

Recommended Practices for Anti-Retaliation Programs

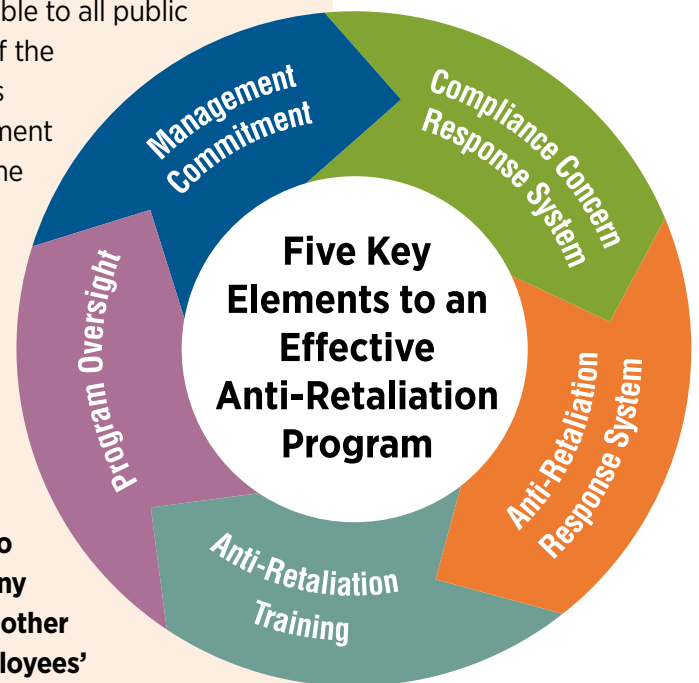


How to Use These Recommended Practices

This set of recommendations is intended to assist employers in creating workplaces that are free of retaliation, including retaliation against employees who engage in activity protected under the 22 whistleblower laws that the Occupational Safety and Health Administration (OSHA) enforces. This document is advisory in nature and informational in content. It is not mandatory for employers, and does not interpret or create legal obligations.

These recommendations are intended to be broadly applicable to all public and private sector employers that may be covered by any of the whistleblower protection provisions enforced by OSHA. This recommended framework can be used to create and implement a new program, or to enhance an existing program. While the concepts outlined here are adaptable to most workplaces, employers may adjust these guidelines for such variables as employer size, the makeup of the workforce, and the type of work performed.¹

This guidance is directed at employers that may be covered by the 22 whistleblower protection statutes that OSHA enforces, although the basic principles in this guidance could also be useful in circumstances where other anti-retaliation protections apply. **This guidance is not intended to advise employees about their rights or protections under any whistleblower protection statute enforced by OSHA or any other government agency. Information and resources about employees' rights under the whistleblower protection statutes that OSHA enforces can be found at www.whistleblowers.gov.**



Retaliation Is Against the Law

OSHA's Whistleblower Protection Program enforces the whistleblower provisions of 22 federal statutes protecting employees who raise or report concerns about hazards or violations of various workplace safety and health, airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health insurance reform, motor vehicle safety, nuclear, pipeline, public transportation agency, railroad, maritime, and securities laws (see list of statutes at the end of this document).

An employer must not retaliate against an employee for engaging in activities that are protected under these laws. Protected activities may include: filing a report about a

¹ The core recommendations presented in this document were recommended unanimously by the Secretary of Labor's Whistleblower Protection Advisory Committee.



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possible violation of the law with OSHA or other government agencies, reporting a concern about a possible violation of the law to the employer, reporting a workplace injury, illness, or hazard, cooperating with law enforcement, refusing to conduct tasks that would violate the law, or engaging in any other type of statutorily protected activity.

Preventing Retaliation Is Good for Workers and Good for Business

Retaliation against employees who raise or report concerns or otherwise exercise their rights under these laws is not only illegal, it is also bad for workers and bad for business. A proactive anti-retaliation program is designed to (1) receive and respond appropriately to employees' compliance concerns (i.e., concerns about hazards or potential employer violations of one of the 22 laws) and (2) prevent and address retaliation against employees who raise or report concerns. Without an effective program, problems in the workplace may go unreported because workers fear retaliation for reporting concerns or feel frustration over the lack of effective resolution of their concerns.

An anti-retaliation program that enables all members of the workforce, including permanent employees, contractors and temporary workers, to voice their concerns without fear of retaliation can help employers learn of problems and appropriately address them before they become more difficult to correct. A program based on this proactive approach not only helps employers ensure that they are following federal laws, but also helps create a positive workplace culture that prevents unlawful retaliation against employees. Furthermore, a successful anti-retaliation program improves employee satisfaction and engagement, and helps protect workers and members of the public from the harm of violations of federal laws and regulations.

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Employees' Rights to Report to the Government

While an anti-retaliation program that enables employees to communicate their compliance concerns to the employer can be beneficial to employers, workers, and the public, employers must also recognize that employees have the right to provide "tips" or file complaints about hazards or potential violations of the law with OSHA and other government agencies. Employer policies must not discourage employees from reporting concerns to a government agency, delay employee reports to government, or require employees to report concerns to the employer first. OSHA also cautions employers that an anti-retaliation program must not have the effect of discouraging or misleading employees about their right to report compliance concerns or retaliation externally. Anti-retaliation program policies and training for management and employees should clearly explain employees' rights to report hazards, violations of the law and retaliation externally, and that retaliation for reporting externally is against the law.

What Is Retaliation?

Retaliation occurs when an employer (through a manager, supervisor, or administrator) takes an adverse action against an employee because the employee engaged in protected activity, such as raising a concern 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 the public; or reporting a suspected violation of law. Retaliation also occurs when an employer takes an adverse action because an employee reported an injury or to dissuade an employee from reporting an injury. An adverse action is an action that could dissuade or intimidate a reasonable worker from raising a concern about a workplace condition or activity. Retaliation against an employee is not only harmful to the employee who experienced the adverse action, it can also have a negative impact on overall employee morale because of the chilling effect that retaliation can have on other employees' willingness to report concerns.

Because adverse action can be subtle, it may not always be easy to spot. Examples of adverse action include, but are not limited to:

- Firing or laying off
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Making threats
- Blacklisting (e.g., notifying other potential employers that an applicant should not be hired or refusing to consider applicants for employment who have reported concerns to previous employers)
- Reassignment to a less desirable position or actions affecting prospects for promotion (such as excluding an employee from training meetings)
- Reducing pay or hours
- More subtle actions, such as isolating, ostracizing, mocking, or falsely accusing the employee of poor performance.

Creating an Anti-Retaliation Program

Implementing an effective anti-retaliation program is not intuitive and requires specific policies and commitments. There are five key elements to creating an effective anti-retaliation program:

1. Management leadership, commitment, and accountability
2. System for listening to and resolving employees' safety and compliance concerns
3. System for receiving and responding to reports of retaliation
4. Anti-retaliation training for employees and managers
5. Program oversight

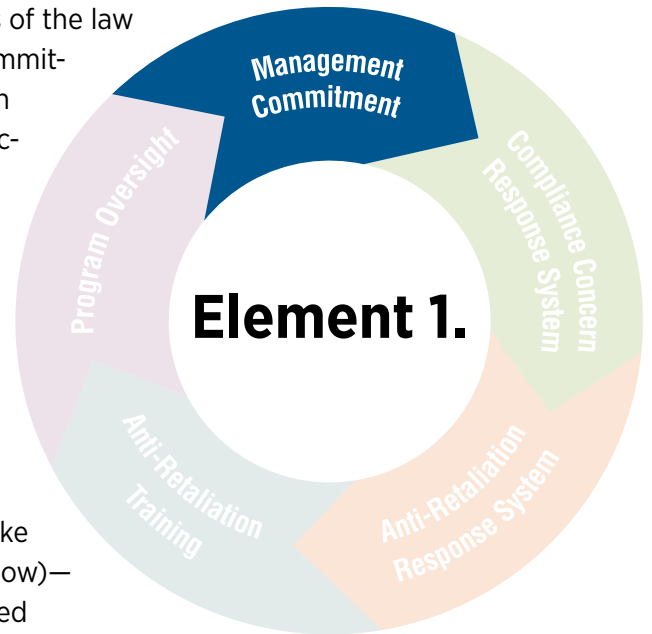
In order to effectively support employee reporting and protect employees from retaliation, employers should integrate all five elements into a cohesive program.

Management Leadership, Commitment, and Accountability

To make preventing retaliation and following the law integral aspects of the workplace culture, it is important that senior management demonstrate leadership and commitment to these values. Senior management, such as the CEO and board (if applicable), should lead by example to demonstrate a culture of valuing and addressing employees' concerns regarding potential violations of the law and commitment to preventing retaliation. To demonstrate commitment, management should back up words with actions; written policies that are not actively practiced and enforced are ineffective. Managers at all levels should be held accountable for the quality of their response to employees' concerns, including reports of potential violations of the law, of safety hazards, and of retaliation.

How can management show commitment to preventing retaliation?

- Ensure that the systems for reporting hazards, compliance concerns and retaliation—including systems for maintaining the confidentiality of employees who make reports (discussed in more detail in elements 2 and 3 below)—are implemented, enforced, and evaluated by a designated manager who is responsible and accountable for these programs, and has access to top managers and the board (if applicable).
- Confer with workers and worker representatives (if any) about creating and improving management awareness and implementation of anti-retaliation policies and practices.
- Require training for managers and board members (if applicable) to make certain they understand what retaliation is, the employer's and their own legal obligations (including their obligation to maintain the confidentiality of employees who make reports), the organizational benefits of anti-retaliation practices, and what it takes programmatically to prevent retaliation. (For more information, see element 4 below.)
- Ensure that there is a mechanism for accurately evaluating employees' willingness to report concerns about the workplace and the employer's actual record in preventing retaliation against employees who report, and ensure that there is a means for accurately reporting to top management the results of such evaluation.
- If appropriate, and taking into account an employee's preference for confidentiality, publicly recognize the contribution of employees whose disclosures have made a positive difference for the employer, perhaps through an award that is publicized company-wide.



How can management be held accountable for preventing retaliation?

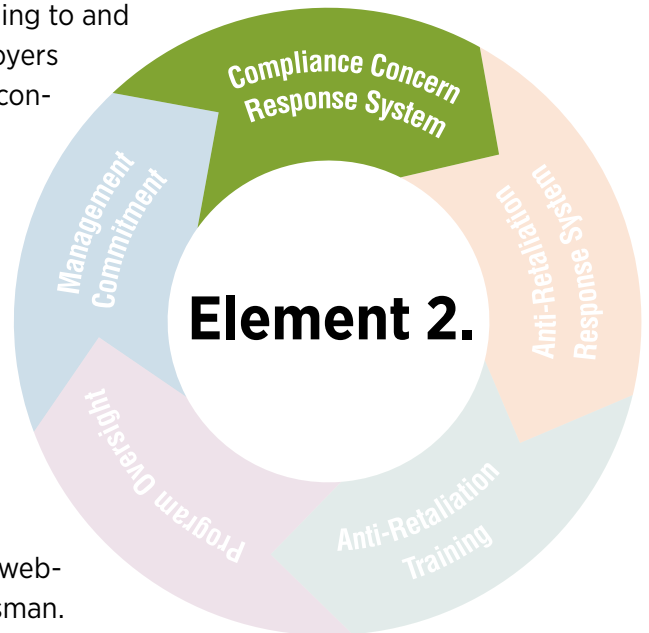
- Incorporate anti-retaliation measures (e.g., promptly and constructively addressing employee concerns, attending training, and championing anti-retaliation initiatives) in management performance standards and reviews.
- Implement strong codes of conduct and ethics programs that clearly identify whistleblower retaliation as a form of misconduct to ensure anti-retaliation policies and practices are enforceable.
- Apply appropriate consequences, such as discipline, to managers who retaliate or who violate the confidentiality of an employee who has made a report. These consequences should be sufficient to serve as a deterrent to future acts of retaliation.

System for Listening to and Resolving Employees' Safety and Compliance Concerns

To help prevent retaliation, employers should proactively foster an organizational culture in which raising concerns about workplace conditions and activities is valued. Employers can cultivate such an environment by listening to and resolving employees' compliance concerns. Specifically, employers should establish procedures that enable employees to report concerns (including through confidential or anonymous channels, when possible), provide for fair and transparent evaluation of concerns raised, offer a timely response, and ensure a fair and effective resolution of concerns. In developing these policies, employers should work with employees and worker representatives (if any).

What can employers do to enable employees to raise safety and compliance concerns?

- Create at least one or, preferably, multiple channels for reporting compliance concerns. Channels can include helplines, anonymous reporting through email boxes or websites, or reporting to a trusted official and/or an ombudsman.
- Protect the confidentiality or anonymity of employees who report concerns, and ensure that confidentiality is not used as a shield to prevent whistleblowers from having access to information needed to exercise their rights.²
- Give employees clear and accessible instructions on how they can report compliance concerns both internally and externally, and make clear that the employee has the right to choose which avenue to use to report concerns. Employees must not be penalized for reporting concerns to the employer by a means other than through these channels.
- Ensure that the program does not restrict or discourage employees from reporting allegations to the government or other appropriate regulatory and oversight agencies.



² While an employee should be permitted to remain anonymous when reporting compliance concerns internally (i.e., within the company) or externally to a government agency, the 22 whistleblower statutes enforced by OSHA do not allow for an employee to anonymously file a retaliation complaint with OSHA.

- Provide employees with opportunities to share information informally and to ask questions at an early stage, before issues become more difficult to resolve.
- Eliminate or restructure formal and informal workplace incentives that may encourage or allow retaliation or discourage reporting. Examples of incentives that may discourage reporting or encourage retaliation include rewarding employee work units with prizes for low injury rates or directly linking supervisors' bonuses to lower reported injury rates.

(For additional information on incentive programs, see OSHA's information on Employer Safety Incentive and Disincentive Policies and Practices, <http://www.osha.gov/as/opa/whistleblowermemo.html>, Revised VPP Memo #5: Further Improvements to the Voluntary Protection Programs, https://www.osha.gov/dcsp/vpp/policy_memo5.html, and incentive program guidance at https://www.osha.gov/recordkeeping/modernization_guidance.html.)

How should employers ensure prompt and fair resolution of compliance concerns?

- Have an independent investigator review reports of concerns promptly, thoroughly, and with transparency, including responding to the employee who brought forward the initial concern.
- Ensure that supervisors or managers respond in a constructive and timely manner upon receiving reports of concerns from employees.
- Guarantee that employee rights are protected even if the person is incorrect or unpleasant in raising a concern.
- Follow through on employee concerns, even if they appear to be trivial.
- Have a strong, enforceable policy of not punishing employees for reporting concerns or incidents or for engaging in any other protected activity.
- Help employees get unbiased, confidential advice or information about exercising whistleblower rights and coping with the stress of reporting concerns, such as by providing a list of resources.
- Ensure that any employment agreement or policy that requires employees to keep employer information confidential does not prohibit or discourage employees from reporting or taking the steps necessary to report information reasonably related to concerns about hazards or violations of the law to any government agency. Steps that may be necessary include conferring with legal counsel, union or other worker representatives, or with medical professionals regarding the employee's concerns. Employers should not use confidentiality or non-disclosure agreements to penalize, through lawsuits or otherwise, employees who report suspected violations of the law or take steps necessary to make such reports.
- Ensure that employment status changes, such as demotions and denials of promotions, are only made for legitimate non-retaliatory reasons and are not likely to be perceived as retaliatory.

Create at least one or, preferably, multiple channels for reporting compliance concerns.

If an employee is disciplined after reporting a concern, injury, or other issue, how should the employer review the discipline to ensure that it is not retaliatory?

Ask questions such as:

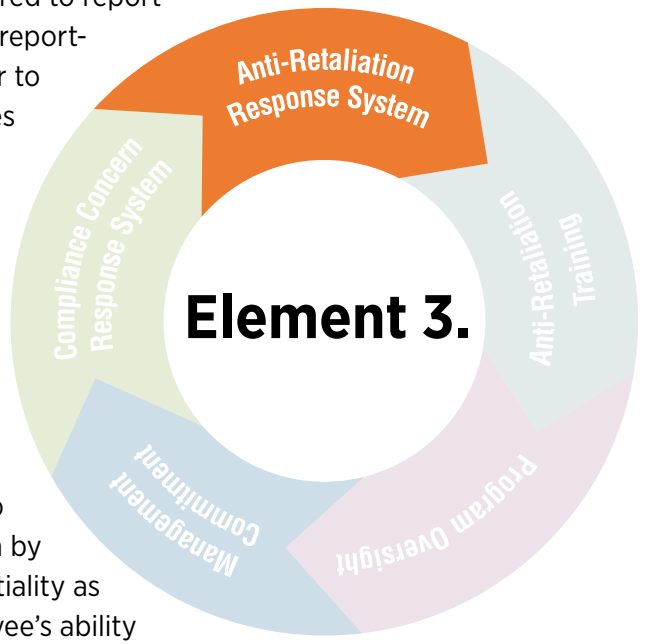
- Did the employee’s report influence the decision to initiate disciplinary action in any way?
- Has the employer disciplined other employees who engaged in the same conduct as the employee but who did not report a concern?
- Is the discipline imposed on the employee of the same severity as the employer’s response to the same conduct by other employees who did not report a concern?
- Has the disciplinary action been independently reviewed by a manager who was not involved in the incident?
- If the employer uses progressive discipline, has it been appropriately used up to this point?
- Could the workforce perceive the punishment as retaliatory? If so, what actions can management take to mitigate the potential chilling effect?

System for Receiving and Responding to Reports of Retaliation

Employees who believe they have experienced retaliation should have independent channels for reporting the retaliation; they should not be required to report to the manager who they believe retaliated against them. The reporting employee should also have the ability to elevate the matter to higher levels, if necessary. There should be clearly defined roles and responsibilities for managers at all levels and others who are involved in responding to reports of retaliation, such as human resources or ethics and compliance personnel. The procedures should be known and accessible to all.

When retaliation is reported, employers should investigate the claim promptly and thoroughly, utilizing an established retaliation response system. Such investigations should:

- Take all reports of retaliation seriously.
- Maintain employee confidentiality as much as possible to protect the employee from further retaliation or isolation by coworkers. However, employers should not use confidentiality as a shield to impede a government agency’s or the employee’s ability to successfully resolve the retaliation claim.
- Be transparent to the employee alleging retaliation about how investigations are conducted, including the roles and independence of the investigators.
- Investigate claims using an objective, independent complaint review process; focus on evaluating the circumstances surrounding the employment decision objectively rather than on defending against the claim; and listen to all sides before making a judgment.



- Ensure that investigations of alleged retaliation are not tainted by preconceptions about what happened.
- Utilize conflict of interest protections.
- Involve senior managers and others who recognize the organizational impact, benefits, risks, and policy ramifications of both the reported concern and the need to prevent retaliation against the reporting employee.
- Ensure that the program does not restrict or discourage employees from reporting retaliation allegations to the government or other appropriate regulatory and oversight agencies.
- Keep the reporting employee and management representatives informed of developments throughout the investigation and ensure respectful, proper closure of the issue.
- After the reported problem has been investigated and resolved, periodically follow up with the reporting employee for a reasonable amount of time to ensure continued protection from retaliation.
- Use third-party, independent investigators if the employer can support it and the circumstances warrant it (e.g., when the allegations involve particularly polarizing or high-stakes issues).
- If possible, make the anti-retaliation investigation completely independent from the corporation's legal counsel, who is obligated to protect the employer's interests. If the employer's legal representative is involved in conducting the investigation, fully inform the whistleblower that the investigator represents the employer's interests and that any attorney-client privilege will only extend to the employer.
- Consider using early dispute resolution techniques when significant disputes arise about an employee's disclosures or when considering implementing adverse actions like termination or demotion.
- Ensure that employees understand that they may file a retaliation complaint with OSHA and, if applicable, another government agency and that any internal investigation by the employer or attempts at early dispute resolution by the employer will not automatically delay or toll the deadline for filing a retaliation complaint with OSHA or another government agency. In certain circumstances, employers should consider whether offering to formally delay the deadline to file would be appropriate.
- Be attuned to the potential for a chilling effect caused by the workforce's perception that management's actions were retaliatory, and if likely, address such a perception through timely and effective communications or other mitigating strategies.

Take all reports of retaliation seriously.

Employers should respond quickly to reports of retaliation. Failure to do so can discourage employees from reporting concerns about workplace conditions or activities.

If the employer confirms that retaliation took place, it should remedy the retaliation and review its anti-retaliation program to determine why the system failed and what changes may be needed to prevent future retaliation. Workers and worker representatives (if any) should be integrally involved in this evaluation.

Anti-Retaliation Training for Employees and Managers

Effective training of employees and all levels of management and the board (if applicable) is key to any anti-retaliation program. Training is essential because it provides management and employees with the knowledge, skills, and tools they need to recognize, report, prevent, and/or properly address hazards, potential violations of the law, and retaliation. Training should be tailored to teach workers and managers about the specific federal whistleblower protection laws and company policies that apply to them, employees' rights under the laws, how employees can exercise their rights using available internal and external protection programs, and the organizational benefits of such programs. Managers should learn these concepts as well as related skills, behaviors, and obligations to act.

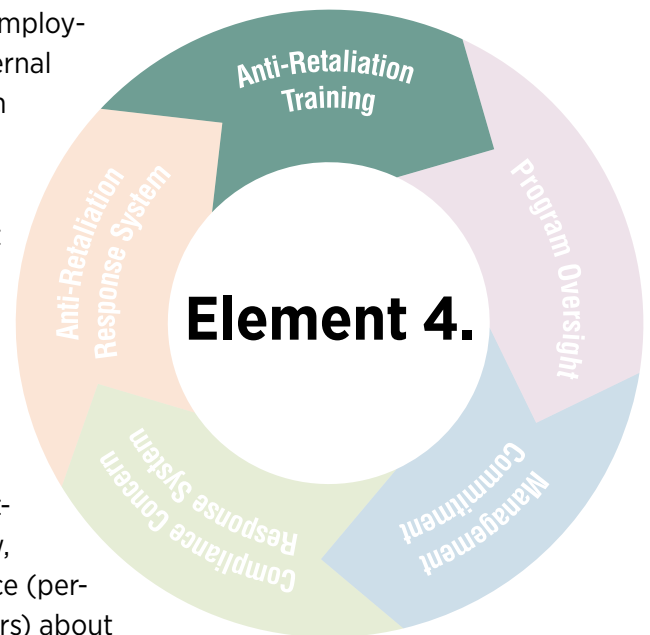
Training should be provided in accessible language(s) and at a level that can be easily understood by the intended audience.

Anti-retaliation training for employees, at a minimum, should include coverage of:

- Relevant laws and regulations.
- An explanation of the employer's commitment to creating an organizational culture of complying with the law, addressing concerns from all members of the workforce (permanent employees, contractors, and temporary workers) about potential hazards and violations of the law, and complying with its code of ethics, including prohibitions on retaliation.
- Employees' rights and obligations, if any, to report potential hazards and violations of the law externally to law enforcement, including OSHA and other government agencies, regardless of whether the employee first reported the violation to the employer.
- Statutory rights to be protected from retaliation for reporting potential violations.
- The elements of the employer's anti-retaliation program, including roles and responsibilities, how to report concerns internally and externally, options for confidential or anonymous reporting, and how to elevate a concern internally when supervisors or others do not respond.
- What constitutes retaliation, including actions such as firing or laying off, demoting, denying overtime or promotion, disciplining, denying benefits, failure to hire or rehire, reducing pay or hours, and blacklisting, along with common but less overt behaviors, such as ostracizing, mocking, intimidating, and making false accusations of poor performance.

In addition to the employee training topics described above, anti-retaliation training for managers should include, at a minimum:

- Skills for defusing conflict, problem solving, and stopping retaliation in a work group.



- How to respond to a report of a workplace concern while protecting an employee’s confidentiality and without engaging in retaliation, appearing to engage in retaliation, or questioning the motives for the report.
- How to separate annoying or inappropriate behavior from the concern itself.
- Consequences for managers who fail to follow anti-retaliation policies or respond to concerns inappropriately.
- How to recognize that an employee believes there has been retaliation, when employers are required to act, and the potential legal consequences the employer and the manager face for inaction.
- Other issues specific to the employer.

Legal requirements can change. Employers should create a process for staying up to date on changes to anti-retaliation laws and regulations and update their training and policies accordingly. Refresher training should be conducted on a regular basis and as needed, such as when there is a change in legal requirements, when retaliation has occurred, or when program oversight reveals that it is needed. Concepts from the training should not only be discussed during the designated training sessions, but should be reinforced frequently using other types of communications in order to make it part of the workplace culture.

Effective training is key to any anti-retaliation program.

Program Oversight

A well-designed anti-retaliation program needs rigorous oversight to ensure that it is effective and working as intended. Employers should develop and implement a plan for oversight of the anti-retaliation program, review oversight findings, and ensure that the program is improved and modified as needed.

What are some methods of oversight that can be used to assess the anti-retaliation program?

Monitoring and audits are two forms of oversight that can help employers gain insight into a program’s strengths and weaknesses and reveal whether program improvements are needed.

- Monitoring is an ongoing analysis of whether the program processes in place are achieving the organization’s planned results and program goals.
- Auditing is an independent, formal, and systematic approach designed to determine whether program processes are efficient, effective, and working as intended. Audits should be conducted by individuals who are independent of the process being audited.

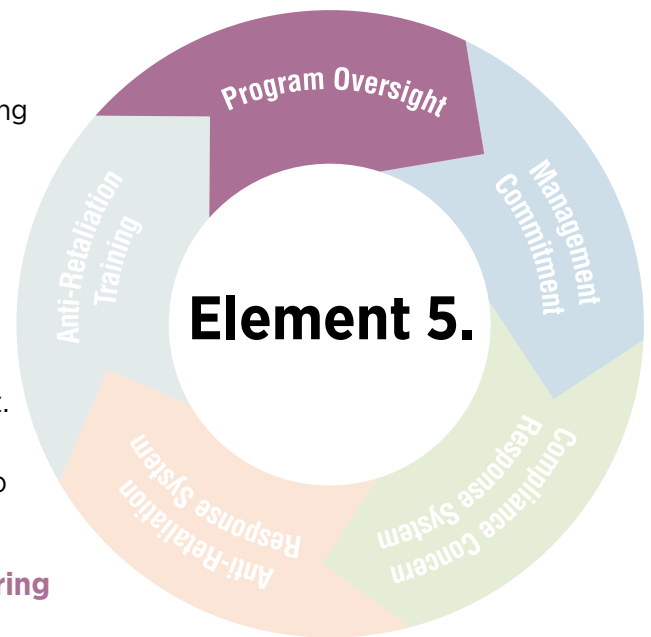
The functions of monitoring and auditing may overlap, and results from any one activity can be used to direct efforts of the other activities.

What issues should employers assess using oversight tools like monitoring and auditing?

Oversight tools like monitoring and auditing should be tailored to meet an organization’s specific needs. Examples of the types of anti-retaliation program topics that may be assessed using oversight include:

- Trends in issue reporting and resolution, including anonymous reporting;
- Whether managers are following program policies;
- Whether workers are unafraid of retaliation and coming forward with concerns; and
- Whether the types of measurements that are used to track issue response and reward improvement could have the effect of discouraging reporting rather than incentivizing it.

Note that when new anti-retaliation programs are implemented, the numbers of reported incidents may rise at first. This often means that employees are more comfortable reporting, not that there are a larger number of concerns to report.



What sources of information should be examined during program oversight?

Program oversight may examine a variety of sources, such as: anonymous surveys; confidential interviews with employees who reported compliance concerns or retaliation; narratives from injury or error reports; case studies of investigated issues and responses; claims department or risk management case files related to injuries or errors; and complaint files relating to reporting requirements.

Employers can also cross-check the data obtained as part of monitoring or auditing with other sources of relevant information, such as information reported to workers' compensation, in grievances, to outside agencies, or in exit interviews. Cross-checking these other sources of information could reveal whether a policy is creating a chilling effect or other barrier that is discouraging or preventing employees from reporting compliance concerns or retaliation.

How should employers use the results or findings of program oversight?

The results of oversight activities like monitoring and auditing should be reported directly to the top managers and the board (if applicable). The results should also be shared with all levels of management and the workers covered by the program.

Top-level managers and board members (if applicable) should review in-depth results of monitoring and auditing, including dashboard reports on all program measurements. Management should also periodically discuss the program with employees and worker representatives (if applicable) to get ideas and feedback.

Employers should use monitoring results as a basis for program improvements and accountability. If the results identify problems, employers should determine whether possible system failures led to the problem and make changes to the reporting system if warranted. Managers should create plans to improve work groups or facilities that have trends indicating room for improvement.

How OSHA Can Help

Filing a complaint

Employees who believe that they have been retaliated against in violation of any of the 22 whistleblower protection statutes that OSHA enforces may file a complaint with OSHA. Employees must file a complaint with OSHA before the filing deadline under the relevant statute (filing deadlines vary by statute). For example, a complaint of retaliation under the Occupational Safety and Health Act must be filed within 30 days of the alleged retaliation. For more information about the filing deadlines for the whistleblower statutes that OSHA enforces, view our “Whistleblower Statutes Desk Aid” at www.whistleblowers.gov/whistleblower_acts-desk_reference.pdf.

Complaints may be filed with OSHA by visiting or calling the local OSHA office at 1-800-321-OSHA (6742), or may be filed in writing by sending a written complaint to the closest OSHA regional or area office, or by filing a complaint online at www.whistleblowers.gov/complaint_page.html. Written complaints may be filed by facsimile, electronic communication, hand delivery during normal business hours, U.S. mail (confirmation services recommended), or other third-party commercial carrier.

Further information

For more information on filing a complaint under the 22 whistleblower statutes that OSHA enforces, please visit www.whistleblowers.gov. You can also call OSHA at 1-800-321-OSHA (6742) if you have questions or need more information.

OSHA enforces the whistleblower provisions of the following statutes: (1) Occupational Safety and Health Act (OSHA 11(c)), 29 U.S.C. § 660(c); (2) Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105; (3) Asbestos Hazard Emergency Response Act (AHERA), 15 U.S.C. § 2651; (4) International Safe Container Act (ISCA), 46 U.S.C. § 80507; (5) Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i); (6) Federal Water Pollution Control Act (FWPCA), 33 U.S.C. § 1367; (7) Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; (8) Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; (9) Clean Air Act (CAA), 42 U.S.C. § 7622; (10) Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; (11) Energy Reorganization Act (ERA), 42 U.S.C. § 5851; (12) Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121; (13) Sarbanes Oxley Act (SOX), 18 U.S.C. § 1514A; (14) Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129; (15) Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109; (16) National Transit Systems Security Act (NTSSA), 6 U.S.C. § 1142; (17) Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087; (18) Affordable Care Act (ACA), 29 U.S.C. § 218C; (19) Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. § 5567; (20) Seaman’s Protection Act, 46 U.S.C. § 2114 (SPA); (21) FDA Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d; and (22) Moving Ahead for Progress in the 21st Century Act (MAP- 21), 49 U.S.C. § 30171.



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