



## **Whistleblower Policies Under the Nonprofit Revitalization Act of 2013**

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The Nonprofit Revitalization Act of 2013 ("NPRA") amended the Not-for-Profit Corporation Law ("N-PCL") and the Estates, Powers and Trusts Law ("EPTL") in numerous ways, including to require certain not-for-profit corporations and charitable trusts to adopt whistleblower policies. Where appropriate, these amendments to the N-PCL and EPTL are referenced together as "the amendments," and the corporations and trusts to which they apply are referenced as "nonprofits."

This guidance describes the specific requirements of the amendments and exceptions to them. The Attorney General's Charities Bureau drafted it to assist nonprofits required to implement whistleblower policies, by clarifying the law and responding to questions the Bureau has received. It is not substitute for advice from a nonprofit's attorney.

### **What is a whistleblower policy?**

Generally, a whistleblower policy is a procedure by which individuals may report suspected improper conduct within an organization without fear of retaliation or adverse employment consequences for doing so, and a procedure within the organization for collecting, recording, reporting, and addressing allegations of suspected improper conduct. *See* N-PCL § 715-b; EPTL § 8-1.9(e).

### **What nonprofits must have a whistleblower policy?**

A not-for-profit corporation or a charitable trust that has 20 or more employees *and* had annual revenue in excess of \$1,000,000 in the prior fiscal year must have a whistleblower policy. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1).

Although the NPRA requires only nonprofits that meet these criteria to have whistleblower policies, smaller nonprofits should consider adopting such policies.

The Internal Revenue Service Form 990 specifically requests all organizations completing the form to respond to question 13 of Part VI:

Did the organization have a written whistleblower policy?

As the Internal Revenue Service states in its Form 990 instructions, "A whistleblower policy encourages staff and volunteers to come forward with credible information on illegal practices or violations of adopted policies of the organization, specifies that the organization will protect the individual from retaliation, and identifies those staff or board members or outside parties to whom such information can be reported."

The IRS also notes:

"Certain federal or state laws provide protection against whistleblower retaliation and prohibit destruction of certain documents. For instance, while the federal Sarbanes-Oxley legislation generally does not pertain to tax-exempt organizations, it does impose criminal liability on tax-exempt as well as other organizations for (1) retaliation against whistleblowers that report federal offenses, and (2) for destruction of records with the intent to obstruct a federal investigation. See 18 U.S.C. sections 1513(e) and 1519. Also note that an organization is required to keep books and records relevant to its tax exemption and its filings with the IRS. Some states provide additional protection for whistleblowers." Source: Instructions to the 2014 IRS Form 990, page 23

Whistleblower policies are generally recognized as part of an effective compliance program and an important part of an effective enterprise risk management and internal control assessment program. See, Committee of Sponsoring Organizations of the Treadway Commission (COSO) 2013 Internal Control.

#### **What if a nonprofit already has a whistleblower policy?**

If a nonprofit organization "has adopted and possesses" a whistleblower policy pursuant to federal, state or local law, and that policy "is substantially consistent with" the whistleblower policy requirements of the amendments (discussed below), the organization will be considered in compliance with the amendments and does not need to adopt a new whistleblower policy. See N-PCL § 715-b(c); EPTL § 8-1.9(e)(3). The Charities Bureau interprets "has adopted and possesses" to mean that the nonprofit has formally adopted a whistleblower policy by action of the governing board or a committee of the board and acts in compliance with that policy. An example of such whistleblower policy is that contained in 18 NYCRR 521 for Medicaid Provider Compliance programs, which applies to New York Medicaid providers with Medicaid revenues above a dollar threshold.

In addition, a not-for-profit corporation is not required to adopt a new whistleblower policy if: (1) it is a "state authority" or "local authority" under New York's Public Authorities Law; (2) its board members have already established written policies and procedures protecting employees from retaliation for disclosing information concerning misconduct; *and* (3) the organization is prohibited by the Public Authorities Law from taking adverse actions against the whistleblower. *See* N-PCL § 715-b(c).

If a nonprofit has a whistleblower policy *but* that policy does not meet either of the two exceptions above, it must either revise its policy or adopt a new whistleblower policy in compliance with the amendments. A nonprofit that does not have a whistleblower policy, must adopt a policy in compliance with N-PCL § 715-b.

In addition to complying with the whistleblower provisions of N-PCL § 715-b, nonprofits must comply with other applicable laws. For example, New York's Labor and Civil Service Laws also protect whistleblowers in certain situations. *See* N.Y. Labor Law § 740; N.Y. Civil Service Law § 75-b.

#### **What *must* a nonprofit's whistleblower policy include?**

The whistleblower policy must include each of the following provisions identified in the NPRA:

- First, the policy must include procedures for reporting violations or suspected violations of laws or corporate policies, including procedures for maintaining the confidentiality of the reported information, and for tracking and reporting on the results of whistleblower reports. These procedures must address appropriate protection from retaliation for persons who report suspected improper conduct. The policy must provide that no director, officer, employee, or volunteer who in good faith reports any action or suspected action taken by or within the corporation that is illegal, fraudulent, or in violation of legally required policies of the corporation shall suffer intimidation, harassment, discrimination, or other retaliation or, in the case of employees, adverse employment consequence. N-PCL § 715-b(b)(1) and EPTL §-b(b)(1) and EPTL § 8-1.9(e)(2)(A).

These procedures should address: (i) the individual(s) or entity(ies) to whom violations may be reported; (ii) the possible means of reporting, such as email or telephone; (iii) the investigative steps the organization will take; (iv) the consequences for violating the policies designed to protect from retaliation persons who report improper conduct and (v) any other procedures the organization deems appropriate. The procedures should provide for an anonymous reporting option.

- Second, the policy must designate one or more employee(s), officer(s), trustee(s) or director(s) of the nonprofit to administer the policy. N-PCL § 715-b(b)(2) and EPTL § 8-1.9(e)(2)(B).

For example, the policy could designate the Chair of the Audit Committee as the person to receive and investigate complaints regarding financial improprieties. It could designate the head of the Human Resources Department as the person to receive and investigate complaints regarding violations of the corporation's applicable human resources policies, problems with co-workers or managers, or issues related to alleged employment discrimination or sexual or any other form of unlawful harassment.

- Each designated person must be required to report on the policy, its implementation, and the general type and resolution of whistleblower complaints to the Audit Committee or other committee of the Board consisting of independent Directors, or to the Board itself. N-PCL § 715-b(b)(2) and EPTL § 8-1.9(e)(2)(B).

Nothing in this guidance is intended to prevent the formation or use of internal compliance committees under the guidance of the Board or a Board Committee. The designated person or persons must accept and implement this responsibility, and should have sufficient knowledge, resources, and training to carry it out, maintain records of whistleblower interactions, and identify and address needs for improvement in the policy.

- Finally, a copy of the policy must be given to all officers, employees, trustees, directors and volunteers. (At a not-for-profit corporation, the policy only needs to be given to volunteers who provide substantial services; at charitable trusts, however, it must be given to all volunteers.) N-PCL § 715-b(b)(3) and EPTL § 8-1.9(e)(2)(C).

#### **What is an “adopted policy” of an organization?**

Adopted policies as to which a nonprofit must provide whistleblower protection include, without limitation, policies formally adopted by the nonprofit's governing body that are designed to: prevent financial wrongdoing, such as internal and external financial controls, accounting policies, and policies prohibiting fraud, theft, embezzlement, bribery, kickbacks, and abuse or misuse of corporate assets; conflict of interest policies; policies addressing unethical conduct; and harassment and discrimination policies. See N-PCL § 715-b(a); EPTL § 8-1.9(e)(1). Some complaints of violations of policies adopted by the Board may not be entitled to whistleblower protection. This could include, for instance, a complaint that a co-worker is wearing sandals in violation of a dress code that is contained in the employment manual adopted by the Board.

#### **How does the Whistleblower Policy have to be distributed?**

The N-PCL requires a nonprofit to distribute a copy of its whistleblower policy to the individuals described above. Best practices would include an initial distribution of the whistleblower policy to each of the necessary individuals (for example, as part of the new

employee handbook or new director, employee or volunteer orientation), with the requirement that they acknowledge that they have received and reviewed the policy. However, provision of "a copy of the policy" requirement may be satisfied by posting the policy on the organization's publicly available website. It is incumbent on the organization to ensure that every individual entitled to receive the policy actually has access to it, so a "hard copy" should be given to anyone who requests it in that form. In addition, nonprofits should promote ongoing awareness of the policy and its requirements and protections as part of their normal compliance training and communication.

### **Who is a volunteer?**

The NPRA does not contain a definition of "volunteer." In making a determination as to who is a volunteer covered by the provisions of the NPRA, and whether a volunteer provides "substantial services," a corporation should look to the circumstances of the organization and the role of and relationship with people who assist it in carrying out its mission. A nonprofit may also refer to the criteria used to determine who is a volunteer in determining the number of volunteers required to be reported in its IRS Form 990. Also, some nonprofits may have a volunteer policy that will guide them in identifying who qualifies as a volunteer. Each nonprofit's definition will reflect its activities and the role played by individuals who assist it without being paid.

### **What constitutes "retaliation" or an "adverse employment consequence"?**

Retaliation and adverse employment consequences include those identified in the NPRA (intimidation, harassment and discrimination) and can include failure to promote, adverse impact on compensation, termination, discharge, suspension, demotion, other change in responsibilities, whether formal or informal, and other negative consequences. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1).

### **What constitutes "good faith"?**

A good faith report is one which the whistleblower reasonably believes to be true, and reasonably believes to constitute illegal conduct, fraud, or a violation of an organization's policy. The good faith requirement focuses on the existence of the violation or suspected violation, and not necessarily on the motives of the whistleblower in bringing it to the attention of the organization. A whistleblower policy might provide that a whistleblower does not necessarily get immunity for participating or being complicit in the violation or suspected violation that is the subject of her or his report or subsequent investigations. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1).

**How do the New York False Claims Act whistleblower provisions interact with the whistleblower requirements of the NPRA?**

For nonprofits that are recipients of funds from the federal government, or from the State of New York or New York county and municipal governments, it is important to recognize the additional requirements under Article XIII of the State Finance Law (New York's False Claims Act) which apply to whistleblowers and whistleblower policies. That statute includes provisions to protect individuals making whistleblower complaints concerning violations of the New York False Claims Act, and nonprofits that receive government funds should consult it when drafting their whistleblower policies.

**Are sample whistleblower policies available?**

There are many sample whistleblower policies publicly available. However, any sample whistleblower policy should be used for guidance *only*. No sample policy can be appropriate for all nonprofits. Each nonprofit is cautioned to tailor its whistleblower policy to its own needs and risks.