

Best Practices for Addressing the Coming Surge of Whistleblower Claims

Ensure That Issues Surface: 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 not only creates legal liability risk but often sets up a 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.

Best Practices

- 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 against a whistleblower, 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?

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- ▶ 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 after the alleged incident.

Do	Don't
<ul style="list-style-type: none"> ✓ Maintain contact with and protect the reporting employee during and after—and sometimes long after—the investigation. 	<ul style="list-style-type: none"> ✗ Isolate the employee or allow later retaliation.
<ul style="list-style-type: none"> ✓ Always promote confidentiality, carefully barring any bias or conflicts of interest within the investigative team and prohibiting the sharing of information between the team and others. 	<ul style="list-style-type: none"> ✗ Grant access to investigative information or the investigative team to anyone other than executive decision makers who have no conflict of interest.
<ul style="list-style-type: none"> ✓ Use third-party investigators if needed for a credible, unbiased investigation. 	<ul style="list-style-type: none"> ✗ Promise anonymity if it can't be ensured.
<ul style="list-style-type: none"> ✓ Recognize the chilling effect of retaliation and lack of response to it. 	<ul style="list-style-type: none"> ✗ Rely solely on prevailing in court or assume that the issues will go away if you “win”—they won't.
<ul style="list-style-type: none"> ✓ Independently review any proposed discipline. 	<ul style="list-style-type: none"> ✗ Punish or threaten punishment for reporting.
<ul style="list-style-type: none"> ✓ Look for underlying causes and hidden or informal incentives for retaliation. 	<ul style="list-style-type: none"> ✗ Assume that the cause of the problem has been fixed just because the case has been resolved.

If you have questions about any of these ongoing developments:

Please connect with [Greg Keating](#), chair of Choate's Whistleblower Defense Group and a former member of the Federal Whistleblower Protection Advisory Committee.