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R&C risk & compliance

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REPRINTED FROM:  
RISK & COMPLIANCE MAGAZINE  
JUL-SEP 2017 ISSUE



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NAVEX GLOBAL®  
The Ethics and Compliance Experts

Published by Financier Worldwide Ltd  
[riskandcompliance@financierworldwide.com](mailto:riskandcompliance@financierworldwide.com)  
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MINI-ROUNDTABLE

# MANAGING RETALIATION CLAIM RISKS



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**RC: To what extent is there a growing risk that organisations will face a retaliation claim from an employee? Are you seeing an increase in such claims?**

**Penman:** Data from the US Equal Employment Opportunity Commission (EEOC) shows that while discrimination claims on the whole remain rather flat, retaliation claims are rising. From 2014-2015, for instance, they rose nearly 5 percent. Since 1997, the percentage of charges alleging retaliation has almost doubled, increasing from 22.6 percent to 45.9 percent of all charges filed with the EEOC. The SEC Office of the Whistleblower also has a specific focus on protecting reporters from retaliation. So there is a growing risk of retaliation claims, which we are seeing in the data from regulatory agencies. Internal claims have also increased significantly, but internal claims remain at a level well below that experienced by external agencies. This lower level of reporting of retaliation should be of concern to organisations. According to our NAVEX Global 2017 Ethics & Compliance Hotline & Incident Management Benchmark Report, internal reports of retaliation have increased from 0.52 percent of all reports in 2011 to 0.93 percent in 2016. This is a rise of 79 percent – a substantial rate of increase for a five-year period. On the other hand, internal retaliation claims still make up less than 1 percent of all reports of misconduct, well below rates seen by external

agencies. As a result, many organisations are not getting the opportunity to address claims of potential retaliation before they are reported externally.

**RC: What kinds of issues typically generate retaliation claims? Could you outline the basic elements that constitute a retaliation claim?**

**Foose:** Employees could report on a wide variety of issues ranging from safety, to employment, to accounting fraud, to false claims under government contracts. Retaliation comes into play when a reporting employee is negatively impacted by an employer in response to an issue being raised. In addition, employees can also experience retaliation for participating or cooperating in an investigation into alleged wrongdoing. In other words, employees do not need to be the reporter to experience or be protected from retaliation. Retaliation is often thought about in the context of a manager retaliating against an employee who has raised an issue. Generically, retaliation is any negative job action that would dissuade a reasonable person from reporting a concern or from participating in an investigation of misconduct. Examples could include: giving an unmerited negative performance review, assigning the reporter a less attractive sales territory, taking away the reporter's overtime opportunities, excluding the reporter from significant meetings or denying training opportunities. However, there

is another form of retaliation that takes place in organisations – peer-to-peer retaliation – which also needs to be addressed. Organisations need to consider this type of retaliation, train on it and monitor for it. These types of cases can be the most insidious and difficult to address. We hear from employees in focus groups that have been ostracised or had their work or personal belongings sabotaged because they spoke up about the actions of a co-worker. These actions naturally make it less likely that employees will feel safe enough to raise future concerns. Managers need to be trained to recognise and address this type of retaliation.

### **RC: What makes retaliation claims such a high-risk scenario?**

**Penman:** Retaliation claims are high-risk scenarios for a variety of reasons. First and foremost, an organisation that allows retaliation to occur without consequences or a process to respond, risks damage to the organisation's reputation and culture. And once the folklore and rumour mill picks up the story, it is very difficult to reverse the perception that speaking up is 'career suicide'. Ultimately, organisations run the risk of losing their best employees as the employees seek better, more supportive work environments. This loss of talent

affects the organisation's competitiveness and future success. Second, the original report does not even

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*Carrie Penman,  
NAVEX Global*

have to be accurate for a legal claim of retaliation to be substantiated and the employer penalised. For example, if someone files an internal report of discrimination and it is found that discrimination did not, in fact, occur, the employee can still win a retaliation lawsuit if he or she can demonstrate that adverse action was taken against them because of their original report.

### **RC: What has contributed to the popularity of retaliation claims? Are legal and regulatory developments having an effect?**

**Foose:** While the number of claims has been increasing, we do not believe that there has been

a corresponding increase in actual retaliation occurrences. We do think, however, that there is greater awareness of the issue of retaliation and of the available protections for reporters. There are several factors that have helped increase awareness. First, federal and state agencies have increased their scrutiny of organisations in relation to retaliation and this has led to greater media coverage. Additionally, the level of publicity regarding retaliation has increased significantly, especially related to the multi-million dollar awards under the Dodd-Frank Act. We have even heard that whistleblower law firms are advertising their services in places like movie theatres. Second, we think social media is playing a role. In a sense, social media is both increasing awareness and providing would-be whistleblowers a new, public-facing and far-reaching reporting channel.

**RC: How has the Sarbanes-Oxley Act, as an avenue through which an employee can pursue a retaliation claim, impacted this space?**

**Penman:** Sarbanes-Oxley was created to require more transparency and public accountability for publicly traded corporations. It was not necessarily intended to be a whistleblower protection act. It did, however, create the requirement that publicly

traded organisations have anonymous reporting mechanisms up to board of director level. To increase transparency, people need to speak up about fraud. This is how whistleblower provisions entered the act. For the new act to be enforced, employees needed to be emboldened to report concerns and have assurances that they would not be retaliated against for doing so. Sarbanes-Oxley was not the first piece of legislation to raise the issues of whistleblower protections. Most agencies and statutes have some form of whistleblower protections. So, we do not think that Sarbanes-Oxley was a defining moment for whistleblower

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protections. However, none of this changes how challenging it can be for an employee – a person – to raise a claim of wrongdoing, including retaliation. Organisations need to focus on creating a culture

and environment where speaking up is welcomed and appreciated, not punished.

**RC: What advice would you give to organisations in terms of the strategies that can be deployed to manage and mitigate retaliation claim risks?**

**Foose:** Any mitigation or management of retaliation claim risks includes comprehensive training, education and awareness programmes. High-quality training should teach managers how to identify and respond to employee complaints, the forms that retaliation can take, and, most importantly, the need to seek guidance after a complaint is made. This training should be integrated into harassment training, ethics and compliance training, and overall management training. The Department of Labor provides substantive guidance that builds on these protection strategies. Broadly speaking, it states that for an appropriate anti-retaliation environment to exist there needs to be a commitment from senior leadership to ensure protection is a priority. The culture of the organisation should foster speaking up comfortably about concerns. A process should be in place to respond to retaliation concerns systematically; senior leadership and all managers should undergo anti-retaliation training and progress should be monitored consistently and the retaliation reporting and investigation process itself should be audited by independent evaluators. Additionally, not

only should managers be trained, but investigators should be, as well. It is essential that investigators understand the full range of actions that are deemed to be retaliatory, and are comfortable weighing the credibility of witnesses in retaliation-related investigations. Separately, we would encourage all organisations to report to the board on cases of retaliation and how they have been resolved.

**RC: What advice can you offer to organisations on creating a corporate culture that encompasses a zero tolerance approach to retaliation? Are training programmes an effective mechanism to educate staff about the nature of protected activities?**

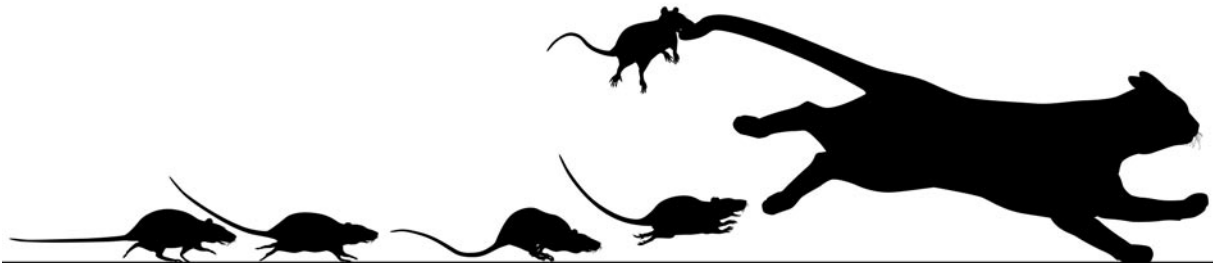
**Penman:** Zero tolerance for retaliation is on the books, typically in the code of conduct, at almost every company. But being mentioned and being practiced are two very different things, especially from the perspective of an employee. A zero-tolerance corporate culture is one that takes clear and consistent actions to sustain that culture. These include enforcing retaliation policies and effectively investigating claims. To support this type of culture, organisations can encourage an 'open door' policy with a variety of reporting options. The most common reasons employees do not speak up are fear of retaliation and the belief that nothing will be done about the issue. Additionally, benchmarking



studies have shown that fear of retaliation greatly outweighs actual reports of retaliation. In our experience, a comprehensive hotline and incident management solution provides the best way to detect and track correction of retaliation and non-action when it is reported. Companies should also demonstrate fairness by following and documenting internal processes. Ensure that any issue resolution follows a consistent and well-established process, which includes: maintaining confidentiality, promptly conducting an appropriate and thorough investigation, documenting the process and involving legal and HR departments in the process early. A good case management system, used by all staff who implement discipline and other corrective actions, is an indispensable tool for ensuring consistency for similar violations. Publish sanitised cases and highlight that retaliators have been disciplined in order to increase employee confidence in the system.

**RC: Do you expect retaliation claims to remain prevalent in the years ahead? In your opinion, are they one of the most under-appreciated legal risks that employers face today?**

**Foose:** As employees become more educated about their rights, and feel more comfortable acting on them, we do not expect retaliation claims to slow down any time soon. Retaliation claims currently only make up less than 1 percent of the almost one million reports analysed in our Ethics & Compliance Hotline & Incident Management Benchmark Report. But we know that many incidents have simply not been reported due to the fear of further retaliation. And of greater concern to organisations, employees are reporting these incidents externally instead. It is crucial that employers stay ahead of the risks posed by retaliation claims by instituting broad, organisation-wide cultural processes and training programmes. **RC**





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