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Non-Retaliation Working Group Policy Considerations

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The ERC Fellows Program formed a working group to assess the many ways in which companies combat workplace retaliation and to share leading practices we identified during our assessment with the ethics and compliance community.

Our first offering to the field consists of observations and considerations for companies to consider when developing or revising a non-retaliation policy. The working group reviewed, discussed, and evaluated the characteristics of publicly available non-retaliation policies as well as a sampling of non-retaliation policies of our member organizations. We also conducted a review of the ethics & compliance literature on retaliation.

The working group recognizes that policy content and level of detail will vary for each organization depending upon its culture, industry, and internal processes. We therefore offer organizations questions to consider when drafting or revising content for a non-retaliation policy rather than prescribing specific policy elements to adopt.

CONSIDERATIONS:

POLICY CONTENT:

- Should the policy explain why it is important to maintain a retaliation-free work environment (e.g., fosters open and honest communication; learn about and resolve misconduct internally)?
- Should the policy explain why it is important for employees to raise concerns of retaliation (e.g., allows company to detect/resolve; responsibility to stakeholders; fosters more productive work environment)?
- Should examples of what retaliation might entail or look like, including subtle forms of retaliation, be included in the policy (e.g., shunning, isolation, defamation as well as adverse employment actions)?
- Should the policy explain the repercussions of engaging in a retaliatory act (e.g., subject to disciplinary action up to and including termination; corrective action for substantiated retaliation based on progressive factors including severity and management level)?
- Should the policy include language to help employees understand the investigation process by which the organization handles accusations of retaliatory behavior (e.g., to reinforce to employees the organization takes allegations seriously and has allocated resources for investigating allegations)?
- Should the policy include manager obligation language to help managers understand what the organization expects of them (e.g., fostering open and honest communication, establishing trust, accountable for dispelling fear of retaliation being mindful of subtle forms of retaliation)?
- Should confidentiality and anonymity safeguards of both the reporter and the accused, be explained in the policy (e.g., to help level set employee expectations)?
- Should the full range of reporting avenues be listed in the policy, including hotlines, direct supervisors, ombudsmen, or even access to committees of the board of directors (e.g., to reinforce to employees the organization is open to reporting and has provided multiple channels to do so)?
- Should the policy include language to help employees understand that the non-retaliation policy is not intended to, and will not, protect employees from their own wrongdoing or ongoing performance management?
- Should the policy include language acknowledging the organization provides resources, training, and support for managers and for reporting persons at risk of retaliation (e.g., which are reasonably designed to prevent, detect and mitigate instances of retaliation)?
- Should there be a standalone policy on non-retaliation? What are the implications of embedding guidance on retaliation in other policies rather than having a standalone policy?
- Who are the key functional partners to consult when drafting or revising the policy (e.g., Ethics Office, Compliance, Legal, HR, CEO or others in senior management)?

POLICY WORDING:

- Are there implications of using subjective terminology such as “zero-tolerance” or “protected to the extent possible?” Subjective terms may result in different interpretations by individual reviewers and could be perceived as misleading or rhetoric by some. For example, use of the term “zero-tolerance” if not properly explained or qualified, could be perceived or interpreted to limit the organization’s options for corrective action (e.g., termination in all instances of retaliation).
- Are there implications of limiting policy applicability to only those who report retaliation in “good faith,” as such language might be perceived to imply the organization may retaliate against those who report retaliation in “bad faith” or disingenuously? Should a working definition of “good-faith” be provided to help employees understand that employees who knowingly provide false information or accusations are subject to disciplinary actions?
- If the organization publishes guidance on non-retaliation in multiple locations, such as in the Code or in other policies, should a cross checking process be established to ensure consistent messaging?
- Should the policy be available in multiple languages?
- Is the terminology used in the policy suitable for a global workforce (e.g., use of the term “informant” may hinder employees from speaking up in many regions)?

POLICY APPLICABILITY:

- Should policy applicability include protection against retaliation for raising business process concerns and challenging management (i.e., in addition to protection for reporting potential misconduct)?
- Should policy applicability include protection against retaliation for not only reporting potential misconduct, but also for cooperation with internal investigations?
- Should policy applicability include threats of retaliation as well?
- Should policy applicability cover third-parties or vendors associated with the organization?



ETHICS & COMPLIANCE REFERENCES CONSULTED:

- Creating a Non-Retaliatory Workplace: CEB Compliance & Ethics Leadership Council Research Brief (2006)
- Creating a Non-Retaliatory Workplace (Article, ECOA SPF) April 2007 by Emily Heard and William Miller (International Business Ethics Institute)
- Developing a Speak-Up Policy and Educating Employees about Its Continuing Importance in a Culture of Compliance (presentation at 2011 Annual Ethics and Compliance Conference) by Laura Merten (Walgreens)
- Guide to Improving Comfort Speaking Up: CEB Compliance & Ethics Leadership Council Brief (2010)
- PwC India Survey report on Whistle Blowing System and their effectiveness in Indian Companies (2012)
- Raising Issues - Roadblocks to Reporting Concerns and Ways to Reduce Fear of Retaliation (Presentation, ECOA Annual Conference) 2003 by Brenda Hildreth (Baxter International) and Tara Dowd Gurber (Health Care Service Corporation)
- Retaliation: When Whistleblowers Become Victims: A Supplemental Report of the 2011 NBES. Ethics Resource Center.
- Encouraging Employee Reporting Through Procedural Justice (2013). Ethics Resource Center.

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