

Best Practices for Addressing the Coming Surge of Whistleblower Claims

Eliminate Confusion: Train Workers and Managers in Whistleblower Rights and Anti-retaliation

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.

Best Practices

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" or "protected activity" (i.e., when management is required by law to respond).
- ▶ What constitutes an "adverse action" which may trigger liability for retaliation, recognizing these can include more subtle decisions made by managers such as transfer or reassignment of work, depending on the circumstances.
- ▶ 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.

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

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.