

**Avoiding Whistleblower and Retaliation Claims**

**Nonprofit Risk Management Center**  
**June 4, 2008**  
**2:00 – 3:00 pm EST**  
**Jennifer Chandler Hauge**  
**Senior Counsel and Director of Special Projects**

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Nonprofit Risk Management Center**

- Created to help nonprofits solve risk management challenges
- Free technical assistance
- Books, Web site, conferences,
- Consulting help with policy development, review of insurance and risk assessments
- [www.nonprofitrisk.org](http://www.nonprofitrisk.org)
- Free e-news and electronic newsletter

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Employment Law Claims**

1. Always an issue, whether you have one employee or many
2. Always an emotional and financial drain
3. Always require vigilance to keep policies up to date

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**9% Increase  
in EEO Claims in 2007**

**Highest jump in years**  
**Retaliation claims up 18% - now  
represent 30% of all claims filed!**  
**Age claims up 15%, Disability up 14%**  
**Largest increase since the 1990's**

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Why the Increase?**

**According to the EEOC:**  
**"The jump in charge filings may be due to  
a combination of factors, including  
greater awareness of the law, changing  
economic conditions, and increased  
diversity and demographic shifts in the  
labor force."**

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Wrongful Discharge Claims**

**Typical Claims Rely On:**

- **Breach of Contract**
- **Discrimination**
- **Violation of public policy**

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Nearly 1/3 of all federal discrimination charges now include retaliation allegations**

The Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), Fair Labor Standards Act (FLSA), Family and Medical Leave Act (FMLA) and individual state laws provide protection against retaliation

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Federal Law Retaliation Claims**

**Significantly Expanded**

- **May 27<sup>th</sup>, 2008: US Supreme Court held that there is a cause of action under "Section 1981" for retaliation:**
- Hedrick Humphries, an African American assistant manager at Cracker Barrel in Illinois, alleged that he was fired based on his race and because he complained to managers that an African American co-worker was also dismissed for race-based reasons.

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**What does this mean?**

- Risk of retaliation claims is high
- Policy against retaliation is prudent
- Employers should maintain personnel file records of employees for FOUR (4) years after termination of employment to adequately defend against Section 1981 claims

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**New Federal Law Prohibits Discrimination Based on Genetic Information**

Brand new (May 2008)  
Effective date sometime in 2009

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**False Claims Act**

- Protects employees who file a claim with the federal government
  - That their employer, a federal contractor,
    - Has conducted fraud on the federal government
- Example: claims of fraudulent billing for Medicare or Medicaid

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**State Law Retaliation Claims**

Retaliation against an employee for exercising a right under state law may be considered a violation of public policy of that state

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---

---


---

---

---

---





**Almost all states have independent whistleblower laws**

- The Center's publication, Taking the High Road, has a short description of each state's statute, with a link to the law
- An on-line version is available with annual updates
- You can also search for your state law on the internet.

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---


---

---

---

---

---



**Retaliation Claims**

Some states prohibit retaliation against only those employees who report a violation of a certain type of law, such as public health or safety regulations – or only protect certain types of workers, such as health care workers

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---


---

---

---

---

---



**Some State Laws Require:**

- That employees use internal complaint procedures first
  - OR alternatively
- That employees file their complaint externally with state or federal regulators and if they do not, they are not engaging in protected activity

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---


---

---

---

---

---



**• What is Protected Activity?**

**• What is Retaliation?**

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**What is Protected Activity?**

- Protected activity is not necessarily limited to making a complaint or obvious "whistle blowing"
- Filing a workers' compensation claim or asking for a disability or religion-related accommodation is protected activity.

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**What is Retaliation?**

**Could be moving an employee's office so there is no view out the window!**

An employee may only need to show "materially adverse action that would tend to discourage a reasonable worker from engaging in similar protected conduct."

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Whistle Blower Policies:**

Why have one?

Why not just rely on our staff to behave decently and investigate complaints fairly?

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---

---

---

---

---

---



**Retaliation Claims**

**NEW 990 asks:**

**Does your nonprofit have a whistle blower policy?**

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Also: Sarbanes Oxley Act compels nonprofits to have whistleblower policies**

- SOX makes it a crime to retaliate against someone who raises a concern about a financial accounting impropriety
- Protected activity can be expressing a concern that restricted funds from a government grant were not properly accounted for; or that a donor's intent was not respected

Generous funding for this program was provided by the Public Entity Risk Institute (www.riskinstitute.org)

---

---

---


---

---

---

---

---



**Avoiding Whistleblower Claims**

- Establish a process for complaint resolution that is internal
- Communicate the process
- Designate a "compliance officer" whose responsibility is to not only receive complaints but also to investigate and train staff
- Do not ignore complaints; investigate thoroughly AND provide complainant with feedback

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---


---

---

---

---

---



**Avoiding Whistleblower Claims**

- Sensitize managers/supervisors to this cause of action and also to protected categories
- Make sure they recognize that "retaliation" can be seemingly innocuous, such as changing work hours
- Employees need options for who they can complain to and how
- Although the policy may require a written complaint -- supervisors need to be sensitive that verbal complaints should be taken seriously. Encourage complaining employee to put it in writing.

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---


---

---

---

---

---



**Response to Employees' Complaints**

- Assure the complainant that the concern is being taken seriously
- Thank employees for coming forward
- Remind them that they are protected from retaliation
- Ask them to come forward immediately with any continuing concerns so that nonprofit can identify possible retaliatory conduct

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---

---

---

---

---

---



**Response to Employees' Complaints**

- Make sure to find out ALL the reasons why the complainant believes s/he has been retaliated against; and
- That the complaining employee provides details about the alleged retaliatory conduct.
- Have the employee verify that he has told you about **all** instances of alleged retaliation.

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---


---

---

---

---

---



**Response to Employees' Complaints**

- Don't panic. Be patient. Get all the facts before making any decisions. Do not delay but take only a reasonable period of time to consider your findings.
- Act on your findings. Supervisors who have retaliated need to be disciplined in some way.
- Close the loop with the complainant by letting him/her know of remedial action taken.

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---

---

---

---

---

---



**Need Help With Policy Review and Development?**

**NRMC can help!**

**[jennifer@nonprofitrisk.org](mailto:jennifer@nonprofitrisk.org)**

Generous funding for this program was provided by the Public Entity Risk Institute ([www.riskinstitute.org](http://www.riskinstitute.org))

---

---

---

---

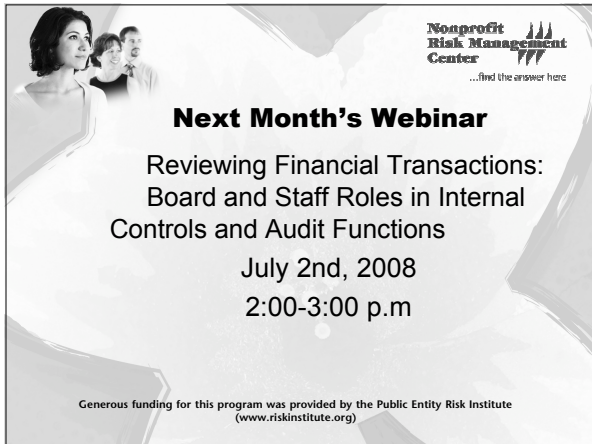
---

---

---

---





**Nonprofit Risk Management Center**  
...find the answer here

**Next Month's Webinar**

Reviewing Financial Transactions:  
Board and Staff Roles in Internal  
Controls and Audit Functions

July 2nd, 2008  
2:00-3:00 p.m

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---

---

---

---

---

---



**Nonprofit Risk Management Center**  
...find the answer here

**Thank You!**

- Questions? Email Jennifer  
jennifer@nonprofitrisk.org

Generous funding for this program was provided by the Public Entity Risk Institute  
(www.riskinstitute.org)

---

---

---

---

---

---

---

---