Preventing Retaliation in the Workplace

Facilitator Resources

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The following program was developed in cooperation with the Employment & Labor Law Practice Group at Dickinson, Mackaman, Tyler, & Hagen, P.C.

This program is educational in nature and should not be relied upon for legal advice.

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Suggestions for Prework

Assigning prework before the workshop can help engage participants in the workshop content even before they arrive. If you would like to include prework as part of the workshop design, we have included some suggestions below for integrating prework into the workshop.

**Suggestion #1**
Ask participants to review the organization’s policies and procedures regarding retaliation and other types of illegal, unsafe or unethical conduct and to come to the workshop prepared to share what they consider to be key elements of the policies and of utmost importance for managers in the organization to know.

**Suggestion #2**
Provide participants with a list of responsibilities of managers in preventing retaliation. Ask them to think of two to three indicators for each responsibility that would demonstrate that managers are meeting the responsibility. Provide an example of a responsibility and an indicator. You can find an example in the Participant Materials on page 5, “Responsibilities and Indicators for Preventing Retaliation in the Workplace.”

**Suggestion #3**
Provide participants with summaries of Title VII: Anti-Discrimination and Anti-Retaliation Provisions and the case of Burlington Northern & Santa Fe Railway Co. v. Sheila White (Handout #4 – page 41). Tell participants that we will discuss the summaries during the workshop.
SMART-START® Retaliation: The Retaliation-Free Workplace Video Activity

Time it takes: 10 – 15 minutes

What it is about: Opening the session on a positive note

What you will need:
- Video – SMART-START® Retaliation: The Retaliation-Free Workplace

How to do it:

1. Begin playing the SMART-START® video 15 minutes prior to the session start time. If you are using the DVD, set the control to automatically loop. If you are using the VHS, the video will repeat itself at least four times.

2. Turn the video off when you are ready to begin your session and explain that you will refer to it again later. After the participants have introduced themselves, you will use this activity as part of your introduction (either to conclude Step 1 or during Step 2).

3. Break the group into smaller groups of three to five people, and ask them to talk within their groups to answer the following three questions:
   - Why should we care about retaliation in our workplace?
   - What are examples of retaliation?
   - What should we do if we become aware of retaliation in our workplace?
4. Debrief the whole group by asking for volunteers to share any highlights from their small group discussion.

5. Transition into the next activity by summarizing participants’ responses and linking them to the responsibility we all have to prevent retaliation.

*Facilitator Note:* This activity may also be used as an energizer during and/or immediately following a break. If used in this manner, be sure to transition into the next activity by drawing a connection to what has been discussed so far and how the video relates to the next set of activities.

Other activities to use with SMART-START® videos are available in VisionPoint’s *Beyond the Box* activity book available for purchase.
Optional Activity 1
Title VII and the Case of Burlington Northern & Santa Fe Railway Co. v White

Time it takes: 20 – 30 minutes

What it is about: Discussing the case and lessons it presents for managers in preventing retaliation in the workplace

What you will need:
- Handout #4 – Summary of Title VII: Anti-Discrimination and Anti-Retaliation Provisions; Summary of the Case of Burlington Northern & Santa Fe Railway Co. v White (pages 41 – 46)
- Handout #5 – Responsibilities of Managers in Preventing Retaliation in the Workplace (pages 47 – 48)

How to do it:
1. Introduce the activity by saying: The ruling of the U.S. Supreme Court in 2006 in the case of Burlington Northern & Santa Fe Railway Co. v. Sheila White should be of special interest to all managers. The ruling of the Court expanded the definition of retaliation of the Anti-Retaliation Provision of the Civil Rights Act of 1964. The case of Burlington Northern demonstrates that situations of retaliation can be very complex. The case also reminds us that, in order to meet our responsibilities of preventing retaliation in our workplace,
Optional Activity 2
Organizational Policies and Procedures Regarding Retaliation

Time it takes: 30 – 45 minutes

What it is about: Helping participants become familiar with their organization’s policies and procedures regarding retaliation and other types of illegal, unsafe or unethical behavior

What you will need:
- Assistance of an expert on your organization’s policies regarding retaliation (e.g., human resources or legal department representative)
- Copies of the organization’s policies and procedures regarding retaliation and other types of illegal, unsafe or unethical behavior

How to do it:

1. Before the activity, ask a representative from your organization’s human resources or legal department to assist you by preparing a brief presentation about the organization’s policies and procedures regarding retaliation and other types of illegal, unsafe or unethical behavior (e.g., discrimination, harassment, safety/OSHA, Codes of Ethics, confidentiality, complaint/grievance, etc.).

You will also want them to:
- Summarize the organization’s history with
Optional Activity 3
Frequently Asked Questions about Retaliation

Time it takes: 20 – 30 minutes

What it is about: Providing seven frequently asked questions about retaliation and the answer to each question; giving managers an opportunity to ask additional questions

What you will need:
- Assistance of an expert on your organization’s policies regarding retaliation (e.g., human resources or legal department representative)
- Handout #6 – Frequently Asked Questions about Retaliation (pages 49 – 58)

How to do it:

1. Before the activity, ask a representative from the organization’s human resources or legal department to attend the activity as an expert resource and to co-facilitate a discussion about the questions on the handout and other questions participants might have.

2. Introduce the activity by saying: Retaliation is such a complex topic you likely will always have questions about it, especially about legal concepts of retaliation. This activity will provide an opportunity for you to learn and discuss seven of the most frequently asked questions and, if time remains, ask other
Optional Activity 4
Case Studies: Your Reactions and Actions Are?

Time it takes: 45 – 60 minutes

What it is about: Discussing your reactions to case studies of overt and subtle situations of retaliation and what your actions would be

What you will need: • Handout #7 – Case Studies: Your Reactions and Actions (pages 59 – 60)

How to do it:

1. Introduce the activity by saying: We can learn a lot about what to do and what not to do in our role as managers through reviews and discussions of case studies. In two case studies for this activity, we will discuss both obvious and sometimes subtle behaviors of managers that may violate legal statutes regarding retaliation and most likely are in violation of the policies and procedures of our organization.

2. Distribute Handout #7 and review the directions. Allow groups 15 minutes to discuss the two case studies.

3. Debrief each case study by asking each group:

   • To present the highlights of its discussion involving questions for each case study.
Optional Activity 5
Federal Anti-Retaliation Statutes and Whistleblower Protections

Time it takes: 30 – 45 minutes

What it is about: Acquainting participants with some of the statutes and protections that may require their awareness in their roles and responsibilities as managers.

What you will need:
• Assistance of an expert on federal anti-retaliation statutes and whistleblower protections (e.g., human resources or legal department representative)
• Handout #8 – Federal Anti-Retaliation Statutes and Whistleblower Protections (pages 61 – 62)

How to do it:
1. Before the activity, ask a representative from the organization’s human resources or legal department to co-facilitate the activity in order to provide expertise in discussion and questions about the statutes and protections; to recommend to participants statutes and protections for which they especially should have a good understanding; and to recommend sources that would afford managers with summaries that laypersons can understand.
DVD Additional Materials
Who, What, How and When

Additional materials are provided to help facilitators supplement a training plan and prepare for an effective workshop. These materials may be used before, during or after a session.

Additional materials provided on the DVD for this program include:

<table>
<thead>
<tr>
<th>What it is</th>
<th>How to use it</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SMART-START® Retaliation: The Retaliation-Free Workplace</strong> – A short video, ideal for kicking off or closing the training session</td>
<td>See optional SMART-START® Activity for one way to use this video. Other activities are available in VisionPoint’s Beyond the Box activity book available for purchase.</td>
</tr>
<tr>
<td><strong>Insights Interview</strong> – Jill Jensen-Welch, a member of the Employment &amp; Labor Law Practice Group at Dickinson, Mackaman, Tyler, &amp; Hagen, P.C., addresses several key questions about retaliation in the workplace.</td>
<td>During a break or as follow-up training to provide insights on retaliation in the workplace.</td>
</tr>
<tr>
<td><strong>Retaliation: An Overview for All Employees</strong> – A video overview of the roles and responsibilities all employees share in preventing retaliation in the workplace.</td>
<td>Use this video element with Retaliation: An Overview for All Employees (found on page 63 in the Facilitator Resources) to conduct an overview or refresher training session for all employees.</td>
</tr>
</tbody>
</table>
Handout #1 - Video Observation Form for the One-Hour Overview

Part 1 – What is Retaliation?

Part 1 of the video presents key legal concepts and definitions regarding retaliation and the business case for preventing retaliation.

Discussion Questions:

As you watch the video, make note of your thoughts concerning the following questions.

1. What are examples of “protected activities”?

2. What are examples of “adverse actions”?

3. What are potential consequences to organizations that fail to prevent retaliation?

4. Based on what you have learned from Part 1 of the video, which definition of retaliation (A, B or C) do you find most meaningful and why?
Handout #2 – Video Observation Notes for Retaliation Overview

As you watch the video, jot your notes concerning the questions below.

- How is retaliation defined under federal employment laws?
- What are examples of “protected activities”?
- What are examples of “adverse actions”?
- Who can commit and who can suffer from retaliation?
- Why should we care about retaliation in our organization?
Handout #3 – Responsibilities of Employees in Preventing Retaliation in the Workplace

Listed below are responsibilities of employees in preventing retaliation in their workplace. The statements do not include indicators that employees meet the responsibilities. For example, what might you observe that would indicate to you that employees “promote and support a culture of trust”? Sample indicators might be that employees are constructive in discussions about the organization or that they do not talk negatively about other employees behind their backs.

As you look at each responsibility below, what do you believe would be indicators that employees are meeting the responsibility?

- Promote and support a culture of trust
- Treat everyone consistently, fairly and respectfully
- Report situations of retaliation to their managers and/or HR
- Maintain confidentiality
- Follow the organization’s policies and procedures regarding retaliation
Summary of Title VII: Anti Discrimination and Anti Retaliation Provisions

- The Anti-Discrimination provision of Title VII of the Civil Rights Act of 1964 prohibits a workplace where individuals are discriminated against because of their status, i.e., race, color, religion, sex or national origin.

- The Anti-Retaliation provision of the Civil Rights Act of 1964 prohibits employers from interfering with an employee’s assertion of rights guaranteed by the Act. The provision:
  
  - Does not restrict retaliation to adverse actions that occur during employment, but recognizes retaliation can occur after employment has ended. In addition, retaliation claims can be brought against an employer different from the one where the initial discrimination complaint was made. For example, failure to hire an applicant because the prospective employer has knowledge of his/her prior protected activity at another employer, is prohibited retaliation and allows the applicant to bring a claim against the prospective employer.
Handout #5 – Responsibilities of Managers for Preventing Retaliation in the Workplace

Responsibilities of managers in preventing retaliation in their workplaces include:

- Create a safe environment and a culture of trust
- Take all reports seriously
- Be observant for possible issues that may be going unreported
- Respond appropriately and set the tone when a complaint is filed or retaliatory behaviors occur
- Treat everyone consistently, fairly and respectfully
- Manage your own emotions and actions
- Coach others in how to respond and manage their feelings so they don’t retaliate
- Seek help from HR and legal departments
- Communicate as needed while maintaining confidentiality
- Document appropriately: not too much or too little
- Follow your organization’s policies and procedures regarding retaliation

You do not know all the facts of the Burlington Northern case. But based on what you know from the summary of the case, which responsibilities of managers (listed above) do you think the managers at Burlington Northern might have neglected?

- Bill Joiner – foreman, against whom Sheila White filed an internal complaint of sex discrimination and who was disciplined following an investigation into that complaint

- Marvin Brown – next higher level manager, who informed Sheila White of the results of the internal investigation, who took her off of forklift duty and reassigned her to the more arduous tasks performed by other track laborers and who allegedly put her under increased surveillance after she filed her sex discrimination and retaliation complaint externally with the EEOC
Handout #6 – Frequently Asked Questions on Retaliation in the Workplace

Note: This material is intended to provide current information relating to employment and labor law. It is not intended as legal advice or opinion.

1. What is “retaliatory harassment”?

There is no specific legal term called “retaliatory harassment.” Rather, this phrase is a combination of two legal terms. To understand the meaning of this phrase, we must parse its terms.

“Retaliation” is a specific protection that is contained within many employment laws, including most anti-discrimination laws. [Some of the federal employment laws that include retaliation protections include Title VII, ADEA, ADA and the Equal Pay Act. Whistleblower provisions that are included in a variety of federal laws (e.g., Sarbanes-Oxley Act, OSHA, etc.) are also a form of retaliation protection. Most state laws governing the workplace also include retaliation provisions.] Generally, retaliation requires that a person (1) engage in a statutorily “protected activity,” and (2) then be subjected to an adverse action, that is (3) causally connected to the protected activity.

Retaliation protection encourages employees to assert their rights so that the purpose of the law is fulfilled (e.g., ridding the workplace of discrimination based on race, etc.). Even former employees are protected from retaliation for protected activities linked to their former employment. Other legal terms embedded within the definition of retaliation are clarified as follows:
Handout #7 – Case Studies: Your Reactions and Actions

Directions: Presented below are two case studies of retaliation. In small groups of three to four participants: (1) discuss each case study and your reactions to the behaviors of the managers and (2) determine actions you would take if you had become aware of the situation. You have 15 minutes for your discussion. Your facilitator will then ask each group to share its reactions and actions for each case study.

Case Study #1: An employee files a claim of discrimination. The company investigates an employee’s claim of discrimination and determines that the claim is without merit. Subsequently, the employee’s manager begins to micro-manage the employee, denies him good job assignments and begins to strictly enforce an attendance policy that had not been enforced prior to the employee’s claim of discrimination. Eventually, the manager terminates the employee for violation of the attendance policy.

- Can the employee file a claim of retaliation for the manager’s subsequent behaviors even though the employee’s first claim of discrimination was determined to be without merit?
- What are your reactions to the behaviors of the manager? What feedback would you give the manager concerning her/his behaviors?
- What actions would you take if you were a coworker of the employee or the manager and you had become aware of the situation?
Handout #8 – Federal Anti-Retaliation Statutes and Whistleblower Protections

Information derived from U.S. Department of Labor’s website: www.dol.gov

Counting federal, state and local laws applicable to employment, literally hundreds include a prohibition against retaliation. Therefore, thorough knowledge of every such law is not possible for managers or even for attorneys specializing in employment and labor law. Managers, however, must have a basic awareness of the general components of certain key laws that apply to their specific industry and their general managerial responsibilities. Below we’ve listed 15 key federal statutes that contain retaliation protections and about which most managers should have a basic awareness. As always, when it comes to employment laws, managers should always defer to the expertise of representatives in the human resources and legal departments.

**Employment Discrimination Laws**
- Civil Rights Act of 1964 (Title VII)
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Rehabilitation Act
- Vietnam Era Veterans Readjustment Act (VEVRA)
- Equal Pay Act

**Employment Whistleblower Laws**
- Sarbanes - Oxley (SOX)
- Whistleblower Protection Act (federal government employees) (WPA)

**Employment Benefits and Pay Laws**
- Employee Retirement Income Security Act (ERISA)
- Fair Labor Standards Act (FLSA – child labor, minimum wage, overtime)
RETALIATION: AN OVERVIEW FOR ALL EMPLOYEES
Conducting the Session –
Retaliation: An Overview for All Employees

Time it takes: 20 – 45 minutes

What it is about: Informing all employees of their responsibilities in preventing retaliation; helping them become familiar with key legal concepts about retaliation and the organization’s policies and procedures regarding retaliation

What you will need: • Copies of the organization’s policies and procedures regarding retaliation, if available
• DVD – Preventing Retaliation in the Workplace: Recognize. Respond. Resolve. or VHS – Retaliation: An Overview for All Employees
• Handout #2 – Video Observation Notes for Retaliation Overview (pages 37 – 38)
• Handout #3 – Responsibilities of Employees in Preventing Retaliation in the Workplace (pages 39 – 40)

How to do it:

1. Before the meeting, review the preparation checklist below:

   □ DVD – Preventing Retaliation in the Workplace: Recognize. Respond. Resolve. or VHS – Retaliation: An Overview for All Employees
   □ Test your video equipment to make sure the DVD or VHS video actually plays and that the color and volume are correct.
     (Remember to rewind the video after you perform this test.)
   □ Flipchart, easel and a fresh set of markers
   □ Handouts
2. Introduce the activity by saying: **We need to remind ourselves on a regular basis of our responsibilities in preventing discrimination in our organization. During this meeting, we’re going to focus on a particular type of discrimination, namely, retaliation. The topic of retaliation is especially important for us because it is currently the fastest growing type of discrimination reported to the EEOC. The topic raises a number of questions, such as what exactly is retaliation and why should we care? Those and other factors regarding retaliation will be summarized for us in a video I’ll show in just a few minutes.**

3. Distribute *Handout #2* and say: While you observe the video, use the handout to make notes about the questions posed. At the conclusion of the video, we’ll discuss what we’ve learned, as well as other questions you may have about retaliation and/or the organization’s policies and procedures regarding retaliation.
Online Resources

VisionPoint’s website is host to the most up-to-date Program Resources, including program-specific tools like reproducible participant materials, self-study guides, facilitator answer guides, FAQs, session extenders, SMART-START® activities, case studies, video scripts and more.

Additional Trainer Resources include information and tools such as energizers, team builders, competency matrices, perspective papers, learning style guides and access to VisionPoint’s master trainers and TrainerSelect™ team.

Resources are updated regularly, so check back when preparing for a new training session.

To access the Online Resources, go to www.visionpoint.com and select the Resources menu. Login for full access to this program’s resources.

If you have any questions about available resources, contact the TrainerTALK™ helpline at 800-300-8880 x302 or trainer@visionpoint.com.