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The Whistleblowing Non-Retaliation Toolkit

Liezl Groenewald

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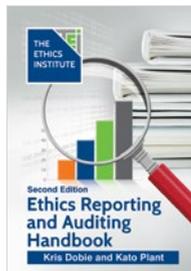
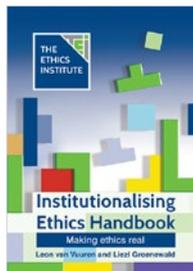
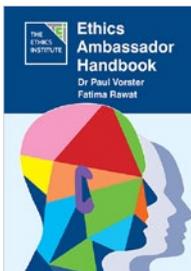
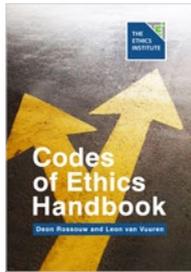
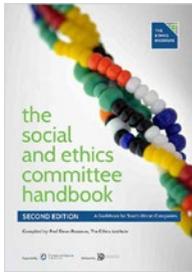
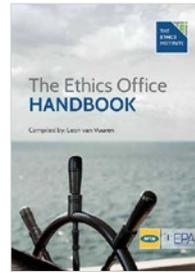
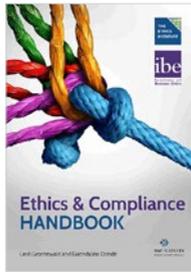
The Whistleblowing Non-retaliation Toolkit

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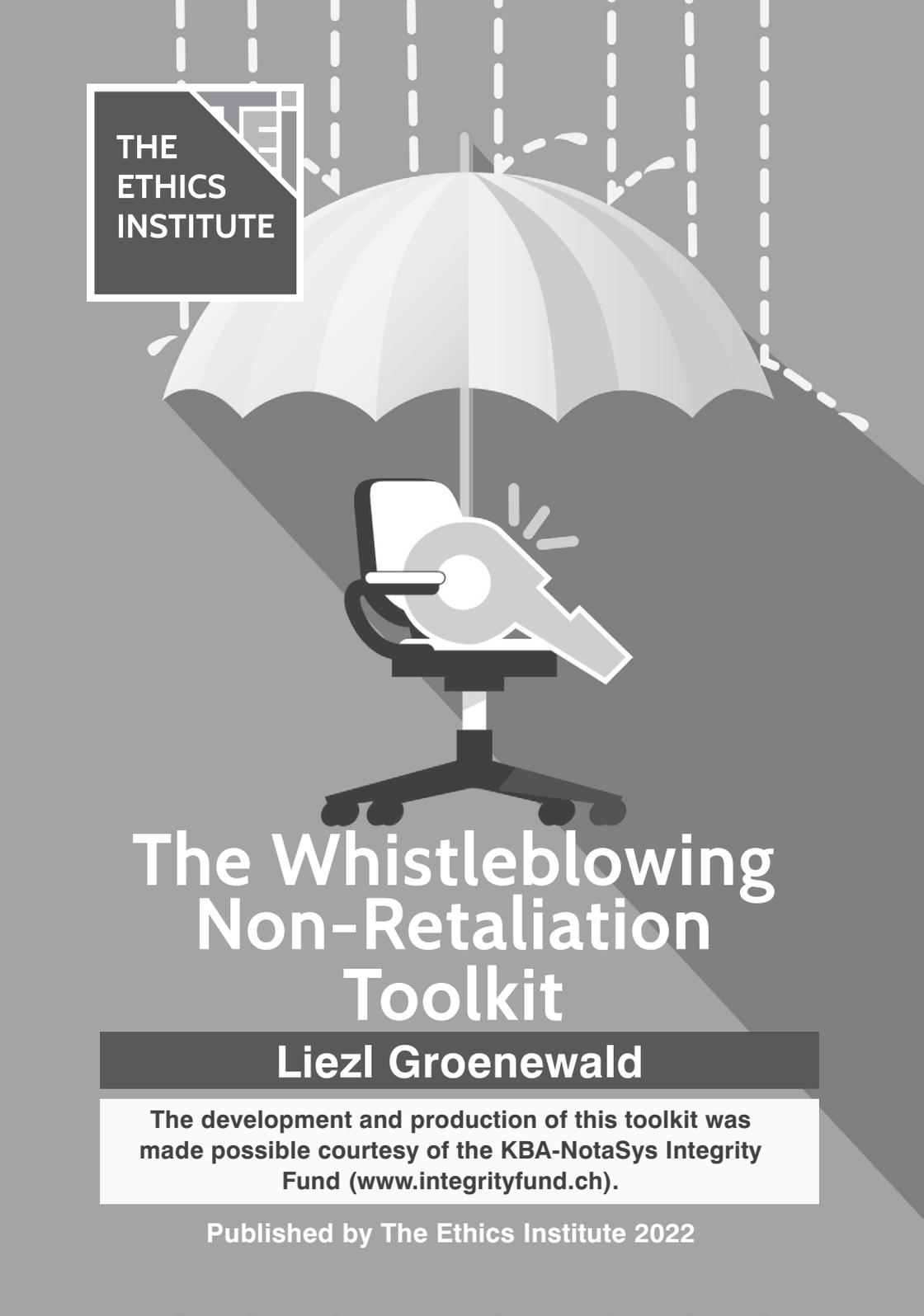
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The background features a stylized illustration of an office chair with a large umbrella over it. Vertical dashed lines represent rain falling around the chair. A dark square box with a white border is positioned in the upper left corner, containing the text 'THE ETHICS INSTITUTE'.

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Liezl Groenewald

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This toolkit was developed by The Ethics Institute (TEI) based on an understanding of the emotional journey of blowing the whistle and the retaliation often experienced by those who chose to speak up. This is coupled with TEI's knowledge of what constitutes good practice to prevent retaliation and protect whistleblowers in organisations. The purpose of this toolkit is two-fold, namely:

- to guide organisations seeking to protect whistleblowers in their organisations against all forms of retaliation for speaking up; and
- to guide whistleblowers to protect themselves from retaliation and, when retaliation for speaking up has occurred, provide them with steps to follow to mitigate the retaliation.

How to use this toolkit

Part 1 is intended for *employers* who are committed to protecting and supporting their employees who reported wrongdoing in the organisation. It provides an overview of the prevalence of misconduct across 13 countries internationally, employees' willingness to report misconduct, the reasons why many choose not to do so, as well as the prevalence of retaliation against whistleblowers. This is followed by practical guidelines to enable organisations to develop robust anti-retaliation programmes.

Part 2 is intended for *employees* who are considering blowing the whistle, and those who are experiencing, or have experienced, retaliation for having blown the whistle on wrongdoing in their organisations. It provides practical guidelines for self-protection against retaliation, as well as the steps to follow if retaliation is occurring or has occurred.

Part 3 provides *organisations* with two useful resources to assist them with the development and implementation of (i) a robust non-retaliation strategy and implementation plan, as well as (ii) a comprehensive whistleblowing policy aligned with TEI standards. The third resource in Part 3 of this toolkit is a template for *reporting* retaliation or victimisation due to an individual having blown the whistle.

Introduction

The importance of whistleblowing in uncovering misconduct cannot be over-emphasised. Without the initiative of whistleblowers, much serious misconduct would remain undetected and would continue. As Kennedy (2004) observed:

“It has been said that...secrecy is no longer acceptable; too many lives and livelihoods have been lost or destroyed because a whistle could not be blown. But too often the voice of the honest worker or citizen has been drowned out by the abusive, unaccountable bosses. Invariably, staying silent was the only option. Creating a safe alternative to silence represents a difficult challenge, legally and culturally; separating the message from the messenger is still obstructed by vested interests; deeply ingrained sociological habits and attitudes, and by the limitations of the law “ (Kennedy 2004: 1).

Organisations must ensure that they have robust, effective, and efficient whistleblowing management systems and non-retaliation policies in place that actively protect whistleblowers from retaliation.

Even with the increased awareness about the necessity of identifying and addressing issues internally in organisations, many employees still prefer to report misconduct publicly or not at all. The question is, why? The answer probably lies in employees distrusting their organisations to respond constructively to their reports. Uncertainty exists about whether the organisation will take a report seriously and whether it will keep the information confidential. And then, of course, employees fear that they will be victimised for speaking up. These are all real and valid concerns. It is for these reasons that organisations must ensure that they have robust, effective, and efficient whistleblowing management systems and non-retaliation policies in place that actively protect whistleblowers from retaliation.

Defining whistleblowing

Before an effective whistleblowing management system, that includes an anti-retaliation programme, can be implemented, organisations must have a common understanding of what whistleblowing entails.



Whistleblowing has several definitions. One of the first modern uses was by US consumer activist Ralph Nader in 1971 who described whistleblowing as “an act of a man or woman who, believing that the public interest overrides the interest of the organization he serves, blows the whistle that the organization is involved in corrupt, illegal, fraudulent or harmful activity” (Rongine, 1985: 28). Transparency International (2009) indicates that whistleblowing involves disclosing information about a perceived wrongdoing in an organisation, or the risk thereof, to people or institutions who they believe will be able to act on such disclosures.



TEI defines whistleblowing as the act of organisational stakeholders (e.g., employees, customers, or service providers), either former or current, calling attention to wrongdoing that has occurred, is occurring or is about to occur in an organisation. This is done to internal or external parties who they believe can act and is aimed at addressing criminal, irregular, and unethical conduct in organisations, both public and private (Groenewald, 2020: 4).

Importance of whistleblowing

Whistleblowing is an important element in not only an organisation's ethics management program, but also in the regeneration of the moral fibre of society. Whistleblowers provide a valuable service to their colleagues, their fellow citizens, and the economy of their countries by exposing, for example, suspected fraud, corruption, cover-ups, misuse of public money and health and safety risks to those who can take steps to address these social ills. Not only can the brave actions of whistleblowers stop illegal

activities, but it can also lead to public and private money being re-couped and, in some instances, saving lives.

But often organisations maintain that, due to their ethical organisational cultures, very little if any misconduct occurs. Besides, if there was wrongdoing in its midst, why do they not receive whistleblowing reports about it? Research proves that these assumptions may be wrong. Not only does wrongdoing occur, but employees often actively choose not to report it for various reasons, one being that they fear retaliation in the form of, among others, losing their jobs.

Research conducted by the Institute for Business Ethics (IBE, 2021) across 13 countries including South Africa, the UK, Ireland, Switzerland, Germany, Spain, Australia and New Zealand refute beliefs that misconduct in organisations is a rarity, that employees do report it, and that those who did report it, are not retaliated against.

Awareness of misconduct in organisations

The freedom to raise concerns about misconduct is a core component of an open organisational culture, where employees are confident that they will be supported to do the right thing.

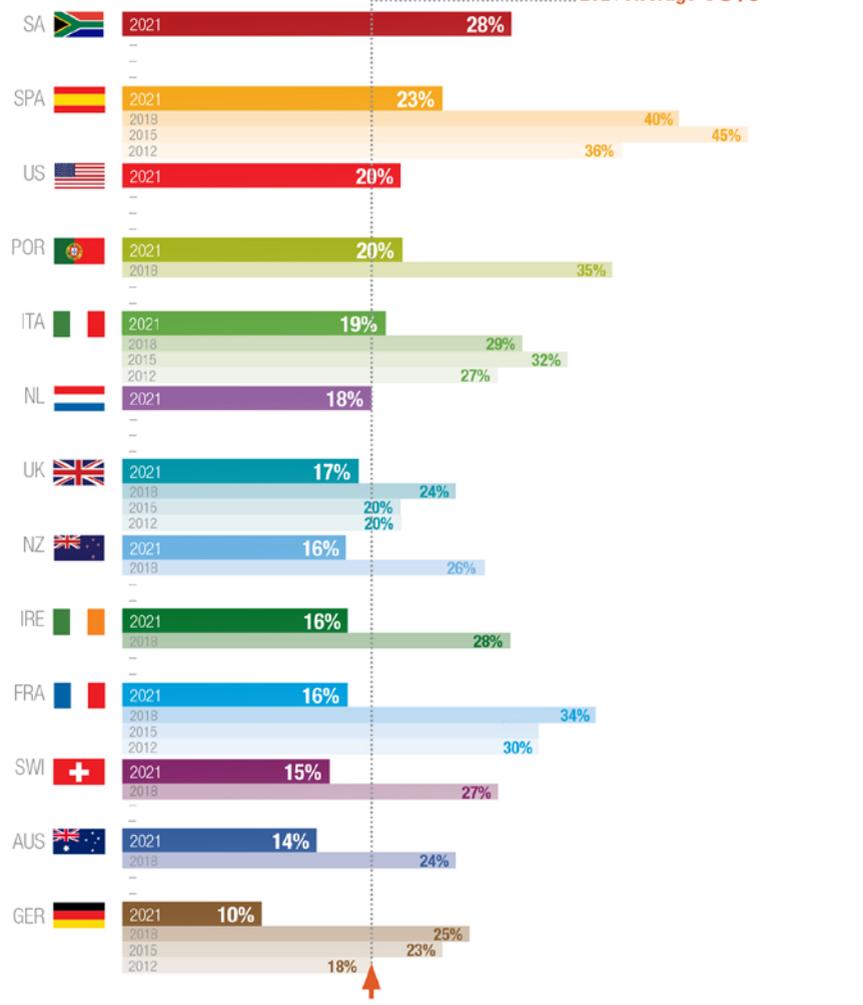
The freedom to raise concerns about misconduct is a core component of an open organisational culture, where employees are confident that they will be supported to do the right thing. Whistleblowing arrangements are an element of good governance and can provide an early warning system for potential risks. This is especially important because instances of misconduct are not uncommon, and no organisation can be immune to it. IBE research (2021) shows that nearly one fifth of employees across 13 countries surveyed say that they were aware of instances of misconduct at work in the previous year (see figure below).

Q4

During the past year at work, have you been aware of any conduct by your employer or colleagues that you thought violated either the law or your organisation's ethical standards?

Percentage of respondents who said yes.

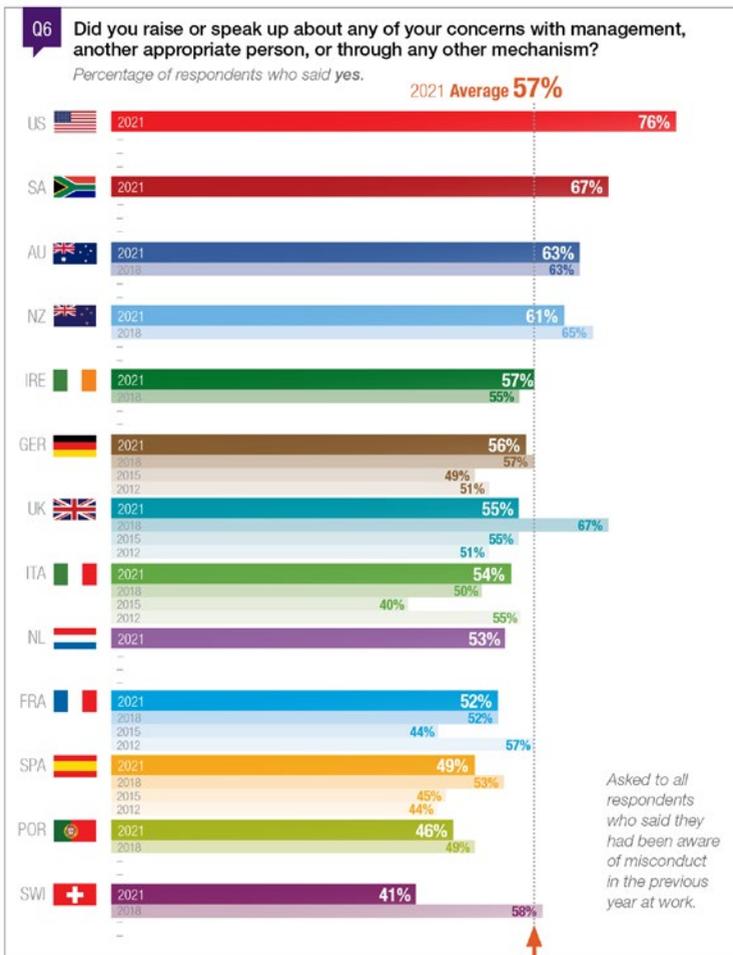
2021 Average 18%



Percentage of employees who say they had been aware of misconduct over the previous year at work

Willingness to report misconduct

An even more telling figure is the number of people that decided to act and report the misconduct. According to IBE research (IBE, 2021), on average 57% of employees who had been aware of misconduct raised their concerns directly with management or another appropriate person, or through some other mechanism (see figure below).



Willingness to raise concerns about misconduct

Reasons for remaining silent

Blowing the whistle can present some risks to those who have decided to reveal the truth. These risks, or barriers to reporting, are often cited as the reason why employees choose to remain silent. The IBE found that, out of approximately 10 000 employees, just more than a third was concerned that they would jeopardise their jobs if they spoke up, and a third worried that they might alienate themselves from their colleagues.

Retaliation

Retaliation or victimisation is a generic category for all negative consequences experienced because of whistleblowing.

Retaliation or victimisation is a generic category for all negative consequences experienced because of whistleblowing. It is a form of punishing an employee for reporting misconduct in the organisation. Retaliation for disclosure includes acts or omissions directed at the whistleblower or the whistleblower's family, associates, or interests, and can involve threats, disciplinary charges, demotion, suspension or other forms of detrimental action or negative treatment. Retaliation is time-dependent in the sense that it must occur after the disclosure has been made. However, retaliation does not necessarily occur immediately after the disclosure – it may take place at any time following the report (Dussuyer and Smith, 2020: 2).

Two questions every organisation should ask

Organisations may believe retaliatory conduct against whistleblowers has little to no effect on its organisational culture, or that retaliation is an issue one only reads about in the newspaper, i.e., it only happens to prominent and well-known whistleblowers. However, both the afore mentioned are fallacies as shown by the answers to the two questions below.



i) Should we care?

Whether a wrong perception (like being passed over for a promotion that the whistleblower would not have received anyway), or an unmistakable experience of victimisation (like receiving harassing calls or emails), retaliation against whistleblowers has a profound impact on both the victim and the organisation.

For organisations two new problems arise when retaliation occurs, namely:

- i) A second form of misconduct has been observed and a new victim emerges - the whistleblower; and
- ii) Retaliation against the whistleblower can create an environment that is destructive to the organisation.

These new issues can impact negatively on the commitment and loyalty of the whistleblower, now the victim, to the organisation. It can also lead to distrust in the organisation's whistleblowing mechanisms and its management – resulting in employees, going forward, not alerting the organisation of misconduct in their midst. Retaliation effectively weakens employee commitment, loyalty, and trust in the organisation.



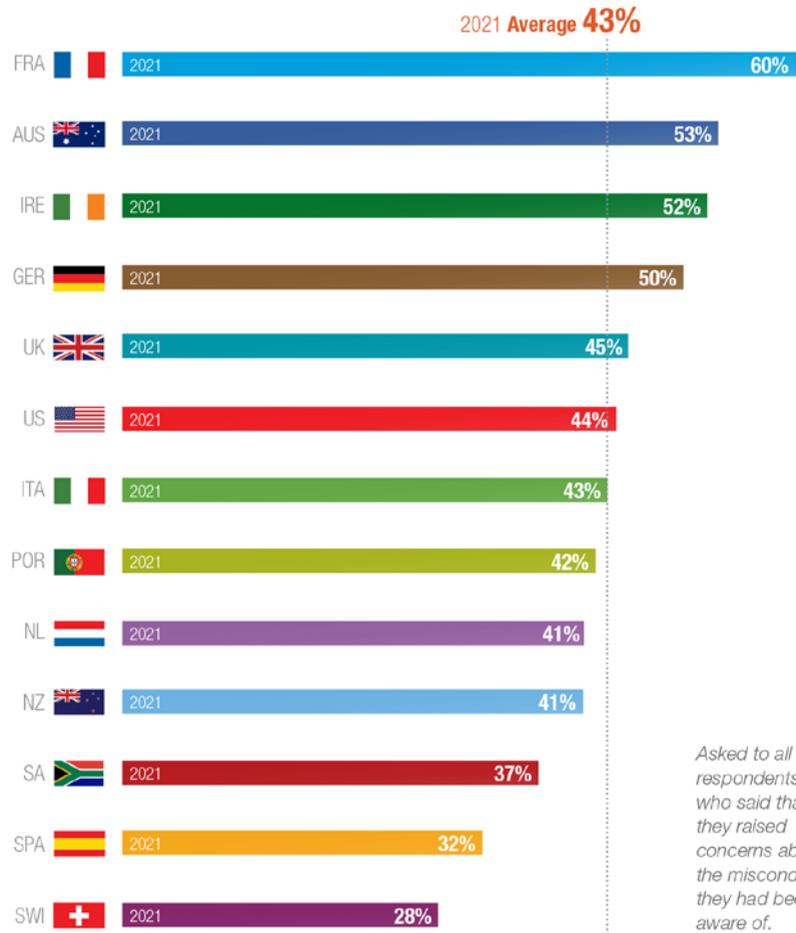
ii) Is retaliation real?

Yes, it occurs everywhere. The IBE (2021) research found that a disturbing 43% of people who raised concerns of wrongdoing in their organisations in 2021 experienced retaliation in one form or another (see figure below).

Q8

After raising or speaking up about your concerns, did you experience any personal disadvantage or any form of retaliation for doing so?

Percentage of respondents who said yes.



Asked to all respondents who said that they raised concerns about the misconduct they had been aware of.

Please note that, due to the low sample base for this question, the figures presented in this table must be interpreted as indicative.

Retaliation for speaking up

Retaliation can take on different forms – many of which are so subtle that whistleblowers sometimes only realise long after the fact that the personal disadvantages they have suffered for speaking up, were retaliation. Below are some of the actions or behaviours that constitute retaliation. The list is non-exhaustive.



Types of retaliation

Adjusting job duties that impact the whistleblower negatively

Blacklisting (a sector- or industry-wide agreement, formal or informal, that prevents an individual from finding alternative employment)



Bullying or harassment (e.g., receiving harassing calls or emails)



Demotion



Dismissal

Hostility (e.g., shaming employee in front of colleagues)



Social isolation from colleagues



Terms or conditions of employment or retirement altered to the whistleblower's disadvantage



Transfer of employee against his/her will

Trumped-up disciplinary charges

Unfair performance evaluation

Given that misconduct is real in organisations, as is retaliation against those who speak up, it is imperative that organisations design and implement robust anti-retaliation programmes. Below are practical guidelines for organisations to protect whistleblowers against retaliation.

Practical guidelines

In this section we provide practical guidelines for protecting whistleblowers from retaliation in the workplace.

Establish an ethical organisational culture

From TEI research (Groenewald and Vorster, 2019), it is clear that in ethical organisational cultures, fewer instances of misconduct are observed, there is a greater willingness among employees to report misconduct, employees experience less pressure to compromise the organisation's standards of ethical conduct, and fewer instances of retaliation for speaking up, occur. At the heart of establishing an ethical organisational culture is leadership commitment to ethical behaviour and decisions, senior and middle management's commitment as well as non-managerial employees' commitment to same. Mature levels of accountability, fair treatment of employees, opportunities for employees to openly discuss ethics and ethical challenges with one another and their managers, and ethics awareness and training are also imperatives for mature ethical organisational cultures.

Develop a comprehensive whistleblowing policy

Organisations should ensure that they have a comprehensive whistleblowing policy and appropriate written procedures to facilitate the reporting of misconduct and protect employees and other stakeholders who speak up about wrongdoing, from retaliation. Such policy communicates the organisation's stance on whistleblowing and its commitment to protect and support whistleblowers. The policy should provide clear, unambiguous guidelines about how and where to report unethical conduct. The aim of a whistleblowing policy is ultimately to enhance the organisational culture, create openness and

accountability, and provide avenues for employees to report wrongdoing without fear of retaliation. It also communicates to employees that the organisation takes any wrongdoing seriously and is committed to identifying and addressing it. (See Part 3 for guidance about what should be included in an effective whistleblowing policy).

Create awareness of the whistleblowing procedures and processes

Whistleblowing policies and procedures must be easily accessible to all employees.

Whistleblowing policies and procedures must be easily accessible to all employees, and awareness should be raised regularly through all available means such as employee engagement, training, intranet sites, and other awareness communications. Organisations should ensure that not only do employees know about the whistleblowing policy and procedures, but that they fully understand why the policy is important, how the process works and that they will be protected against retaliation.

Assess and prevent risks of detrimental conduct

The International Standardization Organisation standard on Whistleblowing Management - Guidelines, ISO37002, recommends that, “when a report is made, organisations should assess the risk of detriment to the whistleblower and other relevant interested parties, by considering for example the following:

- a) What is the likelihood of confidentiality being maintained? (e.g., Who else knows? Who else have they told? Does the nature of the information reveal their identity? Are they the only person who has access to the information? Is this a criminal offence where evidence will need to be revealed as well as the whistleblower’s identity?).
- b) Is the whistleblower anxious about detriment? Has detrimental conduct already occurred or are they aware of any immediate threat?
- c) Is the whistleblower involved in the wrongdoing or is it directed at them?
- d) Does the report involve multiple types of wrongdoing?

- e) How did the whistleblower obtain the information?
- f) What is the whistleblower's relationship with the subject of the report?
- g) What is the whistleblower's relationship with the organisation?

The level of protection and related actions taken are dependent on the type and timing of whistleblowing and the potential consequences of wrongdoing (e.g., for the subject of the report and other relevant parties). Risks should be monitored and reviewed at various points in the process, such as when a decision is made to investigate, during the investigation into the report, and once the outcome of an investigation is known, as well as, where appropriate, after the case has been closed".

Support whistleblowers

Practical support involves encouraging and reassuring the whistleblower of the value of reporting wrongdoing and taking steps to assist their wellbeing.

Whistleblowers must be supported from the time that a report of misconduct has been received. This should continue throughout the processes that follows. Practical support involves encouraging and reassuring the whistleblower of the value of reporting wrongdoing and taking steps to assist their wellbeing. Support can be on various levels, such as providing access to legal advice, security, or independent psychologists to guide whistleblowers through the reporting process, and to assist them in cases of reprisal or victimisation (adapted from ISO37002).

Follow-up with whistleblowers

The function responsible for whistleblowing management should, where the identity of a whistleblower is known, regularly check in to determine if the whistleblower has been experiencing any form of retaliation. In cases where the whistleblower reports retaliatory behaviour against him or her, immediate steps must be taken to prevent further retaliation from occurring, commence with an investigation, and, where the retaliation has been proven, implement disciplinary measures against the retaliator(s).

Train management

Train managers on all levels about the importance of keeping the identity of whistleblowers confidential, as well as the content of reports of wrongdoing made to them. Very often managers are unsure of how to deal with such reports and, in their efforts to find guidance in this regard, unintentionally reveal the identity of the employee, or the content of the report.

Educate employees regarding the many manifestations of retaliation

Some acts of retaliation are obvious such as harassing or attempting to intimidate the whistleblower, but others are more subtle in nature. For example, giving someone the 'cold shoulder' or intentionally failing to provide them with the resources needed to do their job, are also forms of retaliation. Ethics training programs should include case studies that cover overt and covert manifestations of retaliation.

Make sure employees understand the consequences of retaliation

All employees need to be aware of the potential consequences of retaliation against whistleblowers

All employees need to be aware of the potential consequences of retaliation against whistleblowers. This includes training and communication campaigns that outlines the penalties for violating the organisation's whistleblowing or anti-retaliation policy. Encourage employees to report retaliation via the applicable channels.

Have independent investigators

Ensure that investigations are carried out independently and not by the management of the function where the misconduct reportedly occurred. Management's objectivity might be impacted negatively as some may be reluctant to admit that misconduct occurred in their departments. It can also create a situation where management is more interested in determining who spilled the beans on unethical behaviour in their department, than in addressing the concerns raised.

Ensure confidentiality and anonymity

The importance of keeping the identity of the whistleblower (if known) and the content of the report of misconduct confidential, is fundamental in protecting whistleblowers against retaliation. If effective processes are in place in terms of confidentiality, '*shooting the messenger*' becomes much more difficult. Allowing employees to speak up anonymously is an effective anti-retaliation measure. However, it is not a substitute for an integrated anti-retaliation programme. Even if employees blow the whistle anonymously, their identity could at times be deduced from the content or the circumstances of the disclosure. Practically it is also difficult to provide protection to an anonymous whistleblower whose identity could be deduced by potential retaliators. The identity of the whistleblower, if known, and the content of the report, should therefore only be shared on a need-to-know basis. If it becomes necessary to share the report broader within the organisation, or with law enforcement agencies, the whistleblower's consent must be obtained for doing so.

An integrated anti-retaliation programme should include additional steps to protect the whistleblower from retaliation. ISO 37002 advises the following (7.5.5):

When establishing processes, including procedures and tools, to ensure the confidentiality of a whistleblower and other interested parties implicated in the whistleblowing process, including any subject(s) of the report, organizations should consider the following:

- a) a number of characteristics can inadvertently identify a person (name, voice, gender, job description, department, etc.);
- b) the circumstances of the reported wrongdoing can inadvertently lead to the identification of the whistleblower;
- c) the way an organisation investigates the report of wrongdoing can also inadvertently identify the whistleblower;
- d) the way an outcome is reported can also identify the whistleblower;
- e) the way an organisation collects data on indicators for evaluation can inadvertently identify whistleblowers who have reported confidentially;

- f) making whistleblowers aware that when confidential or anonymous reporting is allowed, disclosing their identity during the investigation can be required to proceed further;
- g) making whistleblowers aware that when anonymous reporting is allowed, anonymous reporting can limit the ability to both investigate and protect the individual;
- h) when anonymity is permitted, organisations may define mechanisms to enable communication with the whistleblower.

Procedures should include how to deal with instances where confidentiality has been breached or an attempt has been made to identify the whistleblower or relevant interested parties. This includes providing support and taking disciplinary measures.

Organisations must ensure that their whistleblower protection systems contain measures to protect whistleblowers against retaliation if confidentiality mechanisms fail and the employer deduces the whistleblower's identity, thereby increasing the risk of retaliation by the employer or other employees. Committing to sanctioning retaliators, and communicating such commitment, could reduce the risk of retaliation in organisations. Sanctions can include transfer or, depending on the nature of the retaliation, even dismissal of any person found to have engaged in unfair treatment of, or retaliation against a whistleblower.

A last word

Retaliation against whistleblowers is real and can occur in any type of organisation. Whistleblowers report wrongdoing within their organisations in the belief that action would be taken. They may first report the wrongdoing to their managers, and only later, if they do not see any action, through other reporting channels.

Unfortunately, it happens all too often that the whistleblower begins to experience negative feedback at work, such as receiving poor work reviews, being moved to mean-

ingless tasks, or being relocated. They might even be told to their face that they have unnecessarily 'rocked the boat'. More insidiously, they may become victims of 'smear campaigns' perpetrated by senior people to discredit and isolate them.

With so much at stake, why would employees risk their futures and trust the organisation to protect them from undesirable consequences for having had the moral courage to stand up for what is right?

Only if the organisation commits, in words and through action, to prohibit retaliation against whistleblowers, would employees believe that they will be protected. Organisations should therefore identify and implement strategies and actions to prevent detriment against the whistleblower, as well as other relevant parties.

The practical guidelines in this toolkit should provide organisations with a good starting point for its non-retaliation policy, strategy, actions, and processes.

Example of Retaliation

Victimised for whistleblowing on wide scale sexual harassment, systemic bullying and misconduct in the workplace.

My colleagues trusted me. Being the Compliance Officer at my firm for over 15 years, I think helped give that sense of trust, as employees felt safe to come talk to me about their experiences.

It started as a trickle at first, but then more and more employees began confiding in me. The state of affairs at the firm was extremely distressing, with colleagues being sexually harassed and bullied and yet too afraid to speak up, for fear of losing their jobs and livelihood.

In all, I had over 10 colleagues, men and women across the various departments, approach me with a mix of sexual harassment, bullying and racial discrimination

complaints. A male colleague recounted his very upsetting experience of sexual harassment at the hands of his manager. Another colleague was subjected to bullying, verbal attacks and racial slurs by her manager. Both confirmed that their mistreatment was well known to HR, but they were advised by HR not to make any official grievance complaint against the senior employees, otherwise they would face certain retribution. The employees informed me that they have both suffered mental health breakdowns and are currently receiving treatment for mental health related issues arising from bullying and sexual harassment at work.

Following the various complaints made to me, I raised a whistleblowing report. Although the report was about the mistreatment of employees, I became the target of attack for reporting the wrongdoings. I was harassed, intimidated, and racially abused. A so-called investigation was set up by the same individuals implicated in the wrongdoings, however it soon became apparent that the entire investigation process was part of a cover-up to protect the individuals implicated.

It's been extremely upsetting to see employees suffer such horrendous treatment in the hands of senior employees who act with absolute impunity and blatantly abused their positions of power and misuse authority to gain benefit. Although I no longer work for the company, the mental and psychological trauma on me has been immense. To date I still experience flashbacks and am undergoing counselling, including medication for stress caused to me. The question I've been consistently asked by those close to me has been, "was it worth putting yourself through all that stress and at such great financial cost, for the sake of other people, in order to call out bad behaviour"? My response is and has always been that "to be silent is to be complicit". I consider myself to be someone with a reasonable sense of fairness and justice and so I would rather do the right thing and face the consequences, than be silent and live a life of regret, by opting for the easy way out.

I believe that change beneficial to society is paramount and sometimes does come at a cost, which could include personal cost to me. Whistleblowers have a very important role to play in the workplace and civilised society and yet receive

very little real protection under the current statute and have remained victims condemned to execution by the circular firing squad of establishment.

Unless the government changes the law relating to whistleblowing and until perpetrators are held to account for their wrongdoings, unfortunately these organisations will continue to “shoot the messenger” and whistleblowers will continue to be vilified and suffer the inevitable full brunt of these unethical organisations with deep pockets.”

Source: Protect: Silence in the City #SITC2

Introduction

If you are reading this, the chances are that you have become, or are thinking about becoming, a whistleblower.

You may have uncovered wrongdoing in your workplace. It may be that you have blown the whistle on workplace wrongdoing believing that your organisation will address your concern. But now you are being victimised or retaliated against because of having spoken up. Or it may be that you are thinking about blowing the whistle, but you are worried that you will be subjected to retaliation.

Unfortunately, the fear of being retaliated against for blowing the whistle is real. Many organisations, however, have anti-retaliation programmes that should protect you. But if it does not, use this toolkit to protect yourself from retaliation when you speak up. And if you are already experiencing retaliation, you can follow the guidelines in the toolkit to address it, and report those who are victimising you.

What is retaliation?



Retaliation or victimisation is a generic classification for all negative consequences experienced because of whistleblowing.

Retaliation or victimisation is a generic classification for all negative consequences experienced because of whistleblowing. It is a form of punishing an employee for reporting misconduct in the organisation.

Types of retaliation

How do you know if you are or have been experiencing retaliation because you spoke up about misconduct or unethical conduct in your organisation? Look at the following forms of retaliation that are generally used to victimize whistleblowers:

- Adjusting job duties that impact the whistleblower negatively (e.g., no longer having decision-making/signing powers)
- Blacklisting (a sector- or industry-wide agreement, formal or informal, that prevents an individual from finding alternative employment)
- Bullying or harassment (e.g., receiving harassing calls or emails)
- Civil claim arising from breach of confidentiality requirements of the organisation
- Demotion
- Disciplinary charges (usually for something arbitrary)
- Dismissal (for no obvious valid reason)
- Employer refuses to provide a reference, or provides an adverse reference if the whistleblower applies for another job
- Hostility (e.g., shaming the employee, especially publicly, engaging in emotional, verbal, or physical abuse or unfair and intimidating scrutiny)
- Non-promotion when promotion was due
- Social isolation or ostracization
- Suspension
- Terms or conditions of employment or retirement are altered to the whistleblower's disadvantage
- Threats to the lives of family members of the whistleblower
- Transfer against the will of the employee
- Unfair or inappropriate treatment that forces the whistleblower to resign
- Unfair performance evaluation
- Violence (e.g., being shot at, assaulted, or physically harmed in another way)

The list is non-exhaustive.



I am considering blowing the whistle, but fear retaliation

It may be that you have not yet blown the whistle, but you are considering it. However, you may be hesitant because you fear retaliation. There are several actions you can take to protect yourself against retaliation.

Protecting yourself and your information can be a crucial step in successfully blowing the whistle and potentially preventing undue whistleblower retaliation.

Protecting yourself and your information can be a crucial step in successfully blowing the whistle and potentially preventing undue whistleblower retaliation. You can protect yourself by heeding the following:

Know your rights before you speak up

Consult your local whistleblower protection legislation to determine how and when you will be protected by legislation in your jurisdiction. It is also advisable to consult a legal advisor to guide you in reporting in a manner that will ensure that you are protected from, for example, occupational detriment and adverse action.

The laws that protect whistleblowers in South Africa

These laws provide different levels of protection to those who come forward with information. The main laws in South Africa that pertain to whistleblowers are:

- The Constitution
- The Protected Disclosures Act of 2000
- The Labour Relations Act of 1995
- The Companies Act of 2008
- The Protection Against Harassment Act of 2011

The laws that protect whistleblowers in the United States of America

The main laws in the USA that pertain to whistleblowers are:

- Whistleblower Protection Act of 1989
- Whistleblower Protection Enhancement Act of 2012
- Sarbanes-Oxley Act of 2002

- Fair Labor Standards Act
- Occupational Safety and Health Act
- National Labor Relations Act

The laws that protect whistleblowers in the European Union and the United Kingdom

The main laws in the European Union (EU) and the United Kingdom (UK) that pertain to whistleblowers are:

- The EU Whistleblowing Directive
- Public Interest Disclosure Act of 1998 (UK)
- The Protected Disclosures Act 2014 (Ireland)
- The Law on the Protection of Whistleblowers in the Public Interest (Romania)

Keep records safe

Keep records away from the workplace. If your employer retaliates against you, you could be prevented from retrieving anything from the workplace.

You are not an investigator

It is not expected of employees to gather evidence about the misconduct they want to report. However, you should have reasonable grounds for believing that your information is true, and the report must be made in good faith to ensure protection. Malicious reporting is a criminal offence in South Africa, and also in some other jurisdictions.

Consider remaining anonymous

Being an anonymous whistleblower can offer you the best possible protection. If your employer does not know who the whistleblower is, they do not know who to target for retaliation.

Create accounts with fake names

Create new fake accounts for email, social media or messaging apps you may be using to communicate about your whistleblowing.

Use encrypted messaging apps

Instead of using your phone's default messaging app, rather use an encrypted app like Threema (open-source end-to-end encrypted instant messaging application for iOS and Android).

Hide your screen

Hacking is not the only way that people can obtain your credentials. They can do it in the old-fashioned way by peaking over your screen. Know your device's keyboard shortcut that you can press to hide your web windows or tabs.

Don't blow your own whistle

Blowing the whistle anonymously means that you report misconduct without providing any details about yourself.

If you decide to speak up anonymously, do not, under any circumstances, tell anyone (e.g., colleagues, family, friends, pastor) that you have done so. Blowing the whistle anonymously means that you report misconduct without providing any details about yourself. Keep it that way.

Be careful not to provide identifiers

When blowing the whistle anonymously, be careful not to provide any information that can identify you. Reporting that "my manager, Ms Anne Jones, is stealing from the company" will make it very easy to identify you, especially if Ms Anne Jones has only a few subordinates. Rather say that "a manager at my company, Ms Anne Jones, is stealing from the company".

What actions can constitute ‘occupational detriment’?

The South African Protected Disclosures Act (as amended) defines as occupational detriment the threat or the carrying out of any of the following actions having an adverse impact on the employment status of an employee or worker in response to their making a protected disclosure:

Any disciplinary action

Denial of appointment to any employment, profession, or office

Disadvantageous alteration of a term or condition of employment or retirement

Dismissal, suspension, demotion, harassment, or intimidation

Refusal of transfer or promotion

Refusal of or provision of an adverse reference

Subjection to civil claim for the alleged breach of a duty of confidentiality arising from the disclosure of a criminal offence or a contravention or failure to comply with the law

Transfer against employee’s will

and / or

“being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities, work security and the retention or acquisition of contracts to perform work or render services.”

Source: Protected Disclosures Amendment Act (Act 5 of 2017)



I am experiencing retaliation, what can I do?

You have reported wrongdoing in your organisation, but now you are being told that “you don’t understand how things work here”, or “you are not in possession of all the facts”, or “you are needlessly rocking the boat”, or even “the last person who raised that spurious issue isn’t here any longer”. What can you do?

Consult your organisation's whistleblowing policy or anti-retaliation policy

You can determine from your organisation's whistleblowing-, anti-retaliation- or anti-victimisation policy what processes you should follow to report the retaliation you are experiencing.

Keep record



Gather as much hard evidence of the retaliatory behaviours as possible, without putting yourself in danger.

Retaliation can be blatant or subtle. Therefore, seemingly legitimate actions can be used to retaliate against an employee. Proving retaliation requires thorough investigation and evidence. It is thus necessary that you gather as much hard evidence of the retaliatory behaviours as possible, without putting yourself in danger. Below is advice (some of it provided by a whistleblower who has been experiencing significant retaliation):

- Keep detailed notes of all retaliatory actions. For example, if you are being bullied verbally, make a note of what is said, when and by who, and the names of any witnesses. E-mail the notes to yourself. It will help you to remember facts of events and dates and times. This will also give you a file with an electronic date and time stamp which could be useful.
- Store your notes privately and definitely not at your workplace and on your workplace devices. Keep hard copies of all documents and email correspondence.
- Make backups of your storage devices and give it to people you trust to keep safe. A lawyer will keep a storage device for you for a small fee. You can even give a storage device to your life insurance broker to keep for you.
- Make backups of your files on the cloud. Remember – it is free! Use multiple usernames and an internet cafe if you can, to back up your files to the cloud. Make sure not to write the username or password down anywhere.

Also make sure it is something you will never forget. This will give you the ability to access your files from any internet connection in the world.

- Install a phone call recorder.
- Make sure that your audio recording on your phone is of good quality. Test it. Make an easy and quick to access icon on your phone.
- Ensure that your phone can be locked with at least a pin or fingerprint.
- Install a background video recorder on your phone. These apps have a quick launch button while your phone is locked. It also ensures that another person cannot grab your phone and delete the video as your phone is locked.
- Record all meetings and discussions you are party to. Refer to the protection of personal information, and data protection legislation in your country.
- Save *all* emails, no matter how unimportant it seems at the time. Remember to make backups regularly.
- Become familiar with the relevant whistleblowing protection laws in your country.
- Lawyers are very expensive. Some law firms will help you on a pro bono basis. Some organisations can arrange access to pro bono legal services on your behalf. Ask them! See 'Useful Contacts for Seeking Help' below.
- Get emotional support, see a psychologist or psychiatrist. It gets really tough. And if you do not have the financial resources to pay for such services, contact the 'Useful Contacts for Seeking Help' below to facilitate access.
- Know your case inside and out and never doubt yourself. Keep a diary if you can - you will be surprised how that helps.

Report the retaliation

Generally, organisations encourage employees to report any form of retaliation they experience because of having blown the whistle. Organisations also often commit to protecting whistleblowers against retaliation. Do not suffer alone. Rather inform your organisation that you are being treated unfairly by reporting it to one of the following:

- Your direct line-manager
- Another manager
- The human resources function
- An executive

The rule of thumb is: report retaliation to the person or entity that you trust most and who you believe will act on your report.

- The Ethics Officer
- The Compliance Officer
- The Company Secretary; or
- Your organisation's external whistleblowing or speak up line.

It is important that you speak to the person or facility that you feel most comfortable with. It will be awkward to report to your direct line-manager if s/he is the person victimising you. The rule of thumb is: report retaliation to the person or entity that you trust most and who you believe will act on your report.

When deciding to report the retaliation, you must understand that you will have to reveal your identity. This can be a frightening thought, but without knowing the identity of the person who is experiencing retaliation, there is very little that the organisation can do to protect the employee.

In one case, menial work was assigned as a punishment for reporting accounting malpractice in a hospital: [...] the whistleblower reported this to the manager who then took it to higher management. The whistleblower was called to a meeting where the whistleblower was confronted by the wrongdoers and the whistleblower was asked to repeat the allegations to their faces. The whistleblower refused to do that [...] but then the next day the whistleblower's job was changed [...] now being told to drive a tractor with a trailer and shovel and fill in rabbit holes in the park [...] the whistleblower resigned and never came back.

Source: Dussuyer, I. and Smith, R.G. 2018: 7

Respond to all allegations made against you

If you are being disciplined by more senior staff members or facing a grievance launched by a co-worker in response to having blown the whistle, you should respond to the allegations made against you. It is not enough to say that the disciplinary action is being used against you because you spoke up.

Here are some tips (cf. Protect website) on how to defend yourself and challenge your employer's actions:

- **Point out that you think this is happening because you blew the whistle** on wrongdoing if you believe that your employer or co-worker are using formal disciplinary or grievance processes to retaliate against you.
- **Defend all allegations** against your own conduct or performance. But be aware that whistleblowing will not protect you against legitimate concerns about your behaviour or work performance.
- **Draw a detailed link** between your whistleblowing report, where you reported, the response you received (if any) and the formal grievance / disciplinary process you are going through.
- **Obtain legal advice** if you are facing gross misconduct charges.

Lodge a formal grievance

If reporting to your employer has not stopped the retaliation, consider lodging a grievance. It is important that you be clear in your grievance about the link between the whistleblowing concerns you raised and the retaliation you are suffering. Mention the following in your grievance:

- i) what you have reported
- ii) the date of when you blew the whistle
- iii) to whom you blew the whistle
- iv) how exactly you were victimised in response to your report of wrongdoing

If you are unhappy with the outcome of the grievance, you could appeal the decision according to the appeal process in your organisation's grievance policy.

Bring a claim against your employer

If your grievance and your appeal (if you chose to appeal) were unsuccessful, consider lodging a claim against your employer. You can do this over a matter such as

- unfair dismissal
- unfair deductions from your pay
- changed working conditions
- workplace changes or
- discrimination.

Remember that it is very important that you take steps immediately. In the case of an unfair dismissal dispute in South Africa, you have only 30 days from the date on which the dispute arose to open a case. If the case is an unfair labour practice, you have only 90 days and, with discrimination cases, you have six months. Other jurisdictions impose similar time restrictions – become familiar with them. You will need to show that the fact that you spoke up had a 'material influence' on the negative treatment you are experiencing or have experienced.

If an arbitration process is unsuccessful, in the sense that one of the parties do not comply with the arbitration award of the commissioner, the case may be made an order of the Labour Court.



Be prepared for a long journey.

Seek help

As a whistleblower you may face, inter alia, civil and criminal persecution, loss of employment, defamation, ostracization and isolation within your workplace or even community, loss of income, or threats to you or your family members. Seek help to support you through this tumultuous time. This may include physical protection, psychological counselling, legal advice, or financial assistance.



Do not walk this path alone!

Useful Contacts for Seeking Help	
Ahmed Kathrada Foundation (SA)	www.kathradafoundation.org
Citizens Advice (UK)	www.citizensadvice.org.uk
Corruption Watch (SA)	www.corruptionwatch.org.za
Legal Resources Centre (SA)	www.lrc.org.za
Platform to Protect Whistleblowers in Africa (PPLAAF) (Africa)	www.pplaaf.org
Protect (UK)	whistle@protect-advice.org.uk
Right2Know Campaign (SA)	www.r2k.org.za
The Whistleblower House (SA)	www.whistleblowerhouse.org

A last word

Many whistleblowers report words to the effect of “*I feel as though I have done wrong for doing right.*” And that is hardly surprising given that they may put themselves in a position of significant personal or professional risk by speaking up. By reporting possible instances of unethical conduct by their colleagues, peers, supervisors, and other stakeholders of the organisation, they expose themselves to the risk of retaliation in their workplaces.

However, research shows that individuals will take risks if they believe that it will make a difference (UNODC, 2015:45). Without whistleblowers many instances of unethical conduct in government departments and -agencies, as well as in corporates, would not have been exposed. People sexually harassing or grooming children would not have been exposed. Companies dumping hazardous waste in rivers would have gone unnoticed, poor health conditions in prisons would have gone unnoticed, as well as medical aid fraud. And the list continues.

If you are a whistleblower using this toolkit, know that you are a brave person who has shown great moral courage. You have made a difference. And you are saluted.



You have made a difference. And you are saluted.

Introduction

In Part 3 of this toolkit, we provide organisations with two useful resources to assist them with the development and implementation of (i) a robust non-retaliation strategy and implementation plan, as well as (ii) a comprehensive whistleblowing policy.

The third resource in Part 3 of this toolkit is a template for reporting retaliation or victimisation due to an individual having blown the whistle.



Non-retaliation strategy checklist for organisations

Below is a checklist for organisations to measure the development and implementation of a non-retaliation strategy.

	Indicator	Rating (0, 25, 50, 75, 100)	Comment
1.0	Ethical culture		
1.1	Ethics (and Compliance) officer appointed		
1.2	Ethics risk assessment conducted		
1.3	Ethics strategy approved		
1.4	Ethics management plan approved		
1.5	Ethics management plan implemented		
2.0	Non-retaliation strategy		
2.1	Non-retaliation strategy approved		

	Indicator	Rating (0, 25, 50, 75, 100)	Comment
3.0	Whistleblowing policy		
3.1	Whistleblowing policy approved		
3.2	Commitment to protect and support whistleblowers included		
3.3	Commitment to act against retaliators included		
3.4	Procedure for blowing the whistle included		
3.5	Feedback to be provided to whistleblowers included		
3.6	Policy and procedures easily accessible for employees		
4.0	Awareness of whistleblowing procedures and policy		
4.1	Policy and procedures communicated bi-annually		
4.2	Awareness material distributed		
5.0	Risk assessment and prevention		
5.1	Formal process for assessing and preventing risks of detrimental conduct for whistleblower approved		
5.2	Formal process for assessing and preventing risks of detrimental conduct for whistleblower implemented		

	Indicator	Rating (0, 25, 50, 75, 100)	Comment
6.0	Support for whistleblowers		
6.1	Plan to improve the wellbeing of whistleblowers		
6.2	Resources available to assist whistleblowers in cases of retaliation		
7.0	Follow-up with whistleblowers		
7.1	System implemented to guarantee annual follow-up / check in with whistleblowers (whose identity is known) regarding possible retaliation they may experience		
8.0	Training		
8.1	Training of management conducted about handling whistleblowing reports in a confidential manner, and the importance of protecting the identity of whistleblowers		
8.2	Employee training conducted about the protection of whistleblowers against retaliation and types of retaliation		
8.3	Employee training conducted about the different manifestations of retaliation		
8.4	Employee and management training conducted about the consequences of retaliation		



Whistleblowing policy guidelines

A strong whistleblowing policy (cf. Groenewald 2020) that is linked to the organisation's values, and that is regularly and effectively communicated to all employees, should make the following points evident:

- States a strong commitment to a speak-up culture;
- States that the organisation takes misconduct seriously;
- States a commitment to trust, impartiality, and protection throughout the whistleblowing process;
- Defines the procedures to follow (i.e. how and to whom reports may be made);
- Explains the authority and independence of the whistleblowing management function;
- Identifies the types of concerns and misconduct that may be reported under the policy;
- Points out that employees who are aware of possible wrongdoing within the organisation have a duty to disclose that information through the available reporting channels;
- Indicates the minimum information required to enable the organisation to take action, namely who is involved in the wrongdoing, what is the nature of the wrongdoing, when did it occur, where did it occur and how did it happen;
- Commits to treating all reports of misconduct in a confidential manner;
- Commits to protecting the identity of whistleblowers;
- Explains how the confidentiality of the whistleblower's identity is safeguarded;
- Explains the processes to investigate reports made under the policy;
- States that employees may report misconduct anonymously;
- Guarantees that employees who disclose misconduct in good faith through the available reporting avenues will be protected from any form of occupational detriment, victimisation, and retaliation;
- Guarantees that victimisers of whistleblowers will be subjected to disciplinary measures;

- States that disclosures made in bad faith or maliciously, constitute a criminal offence (in South Africa). If a whistleblower is found guilty in this regard, he or she will be liable for a fine or imprisonment up to two years, or both;
- Explains the consequences of non-compliance with the whistleblowing policy;
- States that the policy will be periodically reviewed to check that it is operating effectively and whether any changes are required to the policy;
- Commits to acknowledging receipt of reports in writing; and
- Commits to providing feedback on closure of investigations.



Template for reporting retaliation or victimisation due to whistleblowing

You can use this template (adapted from “I’ve been victimised for raising concerns” (protect-advice.org.uk) to help you write a letter to your employer reporting that you have been victimised.

Dear [...]

[If your employer has a whistleblowing policy, you should address this letter to the person or department that handles whistleblowing victimisation.]

[If your employer does not have a whistleblowing policy, you should address this letter to a senior manager who is not victimising you, or other relevant department, such as the Ethics Office or Human Resources.]

I am writing to you [in accordance with the whistleblowing policy] because I am being victimised because of having blown the whistle on wrongdoing in the organisation.

I raised whistleblowing concerns to [insert name] on [insert date]. My concerns were [explain the concerns that you raised. If it was not in writing, then provide as much detail here as possible].

After I did this, I was subjected to the following negative treatment.

[Here you should explain:

- Who caused you the detriment
- What the detriment was
- When you suffered the detriment
- The negative effects on you because of the detriment, and
- Whether it occurred on multiple occasions and provide details thereof.]

***If your employer has a whistleblowing policy,
consider including the following:***

The whistleblowing policy states that victimisation of anyone who blows the whistle will not be tolerated. [Quote the policy here if you can.]

The concerns I raised clearly fall within the scope of the policy because [give details here of how you believe your concerns are covered by the whistleblowing policy].

In addition, I have the right not to be victimised or treated negatively in any way for raising whistleblowing concerns under the [name of relevant legislation]. [If you can, explain how your disclosures meet the criteria of a protected disclosure within the relevant legislation.]

As such, the negative treatment to which I am being subjected is a breach of company policy and my employment law rights. I request that you take some action to stop [name individual] from victimising me as I have described above.

***If your employer does not have a whistleblowing policy,
consider including the following:***

Under the [refer to name of relevant legislation], I have the right not to be victimised or treated negatively in any way for blowing the whistle on wrongdoing. [If you can, explain how your disclosures meet the criteria of a protected disclosure within the relevant legislation.]

The negative treatment to which I am being subjected is a breach of my employment law rights, and I request that you take some action to stop [name individual] from victimising me as I have described above.

I would be grateful if you could please acknowledge receipt of this letter and provide a response within two weeks of what action you will take. I am happy to discuss this further and supply any additional information you may require.

Best wishes,

[Your name]

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Liezl has been in the field of organisational ethics since 2004. Her main expertise lies in advising organisations on ethics management and strategies, conducting ethics risk and culture assessments, facilitating ethics workshops, conducting macro ethics investigations, auditing whistleblowing service providers, advising whistleblowers and training boards and Social and Ethics Committees.

She is a seasoned facilitator for TEI and the Institute of Directors South Africa, guest lecturer at the Innsbruck University of Applied Sciences (Austria), as well as at some business schools in South Africa. She speaks at local and international conferences, is a commentator in the media on ethics and whistleblowing, moderator, author of business and military ethics related articles as well as the *Whistleblowing Management Handbook*. She co-authored the *Ethics and Compliance Handbook* and *Institutionalising Ethics Handbook* and contributed to the *Ethics Office Handbook*.

Liezl is a founding director of The Whistleblower House NPC, member of the Inaugural Committee of the International Society of Military Ethics for Africa (AfrolSME) and serves on the Advisory Boards of BEN-Africa and Visflan (a whistleblowing service provider in Sweden). She also serves on the Council of the Cape Peninsula University of Technology in South Africa, is chairperson of its Governance and Ethics Committee, and member of three other Council committees. She is a research associate at the Stellenbosch University (Philosophy Department) and represented South Africa at the global technical working groups for the development of ISO 37000, the ISO Standard for the Governance of Organisations, and ISO 37002, the ISO Standard for Whistleblowing Management.



The Whistleblowing Non-Retaliation Toolkit

Whistleblowing enables organisations to access hard-to-reach information that can help organisations to minimise a wide range of risks. Unfortunately, many organisations still focus on the messenger and not the message.

This causes potential whistleblowers to remain silent for fear of retaliation. Retaliation is real, but all too often overlooked by organisations – be it intentionally or unintentionally. More and more whistleblowing policies promise to protect whistleblowers from retaliation, but this promise often remains just words on paper resulting in whistleblowers suffering life altering detriments for having raised their concerns about wrongdoing in their organisations.

Whistleblowers who are experiencing retaliation are also often left to fend for themselves while struggling to meet financial needs, experiencing depression and post-traumatic stress disorder, and not being able to afford legal counsel. For many it becomes a never-ending downward spiral.

But organisations as well as whistleblowers can be proactive in preventing retaliation and protecting those who have the moral courage to speak truth to power.

The *Whistleblowing Non-Retaliation Toolkit* aims to guide:

- organisations seeking to protect whistleblowers in their organisations against all forms of retaliation for speaking up; and
- whistleblowers to protect themselves from retaliation and, when retaliation for speaking up has occurred, provide them with steps to follow to mitigate the retaliation.

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