

WHISTLEBLOWER PROTECTION

Labor & Employment Law Section Fall Meeting
Kaatskill Mountain Club Resort, Hunter, NY
September 21, 2012

I. Federal Whistleblower Protection:

A. Sarbanes Oxley: Most recent law to be added to the federal mixed bag of whistleblower protection laws. It was enacted by Congress to halt fraud in financial reporting.

1. Protected Parties & Activities

- Applies to publicly traded companies (companies that are either registered under §12 of the Securities Exchange Act of 1934 (“Exchange Act”) or that are required to file reports under §15d of the Exchange Act) as well as contractors, subcontractors and agents of publicly traded companies.
- Covered employers may not discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms or conditions of employment when an employee lawfully:
 - (1) Provides information or assists in an investigation regarding conduct that the employee *reasonably believes* constitutes a violation of federal criminal law relating to mail fraud, bank fraud or securities fraud, SEC rules or regulations, or federal law relating to fraud against shareholders; or
 - (2) Files, testifies, participates in or otherwise assists in a proceeding relating to an alleged violation of federal criminal law relating to such activities
- Employees are protected when the information or assistance is provided to, or the investigation is conducted by, a federal regulatory or law enforcement agency, a member of Congress, an individual with supervisory control over the employee, or any other individual who has authority to discover, investigate, or end the misconduct.

2. Provided Protection

- The Secretary of Labor has delegated authority for the enforcement of the “whistleblower” provisions of fourteen federal statutes to the Occupational Safety & Health Administration (“OSHA”), including Sarbanes-Oxley.
- To be considered timely, an employee alleging a violation must file a complaint within 90 days of the alleged violation (when the discriminatory decision has been made and communicated to employee), or may institute a suit in federal court

provided OSHA has not issued a final decision within 180 days of the filing of the complaint.

- In order for OSHA to conduct an investigation, an employee must make a prima facie showing that:
 - (1) the employee engaged in protected conduct;
 - (2) the employer/named individual knew or suspected that the employee had engaged in protected conduct;
 - (3) the employee suffered an unfavorable personnel action;
 - (4) circumstances were sufficient to raise the inference that the protected activity was a *contributing factor* in the unfavorable personnel action.
- Even if the employee alleges the foregoing, a complaint will not be investigated if the employer/named individual demonstrates by ***clear and convincing evidence*** that it would have taken the same unfavorable personnel action in absence of the employee's protected conduct.
- An employee who succeeds on his/her whistleblower claim is entitled to be made whole, and will be awarded, including others, reinstatement with the same seniority status, back pay with interest, and special damages sustained as a result of the discrimination, including litigation costs, expert witness fees and reasonable attorney's fees.
- An employer may be awarded reasonable attorney's fees up to a whopping \$1,000 if an employee's complaint is found frivolous or brought with bad faith

3. Other Provisions

- Both public and private employers are also subject to criminal penalties for retaliating against employee for engaging in protected conduct. Criminal penalties include fines and up to 10 years in prison.

B. False Claims Act: (31 U.S.C. §3730(h))

1. Protected Parties

- Protects any private citizen who reports or participates in a legal proceeding or investigation related to false claims made by his/her employer for government payments.

2. Protected Activity

- Any act disclosure by a current or ***former*** employee, including but not limited to, initiating the claim, participating in an investigation; or providing testimony in

furtherance of an action involving false claims made to obtain government payments.

- The “whistleblower” does not have to be the individual who files a claim to receive protection.
- The “whistleblower” only needs to have a ***good faith belief*** that a false claim has been made, he/she does not have to prove an actual false claim.

3. Provided Protection

- An employee or former employee may not be discharged, demoted, suspended, threatened, harassed, or be the subject of any adverse employment action because of the employee's participation in the initiation, investigation, or prosecution of his/her employer's involvement in making a fraudulent claim for government payments.
- The statute of limitations for bringing such claim is 6 years in most jurisdictions, including New York, but is currently shorter in some jurisdictions, such as California.
- To make a claim, an employee must also establish that the employer knew about the employee's participation in the investigation of fraud and the adverse employment action was the result of the employee's protected activity.
- If the underlying claim of fraud is established, the employee/former employee may be awarded between 15% and 30 % of the recovery against contractor.

II. New York State Whistleblower Protection:

A. Public Sector – N.Y. Civ. Serv. Law §75-b

1. Protected Employees

- Any public employee, except judges or justices of the NYS Unified Court System

2. Covered Employers

- New York State
- Any county, city, town, village or other municipality
- School districts or other entity running a public school, college, or university (covers charter schools)
- Public improvement or special districts
- Public Authority, Commission, or Public Benefit Corporation
- Any other public corporation

3. Protected Conduct

- Employee's disclosure to a **government body** of information, which the employee **reasonably believes** to be true and improper governmental action, regarding a violation of law, rule or regulation (Federal or State) which creates a substantial and specific danger to public health and safety
- To be protected, the employee, **prior to disclosing**, must make a good faith effort to provide his/her employer the information to be disclosed and give the employer a reasonable time to correct the activity, policy, practice at issue, **unless** there is an imminent and serious danger to public health and safety.
- The following has been held to establish the requisite threat to public safety:
 - Claim that doctor was practicing medicine while impaired by a psychiatric disability as evidenced by his bizarre behavior. *Finklestein v. Cornell Univ. Med. Coll.*, 269 A.D.2d 114, 117 (1st Dep't 2000);
 - Claim that paramedics pronounced a live woman dead without examining her or attempting resuscitation, that they attempted to cover up a second call to the same location, that they did not transport the critically ill patient to the closest hospital, and that they engaged in improper resuscitation. *Rodgers v. Lenox Hill Hosp.*, 211 A.D.2d 248, 253-254 (1st Dep't 1995).
- Where an employee is subject to dismissal under a final and binding arbitration provision contained in a collectively negotiated agreement, the employee **must** assert the protections of 75-b as a defense before the arbitrator. See Civ. Serv. Law § 75-b(3)(a); *Obot v. New York State Dept. of Correctional Serv.*, 256 A.D.2d 1089 (4th Dep't 1998).
- Civ. Serv. Law § 75-b requires the arbitrator or hearing officer to consider and determine the merits of an employee's retaliation defense where such a defense is raised, and to dismiss the disciplinary proceeding if "the dismissal or other disciplinary action is based solely" on the employer's desire to retaliate. *In re Kowaleski (New York State Dept. of Correctional Services)*, 16 N.Y.3d 85 (2010).
- The protection afforded under the "whistleblower" law is not available where the employer has "a separate and independent basis" for the alleged adverse actions taken against the employee. See *Brey v. Board of Educ. of Jeffersonville-Youngsville Central*, 245 A.D.2d 613, 615 (3d Dep't 1997).
- Provides for reinstatement and back pay if the employee can show that the employer retaliated illegally for the protected activity.

4. Statute of Limitations

- Employee must bring a cause of action with one year of the retaliatory conduct. N.Y. Civ. Serv. Law § 75-b(3)(c).

5. Prohibited Employer Conduct

- A covered employer may not dismiss or take other disciplinary action or other adverse personnel action (an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance) against a protected employee for his/her engagement in protected conduct. See N.Y. Civ. Serv. Law § 75-b(2)(a).

B. Private Sector - N.Y. Lab. Law §§740, 741

Labor Law §740

1. Protected Employees

- Any employee

2. Covered Employees

- Any employer

3. Protected Activities

- Reporting or threatening to disclose to an **employer** or **public body** a policy or practice of the employer that is in the violation of any law (Federal or State) which violation creates and presents a substantial and specific danger to public health or safety, or constitutes health care fraud; provides information to or testifies in front of a public body, or objects to or refuses to participate in violation.
- To be protected, there must be an actual violation. The employee's reasonable belief or good faith is insufficient. In other words, an employee may be fired for reporting "possible" violations of law. *Bordell v. General Electric Co.*, 88 N.Y.2d 869 (1996).
- To succeed, the employee must establish that the discharge was in consequence of reporting. *Lambert v. General Electric Co.*, 244 A.D.2d 841 (3d Dep't 1997).
- Institution of a §740 claim irrevocably waives all other claims based upon the same facts. N.Y. Lab. Law § 740(7). For example, it has been held that the waiver provision of the whistleblower statute required dismissal of a hospital employee's breach of contract claim against the hospital because such claim was based upon the theory that the hospital breached its contract by subjecting him to retaliatory conduct. *Bordon v. North Shore Univ. Hosp.*, 275 A.D.2d 335 (2d

Dep't 2000). By contrast, the same provision did not require dismissal against a doctor for tortious interference with his contract with the hospital because such claim was separate and distinct from his claim under the whistleblower statute alleging retaliatory personnel action after raising concerns about the quality of medical care provided to two patents. *Id.*

4. Prohibited Employer Conduct

- An employer may not discharge, suspend, demote or take other adverse action against an employee who engages in protected activities.
- Statute of Limitations – must bring cause of action within one year of the retaliatory conduct. N.Y. Lab. Law § 740(4)(a).

Labor Law §741 – In 2002, a “parallel” whistleblower statute was enacted to provide health care employees with additional protections. It specifically pertains to alleged legal practices that pose a “substantial and specific danger” to public health and safety or a “significant threat” to the health of a specific patient.

1. Protected Employees

- Any individual who performs health care services for and under the control and direction of any public or private employer who provides health care services.

2. Covered Employers

- Any partnership, association, corporation, state, and municipality which:
 - (1) provides health care services in a licensed facility under the public health law;
 - (2) provides health care services within primary or secondary public or private school or university;
 - (3) operates and provides health care under the mental hygiene law or correction law; and
 - (4) registered with department of education.

3. Protected Activity

- Disclosing or threatening to disclose to a public body a policy or practice of an employer that the employee in good faith reasonably believes constitutes improper quality of patient care (any practice, action or failure to act of an employee which violates any law, rule, regulation or declaratory ruling adopted pursuant to law where the violation relates to matters which may present a

substantial and specific danger to public health or safety or a significant threat to the health of a specific patient.

- Objects or refuses to participate in an employer's policy or practice which employee, in good faith, reasonably believes constitutes improper quality of patient care.
- To be protected, the employee has to first bring the improper quality of patient care concerns to the attention of a supervisor and has to give the employer a reasonably opportunity to correct the activity or practice, unless the quality of care concern poses an immediate threat.

4. Employer Prohibited Conduct

- An employer may not discharge, suspend, demote or take other adverse employment action against an employee who engages in protected activities.

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