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U.S. LEGISLATIVE PROTECTION FOR PUBLIC SECTOR WHISTLEBLOWERS

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INTRODUCTION

The past couple of decades have seen growing support in the United States for the statutory protection of employees who act in the public interest by disclosing conduct by their employers that constitutes a breach of law or regulations, or that is otherwise contrary to public policy. A number of federal and state statutes have been enacted to promote such employee disclosure of information, which is known as "whistleblowing." Some statutes provide general protection with respect to retaliation against certain employees who blow the whistle, while other statutes pertaining to particular subject areas provide protection for employees exercising specific rights that they confer.

This paper is limited to a discussion of U.S. statutory protection for public sector whistleblowers, both federally and in the selected states of California, Connecticut, New Jersey and New York.

U.S. FEDERAL STATUTORY PROTECTION

A. Examples of Specific Statutory Anti-Retaliation Provisions

A number of U.S. federal statutes that create rights for and impose duties upon employees contain protections against the discharge or disciplining of such employees who disclose wrongdoing by their employers in the exercise or performance of these rights or duties. Employees in both the public and private sectors are protected by such anti-retaliation provisions.

Such provisions are primarily found in federal statutes regulating employment. They generally prohibit employment reprisals against employees who complain to a specified public authority about their employer's breach of statutory duties, such as maintenance of safety in the workplace or payment of minimum wages, or against employees who claim a statutory benefit, such as workers' compensation. Examples include the whistleblower provisions in the *Occupational Safety and Health Act*,(1) the *Fair Labor Standards Act*,(2) and the *Age Discrimination in Employment Act*.(3)

As a general rule, these anti-retaliation provisions provide for reinstatement of an employee who has been subject to retaliation, and for compensation for loss of wages and seniority. Such provisions in some statutes also provide for civil sanctions against an employer who takes an employment reprisal, including the imposition of liability for the employee's legal costs and, where appropriate, exemplary damages.

Anti-retaliation provisions also appear in a number of other federal statutes dealing with specific issues. For example, they are commonly included in environmental legislation, such as the *Toxic Substances Control Act*,(4) the *Water Pollution Control Act*,(5) and the *Clean Air Act*,(6) provisions of which protect any public or private sector employee who discloses potential employer violations of these environmental laws. The relevant provisions in these statutes are virtually identical and provide for an administrative investigation and hearing within the U.S. Department of Labor. Relief includes reinstatement, back pay, compensatory damages, and attorneys' fees. Some of the Acts also provide for the awarding of exemplary damages.

B. *Civil Service Reform Act of 1978*

While the above statutory provisions offer some protection for public and private sector whistleblowers in the U.S., the protection is generally limited to disclosure of specific statutory breaches pertaining to the particular subject areas covered by the statutes such as labour standards, labour relations, occupational safety and health, workers' compensation, and

(1) 29 U.S.C.A., s. 660(c).

(2) 29 U.S.C.A., s. 215-216.

(3) 29 U.S.C.A., s. 623(d), 631(a).

(4) 15 U.S.C.A., s. 2622.

(5) 33 U.S.C.A., s. 1367.

(6) 42 U.S.C.A., s. 7622.

environmental matters. Federal public sector employees who have disclosed or who wish to disclose government wrongdoing are granted much broader protection under the *Civil Service Reform Act of 1978*,(7) hereinafter referred to as the CSRA.

Under the CSRA, a federal public employee who believes that he or she has been subject to a reprisal for whistleblowing may seek relief in one of several ways. First, where the reprisal has been of a serious nature, such as a discharge or demotion, the employee may appeal directly to the Merit Systems Protection Board (MSPB) which was established by the Act, alleging that a "prohibited personnel action" has been taken as a reprisal for whistleblowing.(8) Second, an employee who is subject to a collective agreement may be entitled to claim the CSRA protection as a defence to disciplinary action by the employer in the context of negotiated grievance procedures.(9) Finally, an employee may file a complaint with the Office of Special Counsel (OSC), also established under the CSRA, which is empowered to investigate the complaint and seek corrective action.(10)

In addition to providing retrospective protection for employees who have been subject to reprisal, the CSRA also creates a mechanism through which a prospective whistleblower, who might otherwise hesitate to make a disclosure for fear of reprisal, may make disclosure anonymously to the OSC and thereby ensure that the information is brought to the attention of the appropriate authorities.

It should be noted that the CSRA does not provide protection for all federal public employees. Under the Act, the following positions are excluded:

> (i) [a position which is] excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

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(7) The Act appears at 5 U.S.C.A., ss. 1201-1222 and 2302. Portions of the following summary of the Act are based on the discussion in: Ontario, Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees*, 1987, at pp. 235-242.

(8) 5 U.S.C.A., s. 7701. Such an appeal may also allege other forms of "prohibited personnel practices," such as discrimination on the grounds of age, race or sex (s. 2302(b)(1)).

(9) Whistleblowing protection may be provided as a matter of contract. Many collective agreements governing federal public employees incorporate by reference as a term of the agreement the protections established by the CSRA. Other collective agreements reproduce the specific language of the anti-retaliation provision contained in the CSRA (i.e., 5 U.S.C.A., s. 2302(b)(8)).

(10) 5 U.S.C.A., s. 1212.

> (ii) [any position] excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration.(11)

In addition, the Act does not apply to:

> (i) a Government corporation, except in the case of a prohibited personnel practice described under [5 U.S.C.A., s. 2302(b)(8)];
>
> (ii) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof, the principal function of which is the conduct of foreign intelligence or counterintelligence activities; or
>
> (iii) the General Accounting Office.(12)

The Act prohibits an employment reprisal against an employee for a disclosure of information that the employee reasonably believes evidences:

> (i) a violation of any law, rule or regulation; or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.(13)

An "employment reprisal" may be in the form of any "personnel action," which is broadly defined in the Act to include such matters as discharges, performance evaluations, decisions concerning pay benefits and awards and "any other significant changes in duties, responsibilities, or working conditions."(14)

Under the above provision, protection is available to the whistleblower irrespective of to whom the disclosure is made, except in specified instances. Public disclosure of wrongdoing may be made by an employee under the Act as long as it is "not specifically

(11) 5 U.S.C.A., s. 2302(a)(2)(B).

(12) 5 U.S.C.A., s. 2302(a)(2)(C).

(13) 5 U.S.C.A., s. 2302(b)(8).

(14) 5 U.S.C.A., s. 2302(a)(2)(A).

prohibited by law" or is "not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs."(15)

Protected disclosure of government wrongdoing that falls within one of those confidential categories may be made under the Act to the OSC, the Inspector General of an agency,(16) or another employee designated by the head of the agency to receive such disclosures.(17)

As a result of important amendments to the CSRA in 1989, the OSC was created as an independent agency rather than as an independent component of the MSPB as it previously was. Its three primary responsibilities, however, remained as follows:

> (1) the investigation of allegations of activities prohibited by civil service law, rule or regulation, primarily allegations of prohibited personnel practices as defined in the CSRA and, if warranted, the initiation of a disciplinary or a corrective action;
>
> (2) the provision of a "secure channel" through which allegations of waste, fraud, mismanagement, illegality, abuse of authority, or a substantial and specific danger to public health or safety may be made without fear of retaliation and without disclosure of identity except with the employee's consent; and
>
> (3) the enforcement of the *Hatch Act*, which restrains partisan political activities of civil servants.(18)

Whistleblowing constitutes only a small portion of the matters that are directed to the OSC.

The CSRA requires the Special Counsel to maintain the anonymity of a federal public employee who blows the whistle to him/her, unless the employee consents to disclosure of his/her identity or "unless the Special Counsel determines that disclosure of the individual's

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(15) 5 U.S.C.A., s. 2302(b)(8)(A).

(16) Under the *Inspector General Act of 1978*, P.L. 95-492, 92 Stat. 1101 (1978) as amended, Congress created a mechanism for the establishment within each agency of government of an "Inspector General" who would be charged with the internal investigation of complaints and allegations made by employees of that agency.

(17) 5 U.S.C.A., s. 2302(b)(8)(B).

(18) "Report of the Office of the Comptroller General," in *Hearings before the Subcommittee on Civil Service of the Committee on Post Office and Civil Service*, House of Representatives, 1st Session, 99th Congress (1985), Serial No. 99-19, pp. 30-31, as cited in: Ontario, Law Reform Commission, *Report on Political Activity, Public Comment and Disclosure by Crown Employees*, 1986, at p. 238.

identity is necessary because of an imminent danger to public health or safety or imminent violation of any criminal law."[19] Prior to the 1989 amendments, the Act provided that the identity of the whistleblower could not be disclosed without his or her consent unless the Special Counsel determined that such disclosure of identity was "necessary in order to carry out the functions of the Special Counsel." It was apparently felt that to retain this provision could have seriously undermined efforts to encourage whistleblowers to come forward with disclosures. It would be unrealistic to expect whistleblowers to volunteer information if they risked the disclosure of their names and possible retaliation.

The Special Counsel, on receiving information from a federal employee, must determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation or gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety. If he or she decides there is such a likelihood, the information must be promptly transmitted to the appropriate agency head, who must investigate the matter and submit a written report regarding the alleged wrongdoing within a prescribed time.[20]

The written report must be reviewed and signed by the agency head, and must include the following information:

> (1) a summary of the information with respect to which the investigation was initiated;
>
> (2) a description of the conduct of the investigation;
>
> (3) a summary of any evidence obtained from the investigation;
>
> (4) a listing of any violation or apparent violation of any law, rule or regulation; and
>
> (5) a description of any corrective action taken or planned as a result of the investigation, such as
> (A) changes in agency rules, regulations or practices;
> (B) the restoration of any aggrieved employee;
> (C) disciplinary action against any employee; and
> (D) referral to the Attorney General of any evidence of a criminal violation.[21]

(19) 5 U.S.C.A., s. 1213(h).

(20) 5 U.S.C.A., s. 1213(c)(1).

(21) 5 U.S.C.A., s. 1213(d).

The agency is not, however, authorized to disclose information that is specifically prohibited from disclosure by "any other provision of law" or specifically required by Executive Order to be kept secret in the interest of national defence or the conduct of foreign affairs.(22)

The agency's report must be submitted to the Special Counsel, who must in turn transmit a copy of it to the complainant whistleblower, unless it contains evidence of a criminal violation that has been referred to the Attorney General.(23) The complainant may also submit comments to the Special Counsel on the agency report within a prescribed time.(24) The Special Counsel must review the report and determine whether the findings of the agency head appear reasonable and whether the report contains the required information set out above.(25) The Special Counsel must then transmit the report, together with any comments provided by the complainant whistleblower and any appropriate comments or recommendations by the Special Counsel, to the President and the congressional committees with jurisdiction over the agency that the disclosure involves.(26)

Should the agency head fail to submit the report within the prescribed time, a copy of the information that has been sent to the agency head must be transmitted by the Special Counsel to the President and the congressional committees with jurisdiction over the relevant agency, along with a statement noting the failure of the head of the agency to file the required report.(27)

The Special Counsel must maintain and make publicly available a list of those matters, other than criminal matters, that have been referred to agency heads and of reports by those heads.(28) The Special Counsel must also take steps to ensure that the public list does not contain any information prohibited by law or Executive Order.(29)

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(22) 5 U.S.C.A., s. 1213(i).

(23) 5 U.S.C.A., s. 1213(e)(1).

(24) *Ibid*.

(25) 5 U.S.C.A., s. 1213(e)(2).

(26) 5 U.S.C.A., s. 1213(e)(3).

(27) 5 U.S.C.A., s. 1213(e)(4).

(28) 5 U.S.C.A., s. 1219(a).

(29) 5 U.S.C.A., s. 1219(b).

Where the Special Counsel determines that there are reasonable grounds to believe that a prohibited reprisal has occurred, exists, or is to be taken, and requires corrective action, he or she must report this to the MSPB, the agency involved and the Office of Personnel Management, together with any findings or recommendations. He or she may also report such determination, findings and recommendations to the President. In the report, the Special Counsel may include recommendations for corrective action.(30) If, after a reasonable time, the agency has not taken that corrective action, the Special Counsel may petition the MSPB to do so.(31)

The 1989 amendments also made it easier for a U.S. federal public sector whistleblower (or the Special Counsel acting on the individual's behalf) to prove that a whistleblower reprisal has taken place. The legislation lowered the burden of proof for federal whistleblowers who have suffered reprisals, while raising the burden of proof for federal agencies defending their personnel decisions. The federal employee must prove by a preponderance of evidence that the whistleblowing was a contributing factor in the employment reprisal.(32) This test was specifically intended to overrule case law which required a whistleblower seeking redress to prove that his or her protected conduct was a "significant," "motivating," "substantial" or "predominant" factor in an employment reprisal. If a whistleblower proves that whistleblowing is a contributing factor in such reprisal, the agency must demonstrate by "clear and convincing evidence" that it would have taken the same action in the absence of the whistleblowing.(33) "Clear and convincing evidence" is a higher standard than the "preponderance of evidence" standard previously used and which applies in most civil matters in American courts.

EXAMPLES OF U.S. STATE LEGISLATION

At the state level, as at the federal level, a number of issue-specific statutes, primarily those covering employment-related or environmental matters, protect employees within the Act's jurisdiction who complain to a specified public authority about breaches of their employers' statutory duties. In addition, at least 35 states have also enacted broader

(30) 5 U.S.C.A., s. 1214(b)(2)(B).

(31) 5 U.S.C.A., s. 1214(b)(2)(C).

(32) 5 U.S.C.A., s. 1221(e)(1).

(33) 5 U.S.C.A., s. 1221(e)(2).

whistleblower protection legislation designed specifically to protect public sector employees generally; some of those statutes also protect employees in the private sector.(34)

For illustrative purposes, the legislative provisions protecting public sector whistleblowers in the states of California, Connecticut, New Jersey and New York will be discussed below.

A. California

In California, state employees who report improper governmental activities are protected against retaliation by their superiors by provisions in the *California Whistleblowing Protection Act*.(35)

This Act states:

> The Legislature finds and declares that state employees should be free to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution. The Legislature further finds and declares that public servants best serve the citizenry when they can be candid and honest without reservation in conducting the people's business.(36)

For purposes of the Act, the following definitions are relevant:

> (a) "Employee" means any individual appointed by the Governor or employed or holding office in a state agency as defined by section 11000, including, for purposes of sections 8547.3 to 8547.7, inclusive, any employee of the California State University.
>
> (b) "Improper governmental activity" means any activity by a state agency or by an employee that is undertaken in the performance of the employee's official duties, whether or not that action is within the scope of his or her employment, and that (1) is in violation of any state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform duty, or (2) is economically wasteful, or involves gross misconduct,

(34) For further details, see, for example: Daniel P. Westman, *The Law of Retaliatory Discharge*, Bureau of National Affairs Inc., Washington, 1991, Chapters 3 and 4. Appendices 3 and 4 to the book summarize the state statutes that protect whistleblowers in the public and private sectors; Marcia Miceli and Janet P. Near, *Blowing the Whistle*, Lexington Books, 1992, Table 6-2.

(35) West's Annotated California Codes, Government Code, ss. 8547-8547.12

(36) *Ibid.*, s. 8547.1.

> incompetency or inefficiency. For purposes of sections 8547.4, 8547.5, 8547.10 and 8547.11, "improper governmental activity" includes any activity by the University of California or by an employee, including an officer or faculty member, who otherwise meets the criteria of this subdivision.
>
> (c) "Person" means any individual, corporation, trust, association, any state or local government, or any agency or instrumentality of any of the foregoing.
>
> (d) "Protected disclosure" means any good faith communication that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.
>
> (e) "Illegal order" means any directive to violate or assist in violating a federal, state or local law, rule or regulation or any order to work or cause others to work in conditions outside of their line of duty that would unreasonably threaten the health or safety of employees or the public.
>
> (f) "State agency" is defined by section 11000. "State agency" includes the University of California for purposes of sections 8547.5 to 8547.7, inclusive, and the California State University for purposes of sections 8547.3 to 8547.7, inclusive.(37)

Section 11000, referred to above, generally defines a "state agency" to include any state office, officer, department, division, bureau, board and commission.

An anti-retaliation provision in the statute provides that:

> (a) An employee may not directly or indirectly use or attempt to use the official authority or influence of the employee for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with the rights conferred pursuant to this article.
>
> (b) For the purpose of subdivision (a), "use of official authority or influence" includes promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment,

(37) *Ibid.*, s. 8547.2.

> promotion, transfer, assignment, performance, evaluation, suspension, or other disciplinary action.
>
> (c) Any employee who violates subdivision (a) may be liable in an action for civil damages brought against the employee by the offended party.
>
> (d) Nothing in this section shall be construed to authorize an individual to disclose information otherwise prohibited by or under law.[38]

The State Auditor administers the Act and investigates and reports on improper governmental activities.[39] Upon receiving specific information that any employee or state agency has engaged in an improper governmental activity, the State Auditor may conduct an investigative audit of the matter. The identity of the person providing the information that initiated the audit must not be disclosed without the written permission of that person, unless the disclosure is to a law enforcement agency conducting a criminal investigation.[40]

In conducting an investigative audit, the State Auditor may request the assistance of any state department, agency or employee. No information obtained from the State Auditor by any department, agency or employee as a result of the request or any information obtained thereafter as a result of further investigation may be divulged or made known to any person without the prior approval of the State Auditor.[41]

If the State Auditor determines that there is reasonable cause to believe that an employee or state agency has engaged in any improper governmental activity, he or she must report the nature and details of the activity to the head of the employing agency, or the appropriate appointing authority. If appropriate, the State Auditor must report this information to the Attorney General, the policy committees of the Senate and Assembly with jurisdiction over the subject involved, or to any other authority that the State Auditor determines appropriate.[42]

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(38) *Ibid*., s. 8547.3.

(39) *Ibid*., s. 8547.4.

(40) *Ibid*., s. 8547.5.

(41) *Ibid*., s. 8547.6.

(42) *Ibid*., s. 8547.7(a).

The State Auditor has no enforcement power. Where the State Auditor submits a report of alleged improper activity to the head of the employing agency or appropriate appointment authority, that individual must report any resulting action taken back to the State Auditor. The first such report must be transmitted no later than 30 days after the date of the State Auditor's report and any other reports must be transmitted monthly thereafter until final action has been taken.(43)

Every investigative audit is to be kept confidential, except that the State Auditor may issue any report or release any findings that he or she deems necessary to serve the interests of the state.(44) The above provisions do not limit the authority conferred upon the Attorney General or any other department or agency of government to investigate any matter.(45)

The Act further stipulates that a state employee or applicant for state employment who files a written complaint with his or her supervisor, manager or the appointing authority alleging actual or attempted acts of reprisal, threats, coercion or similar improper acts prohibited by the statute may also file a copy of the complaint with the State Personnel Board, together with a sworn statement that the contents of the complaint are true, or are believed by the applicant to be true, under penalty of perjury. The complaint, if filed with the Board, must be filed within 12 months of the most recent alleged act of reprisal.(46)

A person who intentionally engages in acts of reprisal, retaliation, threat, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure is subject to a fine not exceeding $10,000 and imprisonment in the county jail for up to a period of one year. Any state civil service employee who intentionally engages in that conduct must be disciplined as provided for by state law.(47)

In addition to all other specified penalties, such a person is liable in an action for damages brought against him or her by the injured party. The court may award punitive damages where the acts of the offending party are proven to be malicious. Where liability is established, the injured party is also entitled to reasonable attorney's fees as provided by law. However, no action for damages is available to the injured party unless that party has first filed a

(43) *Ibid*., s. 8547.7(b).

(44) *Ibid*., s. 8547.7(c).

(45) *Ibid*., s. 8547.7(d).

(46) *Ibid*., s. 8457.8(a).

(47) *Ibid*., s. 8547.8(b).

complaint with the State Personnel Board (as provided for above) and the Board has failed to reach a decision regarding any hearing conducted pursuant to s. 19683.(48)

The Act also states that the above provisions are

> … not intended to prevent an appointing power, manager or supervisor from taking, directing others to take, recommending, or approving any personnel action or from taking or failing to take a personnel action with respect to any state employee or applicant for state employment if the appointing power, manager or supervisor reasonably believes any action or inaction is justified on the basis of evidence separate and apart from the fact that the person has made a protected disclosure as defined in [s. 8547.2].(49)

In any civil action or administrative proceeding, once it has been demonstrated by a preponderance of evidence that an activity protected by the above law was a contributing factor in retaliation against a former, current or prospective employee, the burden of proof is on the supervisor, manager, or appointing power to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in a "protected disclosure." If a supervisor, manager, or appointing power fails to meet that burden of proof, the employee has a complete affirmative defence in an adverse action against him or her in any administrative review, challenge or adjudication where retaliation has been demonstrated to be a contributing factor.(50)

The Act stipulates that nothing in it shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or state law or under any employment contract or collective bargaining agreement.(51)

If the State Personnel Board determines that there is a reasonable basis for an alleged violation, or finds an actual violation, of the anti-retaliation provision, it must transmit a copy of the investigative report to the State Auditor. All working papers pertaining to the investigative report must be made available under subpoena in a civil action brought pursuant to the relevant provision of state law.(52)

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(48) *Ibid*., s. 8547.8(c).

(49) *Ibid*., s. 8547.8(d).

(50) *Ibid.*, s. 8547.8(e).

(51) *Ibid.*, s. 8547.8(f).

(52) *Ibid*., s. 8547.9.

The Act also has separate anti-retaliatory provisions protecting employees of the University of California and California State University who report "protected disclosures" under the Act to designated university officers.(53)

B. Connecticut

In Connecticut, a provision in the law pertaining to state agencies stipulates that:

> (a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency, or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in his possession concerning such matter to the Auditors of Public Accounts.(54)

The section further provides that the Auditors of Public Accounts shall review the matter and report their findings and any recommendations to the Attorney General, who must then make such investigations as he or she deems proper, being assisted by the auditors. The Attorney General has the power to summon witnesses, require the production of any necessary books, papers or other documents and administer oaths of witnesses. He or she is normally required to report his or her findings to the Governor or, in matters involving criminal activity, to the Chief State's Attorney. The Auditors of Public Accounts and the Attorney General must not disclose the identity of a person giving information without that person's consent, unless they determine that such disclosure is unavoidable during the course of the investigation.(55)

The relevant provision also states that no state officer or employee, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such disclosure of information to the Auditors of Public Accounts or the Attorney General. An

(53) *Ibid.*, s. 8547.10 - 8547.12

(54) Connecticut General Statutes Annotated, s. 4-61dd(a).

employee alleging that such action has been threatened or taken may, within 30 days of learning of the specific incident, file an appeal with the Employees' Review Board or, if he or she is covered by a collective bargaining contract, in accordance with the procedure it provides. An employee of a large state contractor who alleges that such action has been threatened or taken may, after exhausting all available administrative remedies, bring a civil action in accordance with section 31-51m(c).(56)

An employee found to have knowingly and maliciously made false charges under the above provision is subject to disciplinary action by his or her appointing authority up to and including dismissal. In the case of a state or quasi-public agency, such action is subject to appeal to the Employees' Review Board or, if the employee is included in a collective bargaining contract, the procedure it provides.(57)

On or before 1 September annually, the Auditors of Public Accounts must submit to the clerk of each House of the General Assembly a report stating the number of cases in which facts and information have been transmitted to the Auditors pursuant to the above provision during the preceding state fiscal year and how each has been disposed of.(58)

Each contract between a state or quasi-public agency and a large state contractor must provide for cases where an officer, employee or appointing authority of such a contractor takes or threatens to take any personnel action against any employee of the contractor in retaliation for having disclosed information to the Auditors of Public Accounts or the Attorney General under the above provision. The contractor is liable for a civil penalty of not more than $5,000 for each offence, up to a maximum of 20% of the value of the contract. Each violation is considered to be a separate and distinct offence and each calendar day on which the violation continues is deemed to be a separate and distinct offence. The executive head of the state or quasi-public agency may request the Attorney General to bring a civil action in the Superior Court for the Judicial District of Hartford to seek imposition and recovery of such civil penalty.(59)

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(55) *Ibid*.

(56) *Ibid*., s. 4-61dd(b).

(57) *Ibid*., s. 4-61dd(c).

(58) *Ibid.*, s. 4-61dd(d).

(59) *Ibid.*, s. 4-61dd(e).

Each large state contractor is required to post a notice of the above provisions relating to large state contractors in a conspicuous place where it is readily available for viewing by its employees.(60)

As used in the above provisions, "large state contract" means a contract of $5,000,000 or more, between an entity and a state or quasi-public agency, except for a contract for the construction, alteration or repair of any public building or public work. A "large state contractor" means an entity that has entered into a large state contract with a state or quasi-public agency.(61)

For purposes of the above provisions, the definition of "state officers and employees" is set out in s. 4-141 as follows:

> "state officers and employees" includes every person elected or appointed or employed in any office, position or post in the state government, whatever such person's title, classification or function and whether such person serves with or without remuneration or compensation, including judges of probate courts and employees of such courts. In addition to the foregoing, "state officers and employees" includes attorneys appointed as victim compensation commissioners, attorneys appointed by the Public Defenders Services Commission as public defenders, assistant public defenders or deputy assistant public defenders, and attorneys appointed by the court as special assistant public defenders, the Attorney General, the Deputy Attorney General and any associate attorney general or assistant attorney general, any other attorneys employed by any state agency, any commissioner of the Superior Court hearing small claims matters or acting as a fact-finder, arbitrator or magistrate or acting in any other quasi-judicial position, any person appointed to a committee established by law for the purpose of rendering services to the Judicial Department including, but not limited to the Legal Specialization Screening Committee, the State-Wide Grievance Committee, the Client Security Fund Committee, and the State Bar Examining Committee, any member of a multidisciplinary team established by the Commissioner of Children and Families pursuant to section 17a-106a, and any physicians or psychologists employed by any state agency. "State officers and employees" shall not include any medical or dental intern, resident or fellow of the University of Connecticut when (1) the intern, resident or fellow is assigned to a hospital affiliated with the university through an integrated residency program and (2) such hospital provides protection against professional liability

(60) *Ibid.*, s. 4-61dd(f).

(61) *Ibid.*, s. 4-61dd(g).

> claims in an amount and manner equivalent to that provided by the hospital to its full-time physician employees.

As well, for purposes of the above provisions, a "quasi-public agency" is defined in s. 1- 121 as follows:

> "Quasi-public agency" means the Connecticut Development Authority, Connecticut Innovations Incorporated, Connecticut Health and Educational Facilities Authority, Connecticut Higher Education Supplemental Loan Authority, Connecticut Housing Finance Authority, Connecticut Housing Authority, Connecticut Resources Recovery Authority, Connecticut Hazardous Waste Management Service, Connecticut Coastline Port Authority, Capital City Economic Development Authority and Connecticut Lottery Corporation.

In a provision in Connecticut's labour law, protection is provided for both private and public sector workers as follows:

> (b) No employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action. No municipal employer shall discharge, discipline or otherwise penalize any employee because the employee, or a person acting on behalf of the employee, reports, verbally or in writing, to a public body concerning the unethical practices, mismanagement or abuse of authority by such employer. The provisions of this subsection shall not be applicable when the employee knows that such report is false.(62)

A "person" is defined as one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons.(63) An "employer" is defined as a person engaged in business who has employees, including the state and any political subdivision of the state.(64) An "employee" is defined as a person engaged in service to an

(62) *Ibid*., s. 31-51m(b).

(63) *Ibid*., s. 31-51m(a)(1).

(64) *Ibid*., s. 31-51m(a)(2).

employer in a business of his or her employer.(65) The term "public body" has the following meaning:

> (A) any public agency, as defined in subsection (1) of section 1-200, or any employee, member or officer thereof, or (B) any federal agency or any employee, member or officer thereof.(66)

"Public agency," as referred to above, is defined in s. 1-200 as follows:

> "Public agency" or "agency" means any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official or body or committee thereof but only in respect to its or their administrative functions.

Another provision of Connecticut's labour law states that an employee who is discharged, disciplined or otherwise penalized by his or her employer in violation of the anti-retaliatory provision cited above, may, after exhausting all available administrative remedies, bring a civil action, within a specified time, for the reinstatement of his or her previous job, payment of back wages and reestablishment of employee benefits lost through such violation. This will be done in the superior court for the judicial district where the violation is alleged to have occurred or where the employer has its principal office.(67)

An employee found to have knowingly made a false report is subject to disciplinary action by the employer up to and including dismissal.(68)

The above provision is not to be construed to diminish or impair the rights of a person under any collective agreement.(69)

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(65) *Ibid.*, s. 31-51m(a)(3).

(66) *Ibid*., s. 31-51m(a)(4).

(67) *Ibid*., s. 31-51m(c).

(68) *Ibid*.

(69) *Ibid*., s. 31-51m(d).

C. New Jersey

In New Jersey, employees who blow the whistle, whether in the public or private sector, are protected from retaliatory action by the same statutory provisions in the *Conscientious Employee Protection Act*.(70)

The relevant provision states:

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy or practice of the employer or another employer with whom there is a business relationship, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or, in the case of an employee who is a licensed or certified health care professional, reasonably believes constitutes improper quality of patient care;
>
> b. Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer with whom there is a business relationship, or, in the case of an employee who is a licensed or certified health care professional, provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into the quality of health care; or
>
> c. Objects to, or refuses to participate in, any activity, policy or practice which the employee reasonably believes:
> (1) is in violation of a law, or a rule or regulation promulgated pursuant to law or, if the employee is a licensed or certified health care professional, constitutes improper quality of patient care;
> (2) is fraudulent or criminal; or
> (3) is incompatible with a clear mandate of public policy concerning the public health, safety or welfare or protection of the environment.(71)
>
> For purposes of the Act, the following definitions are relevant:
>
> a. "Employer" means any individual, partnership, association, corporation or any person or group of persons acting directly or

(70) New Jersey Statutes Annotated, Title 34, ss. 34:19-1 to 34:19-8.

(71) *Ibid*., s. 34:19-3.

indirectly on behalf of or in the interest of an employer with the employer's consent and shall include all branches of State Government, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board or any other agency or instrumentality thereof.

b. "Employee" means any individual who performs services for and under the control and direction of an employer for wages or other remuneration.

c. "Public body" means:
(1) the United States Congress, and State legislature, or any popularly-elected local governmental body, or any member or employee thereof;
(2) any federal, State, or local judiciary, or any member or employee thereof, or any grand or petit jury;
(3) any federal, State, or local regulatory, administrative, or public agency or authority, or instrumentality thereof;
(4) any federal, State, or local law enforcement agency, prosecutorial office, or police or peace officer;
(5) any federal, State, or local department of an executive branch or government; or
(6) any division, board, bureau, office, committee, or commission of any of the public bodies described in the above paragraphs of this subsection.

d. "Supervisor" means any individual with an employer's organization who has the authority to direct and control the work performance of the affected employee, who has authority to take corrective action regarding the violation of the law, rule or regulation of which the employee complains, or who has been designated by the employer on the notice required under section 7 of this Act.

e. "Retaliatory action" means the discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.

f. "Improper quality of patient care" means, with respect to patient care, any practice, procedure, action or failure to act of an employer that is a health care provider which violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics.(72)

(72) *Ibid.*, s. 34: 19-2.

The Act states that protection against retaliatory action for disclosure to a public body must not apply to an employee unless the employee has first brought the relevant activity, policy or practice to the attention of a supervisor by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice. Under the Act, where the situation is urgent, such disclosure to the supervisor would not be required if the employee was reasonably certain that the activity, policy or practice was known to one or more supervisors or if the employee reasonably feared physical harm as a result of the disclosure.(73)

If any of the provisions of the Act are violated, an aggrieved employee or former employee may institute a civil action in a court of competent jurisdiction, within one year. Upon the application of any party, a jury trial must be directed to try the validity of any claim under the Act specified in the suit. All remedies available in common law tort actions are available to prevailing plaintiffs and are in addition to any legal or equitable relief provided by the above Act or any other statute. The court may also order:

> a. An injunction to restrain continued violation of this Act;
>
> b. The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;
>
> c. The reinstatement of full fringe benefits and seniority rights;
>
> d. The compensation for lost wages, benefits and other remuneration;
>
> e. The payment by the employer of reasonable costs, and attorney's fees;
>
> f. Punitive damages; or
>
> g. An assessment of a civil fine of not more than $1,000.00 for the first violation of the Act and not more than $5,000.00 for each subsequent violation, which shall be paid to the State Treasurer for deposit in the General Fund.(74)

A court may award reasonable attorney's fees and court costs to an employer if it determines that an action brought by an employee under the Act was without basis in law or in fact.(75)

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(73) *Ibid*., s. 34:19-4.

(74) *Ibid*., s. 34:19-5.

(75) *Ibid*., s. 34:19-6.

Another provision requires that the employer conspicuously display notices of its employees' protections and obligations under the Act, and use other appropriate means to keep its employees informed. Each posted notice must include the name of the person(s) designated by the employer to receive written notifications pursuant to the Act.(76)

Finally, the Act stipulates that nothing in it shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or State law or regulation or under any collective bargaining agreement or employment contract, except that the institution of an action in accordance with the Act shall be deemed a waiver of the rights and remedies available under any other contract, collective bargaining agreement, State law, rule or regulation or under the common law.(77)

D. New York

In New York State, the relevant legislative provision protecting public sector whistleblowers states as follows in paragraph (a):

> (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation.(78)

Paragraph (b) of the same provision states that, prior to disclosing information pursuant to paragraph (a), an employee must have made a good effort to provide the appointing authority with the information and to have given it a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. An employee who acts pursuant

(76) *Ibid*., s. 34:19.7.

(77) *Ibid*., s. 34:19.8.

(78) New York Consolidated Laws Service, Civil Service Law, s. 75-b(2)(a).

to paragraph (b) is deemed to have disclosed information to a governmental body under paragraph (a).

The following are the relevant definitions for purposes of the above provision:

> 1. For the purposes of this section, the term:
>
> (a) "Public employer" or "employer" shall mean (i) the State of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state.
>
> (b) "Public employee" or "employee" shall mean any person holding a position by appointment or employment in the service of a public employer except judges or justices of the unified court system and members of the legislature.
>
> (c) "Governmental body" shall mean (i) an officer, employee, agency, department, division, bureau, board, commission, council, authority or other body of a public employer, (ii) employee, committee, member, or commission of the legislative branch of government, (iii) a representative, member or employee of a legislative body of a county, town, village or any other political subdivision or civil division of the state, (iv) a law enforcement agency or any member or employee of law enforcement agency, or (v) the judiciary or any employee of the judiciary.
>
> (d) "Personnel action" shall mean an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance.(79)

An employee subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure in a collectively negotiated agreement, or under provision of New York State or local law, may assert as a defence before the designated arbitrator or hearing officer that he or she reasonably believes the disciplinary action would not have been taken but for the whistleblowing. The merits of this argument must be determined as part of the arbitration award or hearing officer decision. If there is a finding that

(79) *Ibid*., s. 75-b(1).

the disciplinary action was based solely on employer violation of the anti-retaliation provision, the arbitrator or hearing officer must dismiss or recommend dismissal of the disciplinary proceeding. If appropriate, the employee will be reinstated with back pay, or, in the case of an arbitration procedure, may take other action permitted in the collective agreement.(80)

An employee whose collective agreement prohibits the employer from taking adverse retaliatory personnel actions and provides for a final and binding arbitration to resolve alleged violations of such provisions, may assert before the arbitrator that he or she reasonably believes that the action would not have been taken but for the whistleblowing. If the arbitrator determines the adverse personnel action was based on a violation by the employer of the anti-retaliatory provision, he or she may take such remedial action as is permitted by the collective agreement.(81) Where an employee is not subject to the above provision, he or she may commence an action in a court of competent jurisdiction under specified terms and conditions.(82)

Finally, the legislation provides that nothing in these provisions shall diminish or impair the rights of a public employee or employer under any law, rule, regulation or collective agreement or prohibit any personnel action that would have been taken regardless of the disclosure of information.(83)

(80) *Ibid.*, s. 75-b(3)(a).

(81) *Ibid*., s. 75-b(3)(b).

(82) *Ibid*., s. 75-b(3)(c).

(83) *Ibid*., s. 75-b(4).