



January 19, 2016

**Board of Directors**

John Applegate  
Alyson Flournoy  
Robert Glicksman  
David Hunter  
Alice Kaswan  
Alexandra Klass  
Thomas McGarity  
Sidney Shapiro  
Amy Sinden  
Robert R.M. Verchick

*Submitted via: Regulations.Gov*

U.S. Department of Labor  
Occupational Safety and Health Administration  
200 Constitution Avenue NW  
Washington DC 202010

**Re: Comments on OSHA’s Draft Guidance Document, “Protecting Workers: Recommended Practices for Preventing and Addressing Retaliation;”  
Docket No. OSHA-2015-0025**

**Advisory Council**

Patricia Bauman  
Frances Beinecke  
Eula Bingham  
W. Thompson Comerford, Jr.  
Sally Greenberg  
John Passacantando  
Henry Waxman  
Robert Weissman

Thank you for the opportunity to comment on OSHA’s draft guidance to help employers develop a program to prevent and address retaliation against workers who report workplace concerns. Such programs have the potential to benefit workers and employers alike by promoting an environment in which workers are encouraged to raise concerns and employers are responsible for promptly addressing those concerns before harm results.

Overall, we support the recommendations included in OSHA’s draft guidance; however, we urge OSHA to consider the following additions and revisions as it moves forward with finalizing this important guidance:

***1. Are there any important features that employers should include in an anti-retaliation program not addressed in the document?***

- The guidance should encourage employers to include within its anti-retaliation program everyone inside the organization—employees at all levels (whether hired by the organization or referred by a staffing agency), temporary workers, volunteers, interns, etc.
- The guidance should provide that all components of the anti-retaliation program (e.g., training and company policies) be communicated by the employer to each person within the organization in a language and at a literacy level he or she can understand.
- The guidance recognizes the need for employers to collaborate with employees and/or union leadership to develop anti-retaliation policies, but it does not discuss methods for effectively doing so. The guidance should discuss the benefits of joint labor-management health and safety committees for addressing employees’ initial concerns and reports of retaliation.

- The guidance should recommend that each employer tailor its anti-retaliation training to the specific federal and state whistleblower protection or anti-retaliation laws, as well as the company policies, applicable to each position within the company. Specifically, employees should understand the anti-retaliation protection laws that apply to them, what rights those laws afford them, and how they can exercise those rights.
- To help reduce retaliation and/or the appearance of retaliation, the guidance should recommend that any time an employee's employment status changes, the employer should provide the employee with written notice of his or her legal rights and protections.

**2. *Are there any concepts in the document that are difficult to understand?***

- OSHA should clarify that an employer's internal investigation and resolution process does not toll the statute of limitations for an employee to file a complaint of retaliation with OSHA or the respective government agency. Employers should notify all employees of this and should never discourage an employee from filing a complaint or imply that he or she should wait until an internal investigation has concluded.
- OSHA could expand the definition of retaliation to include additional examples of adverse action, such as cancelling shifts, blacklisting, engaging in peer pressure, ostracizing, and mocking.
- OSHA could clarify that its recommendations on implementing a system for responding to reports applies to addressing an employee's initial concerns and to reports of retaliation.
- The guidance recommends that employers provide employees multiple channels for reporting, which "can include . . . reporting to a trusted official." But it is unclear who OSHA considers to be a trusted official. OSHA should clarify this term in the guidance.
- The guidance states that any policy requiring employees to keep employer information confidential should make clear that employees may report to a government agency. This should also provide that employees may report to lawmakers, union or other representatives, and medical professionals (unless prohibited by federal or state law).

**3. *What are the challenges to implementing the recommendations in this document?***

- The guidance does not address complex employment situations (e.g., joint employers; subcontractors) or handling instances of continuing retaliation.
- OSHA should provide employers with a model anti-retaliation program and incorporate sample documents, such as sample company policies; training materials; educational resources for employers on complaint intake, investigation, and resolution; and sample forms and practices for tracking and analyzing cases, identifying patterns and systemic factors, and evaluating and improving the anti-retaliation program.

**4-5. Are there issues specific to small businesses that need to be addressed? Are there industry-specific issues in developing an anti-retaliation program that you would like to see addressed?**

- OSHA should incorporate into the guidance document the explanations on small business and industry-specific issues discussed in the Whistleblower Protection Advisory Committee recommendations on which OSHA based its draft guidance. This would help employers understand what OSHA had in mind in suggesting that an employer might need to make adjustments to OSHA’s recommendations based on the firm’s size or industry. OSHA should make it clear that the effect retaliation has on employees and company culture is not reduced simply because the employer is a small business or operates in a specific industry; it may even be greater in certain circumstances.

In conclusion, we appreciate the opportunity to provide feedback on OSHA’s draft guidance to employers on preventing and addressing retaliation. We are encouraged that OSHA is providing this guidance to employers, which we believe offers useful recommendations for promoting a workplace environment where workers feel comfortable reporting concerns and employers are held accountable for promptly addressing those concerns. We hope OSHA will consider our recommendations for improving the draft guidance as the agency moves forward.

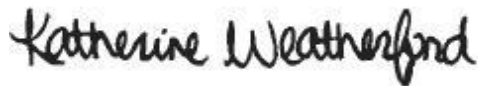
Sincerely,



Thomas O. McGarity  
Joe R. and Teresa Lozano Long Endowed Chair  
in Administrative Law  
University of Texas Law School  
Member Scholar, Center for Progressive Reform



Sidney Shapiro  
Frank U. Fletcher Chair of Administrative Law  
Wake Forest University School of Law  
Member Scholar, Center for Progressive Reform



Katherine Weatherford  
Policy Analyst  
Center for Progressive Reform  
kweatherford@progressivereform.org  
202-747-0698 x7