to discredit the employee and thereby justify retaliation can mask facts and create legal and business risks, in addition to unfairly treating employees and demonstrating risks in reporting.

DO	DON'T
Have a program with safe and structured channels for reporting	...simply rely on having told people to speak up
Make it easy for employees to report in low key ways or ask questions at an early stage	...force reporting to be unduly public or subject the employee to ridicule, stigma or pressures
Be prepared to provide protection and confidentiality to those who report	...leave an employee exposed to resentful peers and supervisors
Examine issues employees raise even if delivered in an unwelcome way	...assume or assess motives for raising the issue, making the issue easy to miss or dismiss
When investigating incidents, evaluate how more open reporting channels could have prevented. Look at possible system failures. Learn from it.	...focus first on the employee who reported the incident before investigating other possibilities. Employee should be the last factor.
Root out formal and informal incentives and value systems that encourage or allow retaliation or discourage reporting	...assume that retaliation is rare, obvious, or just personal or that it won't chill other reporting
Provide training on what constitutes retaliation and why employers are obligated to address it	...assume that everyone will "know it when they see it"
Respect confidentiality and anonymity pledges.	...discount anonymous reports—they are often the most serious.
Start with a blank page and understand that false narratives to discredit the employee and cover-ups are common	...assume that past internal, lower-level opinions or assessments of the employee or issue are correct
Investigate reports of issues promptly, thoroughly and with transparency, including responding to the employee who brought forward the initial concern(s).	
Ensure that any employment agreement or policy which requires confidentiality or non-disclosure of information contains an express "carve-out" which makes clear that nothing precludes the individual from reporting or communicating with any government agency	...require employees to disclose that they have reported or communicated with a government agency.

Small business considerations: These principles are readily applicable to most small businesses, except in the range of reporting channels in some cases.

Statute- or industry-specific considerations: Most recommendations are simply good business practice. SOX and other statutory requirements create significant responsibilities for boards and top leadership.

3. Implementing a Retaliation Response System

Retaliation against whistleblowers usually stems from prior management failures to address issues that employees believe are important or that they otherwise believe they have an obligation to report. An effective retaliation response system should include an independent complaint review process and an independent reporting line that can reach the employer's board or oversight body, if necessary. The system must include clearly defined roles, responsibilities, and expectations for top leaders, board members, managers at all levels, employees, compliance and legal staff, and HR and labor relations staffs. The procedures should be known and accessible to all.

- ✓ Like issue reporting, the retaliation response system should include multiple avenues for reporting, including opportunities outside chain of command and a hotline, including anonymous reporting.
- ✓ When the issues are especially polarizing or high-stakes, a separate, more independent channel or customized methods may be needed.
- ✓ Organizations should be transparent about how investigations are conducted, including roles and procedures, timing, quality standards, conflict-of-interest protections, training of investigative personnel, and confidentiality and anti-retaliation protections.
- ✓ Reports should derive from *de novo*, independent investigations and resolution, and employers should ensure respectful and proper closure of the issue with the reporting party.
- ✓ Investigations should focus on the facts and the underlying concern rather than on defending against the allegation. Consider whether the incident could have been avoided through more open reporting channels and greater trust—and the needed reforms made.
- ✓ Discipline, though not the only form of retaliation, should not be imposed in response to any employee action to report an issue. To protect against retaliatory discipline, an independent review with a pre-established process should review any proposed discipline and apply “just culture” principles and ask questions like:
 - Does the disciplinary action involve any retaliation or the appearance of it (e.g., given the past reporting history of the employee)?
 - Has the disciplinary action been independently assessed, and has true, justifiable and appropriate progressive discipline been applied up to this point?
- ✓ If a formal complaint has been filed, the employer should not simply default to a defensive posture. An objective, independent assessment aimed at solving the initial problem and preventing retaliation should normally be invoked. Rights of all parties in the filing should be preserved while this occurs.
- ✓ The system must have conflict of interest protections in investigations and should include in investigations senior managers and others who recognize the organizational impact, benefits, risks, and policy ramifications of the complaint. These cannot be left to functions with defensive missions.
- ✓ The reporting employee and others should have unrestricted ability to elevate the matter to higher levels. The procedures for doing so must be widely known and readily available.
- ✓ Confidentiality protections and rumor control are essential to encouraging reporting, enabling objective evaluation, finding a fair resolution and protecting the employee from further retaliation.
- ✓ Employers must ensure whistleblowers are protected even many years after the alleged incident.

DO	DON'T
Take all reports of retaliation seriously	...ignore issues because they seem minor or the source or employee motivation is questionable
Try to solve the underlying problem, even in filed cases	...address the complaint only from a defensive position,
Maintain contact with and protect the employee who reported the concern, both during and after	...isolate the employee or allow later retaliation
Recognize that failure to address retaliation can discourage future reporting and lead employees to report incidents externally	...assume that no reports of incidents or retaliation means that none are happening
Ensure confidentiality and make it standard	...allow "lobbying" about a case
Use third-party, fully independent investigators if needed	...promise anonymity if can't be guaranteed; confidentiality is usually sufficient
Respond quickly and transparently to reported incidents of retaliation	...assume that individuals who report retaliation have questionable motivations
Recognize the chilling effect of retaliation and of lack of response to retaliation	...rely solely on a strong chance of prevailing in court or that issues go away with a court "win"
Seek an independent review of proposed disciplinary actions	...punish or threaten punishment for reporting issues or retaliation

Small business considerations: Smaller companies may have simpler processes and fewer reporting channels and options for investigations, but the key principles still apply. Use the board or an outside party when confidentiality or independence is needed. The board may need to become involved earlier than in a larger employer.

Statute- or industry-specific considerations: The retaliation response system should take into account industry-specific statutory requirements.

4. Anti-Retaliation Training

Anti-retaliation skills are not intuitive. All leaders, managers, supervisors, and employees must receive training in what constitutes retaliation, legal protections available to employees, and how to prevent and address it, and management held accountable for implementing anti-retaliation policies. Anti-retaliation training should be considered equal to other required training. In developing the training, work with union leadership or, if not a represented work place, with other employee leaders.

Training should cover at least these topics:

- ✓ What constitutes retaliation—including common but less overt behaviors such as peer pressure, ostracizing, mocking, and exclusion from meetings
- ✓ How to respond to a report of an issue without engaging in or appearing to engage in retaliation
- ✓ Skills for defusing, problem solving and stopping retaliation in a work group.
- ✓ The elements of the anti-retaliation system, including roles and responsibilities, how to report concerns, how to escalate when supervisors or others do not respond, and whistleblower protections
- ✓ Relevant laws, rights of employees, risks and consequences of not responding appropriately, and the importance to organizational culture and results.
- ✓ What constitutes “notice,” when organizations are required to act, and the legal exposure and penalties they face for inaction, the inadequacy and negative consequences of using discipline and litigating a complaint as an organization’s main tool.
- ✓ How to separate, if present, annoying or inappropriate behavior from the report itself and how to deal appropriately with both while not failing to address the issue the person is reporting—and not retaliating. Often the issue is ignored if the behavior delivering the message or the motive for reporting is suspected.
- ✓ Assuming the employee’s motive in raising an issue is rarely useful and can interfere with addressing issues and responding to retaliation.
- ✓ Training should address external changes in legal, regulatory and policy requirements as well as staff turnover and need for refreshers. Training must therefore be continuous.

DO	DON'T
Recognize that some retaliatory behaviors are widely seen as acceptable and seem justifiable to the person carrying it out and to many higher up.	...assume that people intuitively know what constitutes retaliation and how to recognize, prevent and stop retaliatory behaviors

Small business considerations: Training can be brief and simple. Definitions and templates are available from OSHA and from online and other sources (links).

Statute- or industry-specific considerations: The training should be appropriate for the literacy level and language competency of employees, supervisors, and managers in the organization. Training should include the specific requirements and rights pertaining to the organization and its industry.

5. Monitoring Progress

Tracking of progress and trends is crucial to preventing retaliation. Many common measurement and incentive systems used in organizations can actually encourage or mask retaliation. By encouraging low reported numbers of things like safety or financial fault incidents, low numbers for filed concerns or reports of retaliation, retaliation is at least implicitly encouraged in order to meet the numbers or gain rewards associated with low numbers. From this, the seeds of suppression of reporting and then retaliation may be sown. Though these measurement and incentive plans have become common practices, they are now regarded as counterproductive to reporting issues and to preventing retaliation. Newer methods are being developed and adopted, and many companies have simply stopped incentives based on low volume of reporting issues, retaliation, and other problems.

- ✓ Accountability systems that reward management or employees for low reported numbers prevent issues from being addressed that could help organizational integrity, performance, or safety.
- ✓ Incentives should instead reward management and employee behavior that supports the right to come forward with concerns. Behaviors and results that support this can be observed, tracked, and audited.
- ✓ In one emerging and promising trend, accountability and incentives should focus on “leading indicators” of problem solving, encouraging compliance with safety, financial and other safeguards, and of creating a “speak up” and “no retaliation” culture, instead of on “trailing indicators” such as OSHA recordables and reported incidents of other kinds of importance to the organizations.
- ✓ The number of issues recorded often goes up when a new program is implemented. Management should understand that the higher numbers may be due to people feeling more comfortable coming forward. Higher numbers also mean that the organization has an opportunity to address the issues and learn where retaliation is taking place.
- ✓ Top leaders and the board should receive “dashboard” reports on issue reporting, retaliation allegations, and issue resolution, along with in-depth results of independent audits.
- ✓ Bargaining unit leaders should be involved in the development and review of measures. (In non-represented workplaces, consult other employee leaders, workers centers, advocates.)

DO	DON'T
Consider incentives for preventive activities, such as the “leading indicators” noted above	...tie compensation or group incentives to low reporting numbers
Track emerging issues and incidents (including “near-misses”)	...view reports of problems as negative information
Pay attention to the types of issues reported, which can help identify trends and problems	...close investigations too quickly, without resolving the issues, sharing results, and ensuring the fairness of the handling and outcome

Small business considerations: Large-scale data collection and complex incentive programs are out of reach for small businesses, but they can still ensure that incentives don’t discourage reporting or encourage retaliation. OSHA and other online guidance can provide useful templates and adjustments.

Statute- or industry-specific considerations: Some statutes include specific record-keeping requirements.

6. Independent Audits and Program Improvement

Even well-conceived, well-intentioned anti-retaliation programs can founder in implementation, either in certain facilities, functions or organization-wide. Problems can also stay hidden from management and not be apparent in normal data collection. To ensure that their program is working effectively, employers should consider engaging independent evaluators or auditors whose assessments go beyond safety or financial systems audits, but which add depth or are complimentary to those. Specific audits for employees' willingness to report issues and about fears for retaliation are needed to really gauge whether or not there are lingering issues or fears of retaliation.

- ✓ Perform independent assessment audit to ensure workers are coming forward, unafraid of retaliation
 - Direct audits of program data such as training, response time, other--done from outside immediate "business" unit.
 - Independently administered, anonymous employee surveys and confidential interviews that take in a robust sample to check behavior and perception.
 - In-depth surveys and structured individual interviews are crucial and can "ground truth" perceptions about whether policies work, whether employees are willing to report issues, whether they are actually experiencing or are fearful of retaliation; therefore not reporting.
 - Audits, surveys and interviews will be most meaningful if they reflect organization and facility structure and organization, across levels and functions, and thereby sample and focus accordingly.
 - Team with bargaining unit leaders in preparation and review of audit, including and especially the construction and implementation of surveys. (Do other outreach in unrepresented work places.)
- ✓ Cross check other sources: Issues not reported through compliance and ethics channels may be reported to workers comp, grievances, outside agencies, or revealed in exit interviews. Such differences often signal blockages or "chilling" of reporting within the firm, and represent risk, liability, non-compliance. Also analyze layoffs, terminations for reporting employee may have done in their past.
- ✓ Produce and track monitored "Get well plans" for delinquent facilities, work groups, managers.
- ✓ Report assessment results to top management and board. Track trends, problems, "get well" plan.
- ✓ Incident investigations provide a key cross-check to see if policies and systems work under pressure.
- ✓ Mandatory examination of changes in other personnel practices: Does a new or changed program, business process, new leadership, etc., impact freedom to report issues or possibilities for retaliation?
- ✓ Board should receive a thorough briefing on audit/assessment results. Board role should include seeking accountability and answers; hear directly from auditors.

DO's	DON'Ts
Independently evaluate the effectiveness of the anti-retaliation program	... assume that good intentions in a program are enough or that low numbers mean no issues
Confidential, independent written surveys. Use a broad sample of workers for surveys, interviews	...assume from a simple survey that workers are willing raise issues.
Use exit interviews, grievance information and incident investigations, etc. as ways to also test program efficacy	... restrict board to cursory information.
Ensure that proper safeguards exist to avoid conflicts of interest for independent auditors	
Institute and enforce provisions in third party and supplier contracts and codes of conduct that are consistent with these principles	
Consider publishing any results of third party audits	

Small business adaptations: Use outside resources employees will trust to: do confidential surveys interviews; check willingness to come forward, unaddressed issues, pressures and if programs work.

Statute or industry-specific considerations: Recognize applicable requirements when designing audit so that program will meet regulatory requirements.

**General Comments from WPAC to OSHA with transmittal of the above
recommendations on
“Best Practice for Protecting Whistleblowers and Preventing and Addressing
Retaliation”**

The following are general comments discussed during the WPAC meeting on April 21, 2015. These comments are intended to provide additional guidance to OSHA as the agency develops a final document to guide employers:

1. This is a generic document. We also encourage OSHA to develop additional materials that are more specific to individual statutes, sectors or industries, issues (e.g. safety and financial), or work relationships (e.g., temp workers)
2. We acknowledge the complexity of reaching out to obtain employee voice in private sector employment where there is no union bargaining agent, in view of the existing labor laws. We urge OSHA to think creatively and cautiously about this problem in developing the final best practices guidance. Solicitation of one-way input from unorganized workers into the development of policies and practices is important. It is also possible for employers to seek input from organized groups of employees within the workplace (e.g., identity groups), or from external worker advocates, in developing policies.
3. We also acknowledge the complexity of addressing these reporting and retaliation issues in complex employment relationships, particularly those that involve subcontracting and staffing agencies. We urge OSHA to be aware of these problems and to address them appropriately in final documents, with regard to appropriate policies and practices as well as training.
4. The purpose of this document, as drafted, is to forestall the necessity for an employee to seek official governmental action. It is directed to employers who want to establish internal programs and policies that will encourage employees to bring forward issues within the organization and discourage all forms of retaliation against employees who do so.
5. These recommendations were designed for “willing” employers, and were not intended to take into account the broad experiences of various employers with CSR and other audit programs for labor-related compliance.
 - a. OSHA itself has had experience with audits and monitoring in its compliance settlements, including corporate-wide settlements (CSA’s). The WPAC has not considered whether these recommendations are appropriate for inclusion in such settlements.
 - b. OSHA should proceed cautiously with the development and inclusion of audit functions in settlements in whistleblower cases, especially in cases involving large employers.
6. Although set out as six separate principles, the subcommittee and WPAC view these six elements as deeply intertwined. The recommendations interrelate.
7. Among the interrelationships, the WPAC would like OSHA to keep in mind the intertwined nature of reports of issues and retaliation.