



Tax-Exempt Organizations Alert: **Whistleblower Policies**

IRS Form 990, the annual return form filed by Section 501(c)(3) organizations with annual gross receipts of \$200,000 or more, asks nonprofit organizations to state whether the organization has adopted a whistleblower policy.

Although a nonprofit organization is not required to have a whistleblower policy in order to be tax-exempt, the IRS considers having such a policy a good governance practice that helps ensure that the organization's assets will be used consistently with its exempt purposes.

What is a Whistleblower Policy?

A whistleblower policy protects individuals who risk their careers to report unethical or unlawful practices within an organization.

Such a policy improves governance and accountability by giving the organization's management and board of directors opportunities to learn of unethical or unlawful practices directly from their employees and volunteers (rather than from the media, law enforcers or a regulatory agency) and to respond with prompt corrective action.

Every tax-exempt organization should strongly consider establishing a written whistleblower policy for at least three reasons.

1. Establishing a whistleblower policy is a proactive response to the IRS's increased interest in good governance policies.
2. Protecting whistleblowers is an essential component of an ethical and open work environment.
3. A written whistleblower policy that is vigorously enforced sends a message to the organization's board members, managers, employees and volunteers as well as to the IRS and the public that the organization will not tolerate misconduct.

What are the Components of an Effective Whistleblower Policy?

A whistleblower policy should:

- encourage staff and volunteers to come forward with credible information on illegal practices or violations of adopted policies of the organization,

- specify that the organization will protect such individuals from retaliation; and
- identify those staff or board members or outside parties to whom such information can be reported.

1. Encourage Employees and Volunteers to Become Whistleblowers

Every organization should encourage staff and volunteers to report suspected wrongdoing within the organization. The range of suspected wrongdoing covered by a whistleblower policy should be broad enough to include any action that is illegal or violates an adopted policy of the organization. Examples include:

- violations of the organization's client protection policies;
- theft or financial reporting that is intentionally misleading;
- improper or undocumented financial transactions;
- improper destruction of records,
- improper use of assets; and
- violations of the organization's conflict-of-interest policy.

Information about the organization's whistleblower policy should be:

- in writing;
- widely distributed to the organization's staff and volunteers; and
- incorporated into orientation programs, handbooks and ongoing training programs for employees and volunteers.

In determining how to publicize a whistleblower policy, an organization

should keep in mind that employees and volunteers are most likely to perceive a policy as credible when senior management and board members are vocal about its importance.

2. Protect Whistleblowers from Retaliation

Every organization must ensure that no punishment is inflicted on an employee or volunteer who, in good faith, raises concerns about practices that are illegal or that violate the organization's policies.

So long as the employee or volunteer has acted in good faith—without malice towards the organization or any individual within the organization and without having good reason to believe that the claim is false—the organization should not punish an employee or volunteer even if his or her claims are determined to be unfounded. Moreover, the organization should not punish anyone who, in good faith, cooperates in the investigation of a reported violation.

Examples of the types of punishment from which employees and volunteers must be protected include firing, demotion, suspension, harassment, failure to consider the employee for promotion, or any other discrimination.

A policy of non-retaliation is advisable with respect to all categories of concerns about unethical or illegal activity. Moreover, the Sarbanes-Oxley Act of 2002 prohibits a charitable organization from retaliating against a whistleblower who provides information on certain financial crimes delineated under federal law. A violation of the Sarbanes-Oxley prohibition on retaliation will subject an organization and any individual within

the organization who is responsible for the retaliation to civil and criminal sanctions.

An organization can protect itself against claims of retaliation made by employees or volunteers by:

- adopting a written policy of non-retaliation;
- educating managers and board members on whistleblower protections;
- identifying the managers or board members to whom complaints of whistleblower retaliation should be addressed;
- taking disciplinary action against any individual who engages in retaliation; and
- maintaining well-documented personnel files, including thorough records of termination or other disciplinary actions.

3. Establish Reporting and Investigation Procedures

All whistleblower policies should specify the individual or individuals to whom the employee or volunteer should address his or her concerns. To ensure that whistleblowers are as comfortable as possible in reporting wrongdoing, an organization should consider adopting the practice of designating at least one senior employee and at least one board member to whom concerns should be addressed.

In addition to specifying individuals within the organization to whom concerns should be addressed, all whistleblower policies should establish a confidential and anonymous procedure through which employees and volunteers

may raise their concerns. This provides employees and volunteers who report wrongful acts with an extra layer of protection against retaliation.

Large organizations should consider establishing a whistleblower hotline or an intranet site to facilitate anonymous reporting. As a simpler alternative, smaller organizations can establish confidential and anonymous reporting procedures by designating an external advisor, such as the independent accountant or outside attorney, to whom concerns should be addressed and by instructing that external advisor to contact the board of directors if there is a report.

In addition to establishing reporting procedures, all whistleblower policies should establish a procedure for handling whistleblower complaints. An organization must ensure that every concern raised by a whistleblower becomes the subject of a comprehensive and objective investigation.

The investigation can be conducted by the organization's Audit or other Board committee or by management personnel who have sufficient independence and authority to conduct a thorough and objective review. In the case of the senior members of management, it is generally considered a best practice to have the Board investigate any complaint.

After the investigation has been completed, the organization should not consider the whistleblower issue closed until either all problems revealed by the investigation have been addressed or the organization can explain to the affected

stakeholders why corrective action is not necessary.

Additional Resources

A sample whistleblower policy is attached to this notification. This sample policy may not be appropriate for every exempt organization. Your organization's actual policy should be drafted in consultation with legal counsel.

You may also find the following information helpful in establishing your organization's whistleblower policy:

- IRS, Form 990, Schedules and Instructions.
<https://www.irs.gov/charities-non-profits/annual-reporting-and-filing>
- Independent Sector, Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations (2015).
<https://www.independentsector.org/wp-content/uploads/2016/11/Principles2015-Web-1.pdf>
- Sample Whistleblower Policy, National Council of Nonprofit Associations
<http://www.councilofnonprofits.org/sites/default/files/Sample%20WhistleblowerPolicy%202.2010.pdf>

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The following is a sample document for nonprofit organizations incorporated in the District of Columbia only. It is intended only for corporations seeking to qualify as tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code. This sample is provided only for informational purposes and does not provide specific legal advice for any individual situation. Some or all of this document may not be appropriate for your organization. The sample also reflects the provisions of the Internal Revenue Code and the laws of the District of Columbia as of the date it is written. However, laws change. Only an attorney with knowledge of your particular situation can provide the legal assistance you need.

Sample Whistleblower Policy for Tax-Exempt Organization

Whistleblower Policy of [Organization]

[Organization] (the "Organization") requires its directors, officers, employees and volunteers to observe high standards of business and personal ethics in the conduct of their duties and responsibilities within the Organization. As representatives of the Organization, we must practice honesty and integrity in fulfilling our responsibilities and must comply with all applicable laws and regulations.

The purpose of this Whistleblower Policy is to create an ethical and open work environment, to ensure that Organization has a governance and accountability structure that supports its mission, and to encourage and enable directors, officers, employees and volunteers of the Organization to raise serious concerns about the occurrence of illegal or unethical actions within the Organization before turning to outside parties for resolution.

Notwithstanding anything contained in this Whistleblower Policy to the contrary, this Whistleblower Policy is not an employment contract and does not modify the employment relationship between the Organization and any of its directors, officers, employees or volunteers, nor does it change the fact that all employees of the Organization are employees at will. Nothing contained in this Whistleblower Policy provides any director, officers, employee or volunteer of the Organization with any additional rights or causes of action not otherwise available under applicable law.

Reporting Responsibility

All directors, officers, employees and volunteers of the Organization have a responsibility to report any action or suspected action taken within the Organization that is illegal, unethical or violates any adopted policy of the Organization ("Violations").

Anyone reporting a Violation must act in good faith, without malice to the organization or any individual in the organization and have reasonable grounds for believing that the information shared in the report indicates that a Violation has occurred. A person who makes a report does not have to prove that a Violation has occurred. However, any report

which the reporter has made maliciously or any report which the reporter has good reason to believe is false will be viewed as a serious disciplinary offense.

No Retaliation

No one who in good faith reports a Violation or who, in good faith, cooperates in the investigation of a Violation shall suffer harassment, retaliation or adverse employment consequences. Any individual within the Organization who retaliates against another individual who has reported a Violation in good faith or who, in good faith, has cooperated in the investigation of a Violation is subject to discipline, including termination of employment or volunteer status.

If you believe that an individual who has made a good faith report of a Violation or who has, in good faith, cooperated in the investigation of a Violation is suffering harassment, retaliation or adverse employment consequences, please contact [_____] (the "Compliance Officer").

Reporting Process

All directors, officers, employees, and volunteers should address their concerns relating to a Violation to any person within the Organization who can properly address those concerns. In most cases, the direct supervisor of an employee or volunteer is the person best suited to address a concern. However, if you are not comfortable speaking with your supervisor or if you are not satisfied with your supervisor's response, you are encouraged to speak to the Compliance Officer, to [designated board member] or to anyone in management you feel comfortable approaching.

An officer who believes that there has been an actual or probably material violation of the law, or any material breach of a duty owed to the Organization, must report the violation to a superior officer, to **[designated board member]** or the Compliance Manager. However, if the person to whom he or she would normally report is implicated in a Violation, the officer should report directly to the board of directors.

The Organization encourages anyone reporting a Violation to identify himself or herself when making a report in order to facilitate the investigation of the Violation. However, reports addressed to an individual within the Organization may be submitted on a confidential basis and reports may be submitted to the Compliance Officer anonymously by [Insert procedure for reporting Violations anonymously.] Reports will be kept confidential, to the extent possible, consistent with the need to conduct an adequate investigation.

Compliance Manager

A supervisor, manager and board member is required to notify the Compliance Officer of every report of a Violation. The Compliance Officer will notify the sender and

acknowledge receipt of a report of Violation within five business days, but only to the extent the sender's identity is disclosed or a return address is provided.

The Compliance Officer is responsible for promptly investigating all reported Violations and for causing appropriate corrective action to be taken if warranted by the investigation.

The audit committee of the board of directors is responsible for addressing all reported concerns or complaints of Violations relating to corporate accounting practices, internal controls or auditing. Therefore, the Compliance Officer must immediately notify the audit committee of any such concern or complaint. In addition, if the Compliance Officer deems it appropriate, the Compliance Officer may advise the Executive Director or the audit committee of any other reported Violations.

The Compliance Officer has direct access to the board of directors and is required to report to the board of directors at **[quarterly/annually]** about whether the Compliance Officer has received any reports under this policy.

Compliance Officer: **[Name, Phone Number, Mailing Address]**

Adopted by the Board of Directors at its Meeting on _____