

REPRISAL RISK ASSESSMENT GUIDE

This section aims to help DOs understand the nature of reprisal, identify reprisal risks, develop suitable mitigation strategies and implement a plan to reduce the risk of reprisal to the discloser.

Understanding reprisal

Reprisal is defined under section 31(1) of PIDA. Reprisal occurs when a person adversely impacts, or threatens to adversely impact, another person's employment or working conditions because they made a disclosure, sought advice under PIDA or cooperated with a PIDA investigation.

Reprisal can come in many forms and is not always a single high-profile event such as termination or demotion. It can be covert and informal and may come from colleagues as well as superiors. The most common types of reprisal include threats, intimidation, discrimination, harassment, undermining of authority, heavier scrutiny of work, ostracism or exclusion, questioning of motives, unsafe or humiliating work, and being made to work with alleged wrongdoers.

When to conduct a reprisal risk assessment

Conduct a reprisal risk assessment at the following times:

- as soon as is practical after receiving a disclosure;
- before beginning an investigation, as part of the investigation planning process;
- as needed during the investigation; and
- before sharing the results of an investigation, even in draft form.

Reprisal may take place at any time. Therefore, ongoing reprisal risk assessments are necessary.

Step 1. Risk analysis and evaluation

Some factors make disclosers particularly vulnerable to reprisal:

Disclosers whose allegations are particularly egregious

Examples:

- alleged wrongdoing has taken place over a significant period of time
- alleged wrongdoer is in a high position of influence
- allegations are against multiple people
- allegations include significant harm or financial loss
- allegations include discrimination, harassment or violence

Disclosers whose identity could become known

Examples:

- discloser has stated their identity is known
- discloser has raised these concerns previously
- confidential investigation of the disclosure is not possible
- discloser can be easily identified due to the nature of the allegations
- discloser told someone they were making a disclosure

Consider these factors to the extent possible even if the discloser is anonymous.

Disclosers who are in vulnerable positions

Examples:

- discloser has expressed fear of reprisal
- respondent(s) has/have seniority over discloser or can easily affect discloser's working conditions

- discloser has been/is being performance managed
- discloser is an employee on a contract, auxiliary, part-time or works in an isolated location
- social or cultural inequities or power imbalances such as gender, race or sexual orientation are present that may disadvantage the discloser and/or advantage the respondent(s)
- lack of effective supervisory arrangements for respondents or others who are likely to commit reprisal
- allegations include discrimination, harassment and/or violence
- discloser and respondent work together in a physically isolated location and/or with little supervision

The respondent(s) or others are motivated to commit reprisal

Examples:

- respondent(s) will likely experience adverse consequences as a result of the investigation
- identity of respondent(s) cannot remain confidential during the investigation
- respondent(s) will be removed from the organization during the investigation
- respondent(s) and discloser have had a strained relationship in the past

There are other dynamics that suggest potential for reprisal

Examples:

- discloser does not have support network in the organization
- discloser and respondent(s) socialize outside of work

- a history of conflict in the workplace involving the discloser, respondent(s), management and/or colleagues
- a workplace culture that facilitates conflict, discrimination or harassment

Step 2. Reprisal risk mitigation strategies

General strategies:

- ☐ Keep the identity of the discloser confidential.
- ☐ Develop a support strategy for the discloser and respondent(s).
- ☐ Communicate with the discloser and respondent(s) at regular intervals.
 - Be proactive by reinforcing the Act's prohibitions against reprisal with the respondent(s) and any person cooperating with an investigation.
- ☐ Where appropriate, take steps to delay or limit workplace awareness of the investigation. For example, collect evidence after work hours.
- ☐ Consult with the discloser regarding alternate work arrangements such as changing lines of reporting or changing the discloser's/ respondent's work hours or work location.
- ☐ Delay notification to the Chief Executive and/ or respondent(s) in accordance with PIDA and where natural justice permits.
- ☐ Carefully consider when and how to notify the alleged wrongdoer/respondent(s) of the allegations against them.
- ☐ Ensure the disclosure is dealt with in an appropriate timeframe.

Interview tips:

- ☐ Give the discloser an alias (e.g. – Witness C) for use on all documents which may be used during interviews, to avoid unwittingly sharing the discloser’s identity.
- ☐ Interview the discloser as part of the investigation, if it would be expected that everyone in the workplace would be interviewed.
- ☐ Do not discuss details of the allegations which may only be known to the discloser, except to the extent necessary to conduct a procedurally fair and effective interview.

Counsel the **discloser** on the following:

- Disclosers should limit communication regarding any wrongdoing to discussions with the DO, a union representative (as applicable), legal counsel or other “support person” – this may be a spouse/partner, counsellor or other person who can provide emotional support but is not involved in the process or connected with the workplace.
- Disclosers should ensure that their chosen means of communication is private and is not subject to third party monitoring.
- Disclosers should take care to ensure they do not alert anyone who may be the subject of a disclosure that a disclosure has been made.
- Disclosers should only assist the DO when requested. Disclosers should not, on their own initiative, seek out additional information or evidence.
- Disclosers should notify the DO immediately of any reprisal measure, or suspicion that reprisals are occurring or have been threatened.

Counsel **witnesses** on the following:

- Remind witnesses that the investigative process is confidential and explain the prohibitions on disclosing personal information which could enable the identification of the employee who made the disclosure.
- Tell witnesses not to discuss their interview or their evidence with colleagues.
- Discuss the reprisal protection provisions and confidentiality obligations of PIDA with every witness.

Counsel **respondents** on the following:

- Only discuss the matter with the DO, union representative (as applicable) or legal counsel.
- Do not take any adverse measures against another employee whom they know or suspect has made the disclosure.

Step 3. Risk management plan

In light of the above strategies, develop a plan to eliminate or minimize reprisal risks. The risk management plan should be customized according to the particular situation of the discloser and the subject matter of the disclosure.

Consider *what* actions are appropriate, *who* will take these actions and *when* they will be executed. Multiple actions may need to be taken to mitigate multiple risks.

Repeat the reprisal risk assessment and re-evaluate the risk management plan on an ongoing basis as the risks and mitigation strategies may evolve over the course of an investigation.