

BEST PRACTICES for Protecting Whistleblowers and Preventing and Addressing Retaliation

This document is adapted and updated from best practices developed by the Whistleblower Protection Advisory Committee of the U.S. Department of Labor, a bipartisan group consisting of union representatives, legal experts, corporate safety and compliance directors, public policy professionals, academics, and active and former regulators. The committee submitted its consensus recommendations in full to the Occupational Health and Safety Administration (OSHA) in May 2015.

Retaliation against employees who report concerns about safety, sexual harassment, discrimination, or organizational integrity is all too common. It happens in organizations of all sizes and across the public, private, and nonprofit sectors. Across these sectors, leaders, general counsels, compliance officers, and most researchers will attest, however, that organizational effectiveness and business profitability improve with active whistleblower protection and anti-retaliation systems.

To gain such benefits, organizations must move from a defensive and reactive stance to a proactive and prevention-oriented culture in which issues and complaints can be easily and safely reported, assessed, and resolved in a fair and timely manner. Many leaders think that retaliation couldn't happen in their organization—that employees can safely report issues and have them resolved—but survey after survey suggests that no organization is immune.

“Don't assume that lack of reported issues or reported retaliation means that these things aren't happening.”

Nurturing programs to ensure a nonretaliatory environment is not only the right thing to do, but it mitigates legal and public relations risks and boosts employee satisfaction, cohesion, and engagement.

This document provides practical guidance and best practices for organizations that want to establish or improve programs to protect whistleblower rights. The recommendations are based on lessons from a range of industries and sectors and include approaches not yet in common use. They apply to most workplaces, with appropriate adaptations for scale, culture, history, and applicable law.

These are the six key ingredients of a strong program, as explained in detail in the following sections:

1. Foster a “speak up / listen up” culture so issues can surface early, before they become polarizing.
2. Implement an independent, objective retaliation prevention and response system.
3. Train workers and managers in whistleblower rights and anti-retaliation skills.
4. Measure results and mitigate competing incentives.
5. Carry out independent auditing to ensure the program's effectiveness.
6. Ensure leadership commitment and accountability.

1. Foster a “Speak Up / Listen Up” Culture so Issues Can Surface Early

The seeds of retaliation are planted when employee concerns are treated as unwelcome, go unaddressed, or are suppressed. Often, economic or other incentives or cultural forces overwhelm anti-retaliation goals. Employers should implement programs whose incentives and measures foster a “speak up / listen up” culture that encourages early reporting of issues, and their prompt and fair resolution, in a nonretaliatory environment. This will lead to earlier detection, less complex and polarized conflicts, more cost-effective remedies, a more positive work culture, lower legal and public relations risks, and improved teamwork. Don't assume that no reports of incidents or retaliation means that no issues exist. The absence of reports more likely means that employees are afraid to speak up about deficiencies or violations or that there are active efforts to suppress reporting in parts of the organization.

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- ✓ Organizations should have a structured and transparent system through which employees can, without risk, confidentially report concerns and be assured of timely, bias-free resolution.
- ✓ Make it easy for employees to report in low-key ways or to ask questions at an early stage.
- ✓ Multiple reporting avenues should be available, including for anonymous reporting. Anonymous reports are often the most serious and therefore reflect the most fear and are most crucial to hear.
- ✓ Provide ways for employees to receive unbiased, confidential advice about exercising whistleblower rights and how to cope with the stress of reporting concerns.
- ✓ Leaders should seek the input and involvement of workers and union leaders in designing and implementing reporting channels and anti-retaliation programs.
- ✓ Whistleblowers should be protected even if they are mistaken or behave unpleasantly. To keep faith with employees and ensure candor in the future, organizations must uphold pledges of confidentiality and anonymity.
- ✓ Root out incentives or values that encourage or allow retaliation or discourage reporting.
- ✓ Employment agreements and confidentiality or nondisclosure rules should expressly carve out an exception for reporting to or contacting government agencies about issues or retaliation. Employees have a right to report to government entities and are not obliged to disclose that they did so.
- ✓ Employers should have a policy of “no punishment” for reporting concerns—including subtle forms of punishment such as changes to work hours or assignments or the “silent treatment.” Punishing whistleblowers discourages others from reporting in the future.
- ✓ All employees and managers should learn to recognize retaliation against those who report and should understand their obligation to stop it.

✓ DO	⊗ DON'T
Make it easy for employees to report issues or ask questions early and in low-key ways.	Mandate reporting formats that would potentially subject an employee to ridicule, stigma, or pressure.
Respond quickly to all issues and resolve them through a fair and objective process.	Ignore or fail to investigate and resolve issues, and don't neglect to keep employees who report issues informed about how the matter is being handled.
Uphold assurances of confidentiality in order to prevent retaliation.	Leave an employee exposed to resentful or worried peers and supervisors.
Investigate reported issues even if the employee raises them in an unwelcome way.	Assume or try to assess an employee's motives for raising an issue.

✓ DO	⊗ DON'T
Focus on systemic shortcomings when investigating issues, and consider how easier reporting might have helped prevent the problem.	Focus first on the employee who reported rather than on potential causes of the issue.
Start without assumptions, and be ready to cut through coverups and false narratives about whistleblowers.	Assume that past opinions or assessments of the employee or the issue are correct.
Investigate issues thoroughly, transparently, and promptly, and respond promptly to the employee who reported them.	Drop the issue into a long queue or ignore it because it doesn't seem important.

2. Implement an Independent Retaliation Prevention and Response System

Retaliation happens when management at some level doesn't want to recognize or acknowledge the initial complaint and would rather silence the employee. This is a violation of the law and will set up spiraling conflict within the organization, often with profound consequences for the culture and for trust in management, as well as for productivity, quality, and ultimately profits. An effective retaliation response system should include a review process that is independent of the chain of command, with a direct reporting line that can reach the board if necessary. To be effective, the system must include defined and widely known roles, responsibilities, and expectations for top leaders, board members, managers, supervisors, employees, and compliance, legal, HR, and labor staffs. Confidentiality, absence of conflict of interest among those investigating, and protections against further retaliation are essential.

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- ✓ As with issue reporting, the retaliation response system should include multiple avenues (including outside the chain of command), confidentiality, and ways to report anonymously.
- ✓ Employers should respond immediately to reported incidents of retaliation.
- ✓ The system should be transparent about how investigations are conducted, including roles and procedures, who will be involved, timing, quality standards, confidentiality, skills and training of investigators, and protections against conflicts of interest and retaliation.
- ✓ To protect employees from further retaliation and to prevent a chilling effect, reports of retaliation must be kept strictly confidential within the independent investigatory group.
- ✓ Reports and conclusions should derive from *de novo*, independent investigations. Employers should beware of false narratives, which are frequently used to discredit whistleblowers.
- ✓ Investigations should focus on facts, issues, and resolution, not on defense or “winning.”
- ✓ Leaders should avoid defaulting to a defensive position and should instead focus on problem solving.
- ✓ Leaders should ensure respectful and proper closure of the issue with the reporting party.
- ✓ Discipline or penalties for confirmed acts of retaliation should be imposed as a form of deterrence.

- ✓ To prevent retaliatory discipline, all disciplinary actions should be reviewed by a pre-established, independent board that applies “just culture” principles such as:
 - Does the disciplinary action have a potential connection to past reporting behavior by the employee?
 - Has progressive discipline been applied, and has it been justifiable and appropriate?
 - Is the discipline proportional to that imposed on others for similar offenses?
- ✓ Retaliation investigations should include senior managers who can see broader implications, risks, and opportunities posed by the case, and who can then reform relevant practices.
- ✓ The reporting employee and others should be able to freely and safely elevate the issue to higher levels. The procedures for doing so must be widely known and accessible.
- ✓ Whistleblowers should be protected against retaliation even years after the alleged incident.

“Many formal and informal workplace incentive systems, including productivity and cost-reduction incentives, can encourage or mask retaliation.”

“Don’t rely solely on a strong chance of prevailing in court.”

✓ DO	⊗ DON'T
Maintain contact with and protect the reporting employee during and after—and sometimes long after—the investigation.	Isolate the employee or allow later retaliation.
Always ensure confidentiality, carefully barring any bias or conflicts of interest within the investigative team and prohibiting the sharing of information between the team and others.	Grant access to investigative information or the investigative team to anyone other than executive decision makers who have no conflict of interest.
Use third-party investigators if needed for a credible, unbiased investigation.	Promise anonymity if it can't be ensured.
Recognize the chilling effect of retaliation and lack of response to it.	Rely solely on prevailing in court or assume that the issues will go away if you “win”—they won't.
Independently review any proposed discipline.	Punish or threaten punishment for reporting.
Look for underlying causes and hidden or informal incentives for retaliation.	Assume that the cause of the problem has been fixed just because the case has been resolved.

3. Train Workers and Managers in Whistleblower Rights and Anti-Retaliation Skills

Anti-retaliation skills are not intuitive. In fact, some retaliatory behaviors are widely seen as acceptable or justifiable, even to higher-ups. All leaders, managers, supervisors, and employees should receive periodic training in legal protections for whistleblowers, what constitutes retaliation, and how to prevent and address it. As training is developed, employers should consult with union leaders (or, in a nonunion workplace, employee leaders) to get their input. Anti-retaliation training should be considered equal in importance to required certifications.

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Whether for the board, senior management, front-line supervisors, or other employees, anti-retaliation training should cover the following topics, at a minimum:

- ✓ What constitutes retaliation—including less overt but still common behaviors such as peer pressure, ostracizing, mocking, and exclusion from meetings
- ✓ How to respond to a whistleblower without inadvertent retaliation
- ✓ Skills for preventing, defusing, and stopping retaliation in a work group
- ✓ Elements of the organization’s anti-retaliation system, including roles, protections, responsibilities, how to report concerns, and how to escalate when the response is insufficient
- ✓ The importance of confidentiality in handling reports of retaliation
- ✓ Relevant laws, rights of employees, and risks and consequences of ignoring retaliatory behavior
- ✓ What constitutes “notice” (i.e., when management is required by law to respond)
- ✓ Negative consequences of relying on discipline and litigation to resolve complaints
- ✓ How to separate annoying or inappropriate behavior on the part of a whistleblower from the substance of the complaint and the right to safely report issues—and how to deal with each

✓ DO	⊗ DON'T
Recognize that some retaliatory behaviors are commonly believed to be acceptable and justifiable.	Assume that people will intuitively know what retaliation is and can or will act to stop it.
Note that most employees report first to a supervisor.	Leave supervisors unprepared or uninformed.
Ensure that board members understand their obligations and are prepared to act.	Assume that board members have a background in this area or know their obligations to act or how to respond.
Make sure all levels of management know how to put a reported problem on track for resolution.	Assume that handoffs or referrals will naturally occur or that confidentiality will automatically be maintained during the process.

4. Measure Results and Mitigate Competing Incentives

Many formal and informal workplace incentive systems, including productivity and cost-reduction incentives, can inadvertently encourage or mask retaliation. Organizations should therefore track reports of issues and incidents of retaliation and periodically assess these systems and those for measuring or rewarding work performance to ensure that they do not discourage employee reporting or encourage retaliation.

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- ✓ Accountability and measurement efforts should focus on “leading indicators” such as behavior that encourages compliance with workplace safeguards and fosters a “speak up / listen up” culture—rather than on traditional “trailing indicators” such as reported incidents. Evidence shows that the common practice of rewarding management for low levels of reporting leads to suppression—the primary precursor to retaliation.
- ✓ Periodically, and after any breakdowns in reporting or response, carefully review the formal and informal incentives that influence employee and management behaviors.
- ✓ Top leaders and the board should receive “dashboard” reports on reported issues, retaliation allegations, and issue resolution, along with detailed results of system audits.
- ✓ Monitoring should include near-misses and emerging issues and incidents, as well as trends in the types of issues reported and to whom they are reported.
- ✓ To ensure that informal workplace incentives and systems are understood, organizations should engage bargaining unit leaders (or, in nonunion workplaces, other employees) in developing and reviewing monitoring efforts.
- ✓ Be prepared for the number of reported issues to go up when a new program or more open reporting is implemented. Initially higher numbers may be due to employees feeling safer about reporting.

“Failure to address retaliation can discourage future reporting and lead employees to report incidents externally.”

“For issues that are especially polarizing or high-stakes, an independent, third-party channel or customized methods may be needed.”

✓ DO	⊗ DON'T
Consider using incentives that reward preventive activities and behaviors that encourage compliance with workplace safeguards.	Risk complaint suppression by tying pay or group rewards to low volumes of reported issues.
Use incidents (including near misses) to assess what should be changed.	View reports of problems as negative information; instead, view them as opportunities.
Pay attention to the types of issues reported, which can help pinpoint trends and problems.	Close investigations without resolving the issue, addressing causes, sharing results, and ensuring a fair process.

5. Carry Out Independent Auditing to Ensure Program Effectiveness

Even well-conceived anti-retaliation programs can founder. Problems can be hidden from management; normal data collection can't measure employees' fears or attitudes about reporting. To ensure that a reporting or anti-retaliation program is working as intended, leaders should periodically oversee audits that go beyond normal monitoring efforts by employing specialized, independent analysis, surveys, and interviews. Comparing internal reports to reports in external systems—such as workers' compensation, insurance claims, grievances, and exit interviews—can quickly reveal discrepancies. These and other auditing tools can reveal employees' willingness to report issues, their fears of retaliation, and the gap between program objectives and reality in the workplace. Such auditing requires extreme confidentiality in order to obtain candid replies. Senior leaders are frequently shocked by, and make significant reforms based on, the results of carefully conducted audits.

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The most useful independent audits are likely to include some combination of the following:

- ✓ A simple examination of established whistleblower policy and program features to confirm that necessary basic policies are in place and roles are well defined
- ✓ In-depth anonymous surveys and structured interviews with a broad sample of workers to determine whether they understand, have access to, and trust anti-retaliation policies and programs
- ✓ Cross-checks of internal reporting data with other reporting channels, such as worker's compensation claims, grievances, attendance patterns, quit rates and locations, and exit interviews
- ✓ Analysis of layoffs, terminations, and disciplinary actions to uncover correlations with prior reporting
- ✓ Examination of incident investigation reports to see if policies and systems work under pressure
- ✓ Improvement plans for delinquent facilities, work groups, and managers
- ✓ Enforcement of parallel whistleblower and anti-retaliation provisions through supply chain contracts
- ✓ Union input (if available) in preparing and reviewing audits and surveys
- ✓ Detailed reporting of audit results to the board so it can consider reforms or other action

“Ensure proper safeguards to avoid conflicts of interest among both outside and internal auditors.”

“Independent auditing by experts is the only way to learn whether employees are truly willing to report issues and whether they trust management to protect them from retaliation.”

✓ DO	⊗ DON'T
Independently evaluate the effectiveness of the anti-retaliation program.	Assume that good intentions are enough or that low reporting numbers indicate few issues or problems.
Conduct confidential, independent, in-depth employee surveys and interviews, and check external data.	Assume from a simple work climate survey that workers feel comfortable raising issues.

✓ DO	⊗ DON'T
Carefully protect the confidentiality of survey and interview participants.	Allow the auditing process to be misused for retaliation.
Ensure proper safeguards to avoid conflicts of interest among independent auditors.	Let audits be controlled by those who might have something to hide.
Consider wide distribution of audit results.	Hide the results of audits.

6. Ensure Leadership Commitment and Accountability

An effective whistleblower protection and anti-retaliation program requires commitment and accountability at all leadership levels. The appropriate policies and actions can often seem counterintuitive, so CEOs and governing boards must implement and sustain an effective program, follow through on their commitments, and continuously measure results. Managers and supervisors must be trained in—and held accountable for—implementing, operating, and supporting the program.

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- ✓ Leaders at all levels—from the board to front-line supervisors—must be formally accountable for ensuring whistleblower rights and the quality of response to issues and reports of retaliation.
- ✓ Top leaders should ensure that employees have safe, nonthreatening channels for reporting issues and getting them resolved. All channels must be free of bias and conflict of interest.
- ✓ Top leaders and the board should understand the statutory definition of *retaliation*, their obligations to prevent it, and their employees' willingness to report it. They must understand that retaliation is easily camouflaged and must be alert to signs that it is happening.
- ✓ Board members should understand their legal responsibilities and exposure under applicable statutes (such as the Sarbanes-Oxley Act).
- ✓ Board members should receive training, case studies, industry-specific data, and regular (at least annual) updates on reported issues, retaliation incidents, and program results.
- ✓ Multinational companies should know their obligations under the Foreign Corrupt Practices Act.
- ✓ The organization should have a chief compliance officer with authority to enact, enforce, and evaluate anti-retaliation policies and programs and report to the CEO and the board.
- ✓ Performance reviews and incentives for managers and leaders should promote anti-retaliation behavior, including support for training and compliance initiatives and taking action to address concerns and causes.
- ✓ In union workplaces, bargaining unit leaders can play a valuable role in creating management awareness and strengthening the willingness of employees to come forward.
- ✓ The board should enact a strong code of conduct and ethics programs to support fair treatment of employees who report issues, whether internally, to their union, or to government agencies.

“Protections for whistleblowers and prevention of retaliation are not naturally occurring phenomena.”

“Take all reports of retaliation seriously; don't ignore issues because they seem minor or because the source or the employee's motivation seems questionable.”

- ✓ Consequences (such as discipline or penalties) should be imposed when acts of retaliation are confirmed; those consequences should be serious enough to serve as a deterrent to others.
- ✓ Employers should have a mechanism for updating internal training, auditing, and other practices in response to changes in laws and regulations and to changes within the organization.

✓ DO	⊗ DON'T
Provide board training, case studies, industry-specific data, and internal monitoring data.	Provide the board with only general policies or cursory summaries.
Give the board regular updates—on reported issues, reports of retaliation, and program results.	Block employees from bringing issues directly to the board if others in the chain of command or reporting system are not responding.
Ensure adequate channels for reporting and resolving issues.	Assume that policies and statements are enough.

Applying the Best Practices

By applying the simple yet comprehensive approach presented in this document, organizations can improve productivity, the quality of their products and services, teamwork, and trust and satisfaction among employees and managers while ensuring compliance and reducing litigation and public relations risks. Whether in a small nonprofit or a Fortune 500 corporation, these principles and best practices can be adapted to the organization’s scale and circumstances to enhance or remake the work culture.

This overall approach was endorsed by OSHA in January 2017 and has been recognized as particularly valuable and practical by respected labor advocates, management attorneys, CEOs, top compliance officers, and other experts and researchers.

Employees who experience or report workplace issues—from safety and health hazards and lapses in organizational integrity to racial discrimination and sexual harassment—are often poorly served by common human reactions. The investments required for effective prevention and response programs are extremely modest when weighed against the human and institutional costs of failing to prevent and respond to #MeToo transgressions, aircraft and space flight safety lapses, product defects, financial or ethical misconduct, and myriad other potentially grave circumstances. Countless managerial and front-line careers have been ruined in whistleblower and retaliation-related conflicts and lawsuits. In those circumstances, no one really wins. By taking a proactive approach, organizations can guard against these harmful outcomes.

This summary was prepared as a public service with the input and encouragement of former members of the Whistleblower Protection Advisory Committee (WPAC). It is based on information that is in the public domain, so it can be freely used or adapted to promote the goals of whistleblower and anti-retaliation protections. OSHA’s support for the approach detailed here can be found in its “Recommended Practices for Anti-Retaliation Programs” at www.osha.gov/Publications/OSHA3905.pdf. For more information on this document or its contents, contact former WPAC member Jon Brock, associate professor emeritus of public policy, University of Washington, at brockjon@outlook.com.