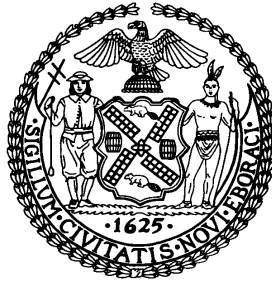


Committee on Oversight and Investigations
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THE COUNCIL OF THE CITY OF NEW YORK

COMMITTEE REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION

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COMMITTEE ON OVERSIGHT AND INVESTIGATIONS

Hon. Ritchie J. Torres, Chair

December 16, 2020

PROPOSED INT. NO. 1770-A: By Council Member Torres, the Public Advocate (Mr. Williams), Kallos, Rosenthal and Ayala

TITLE: A local law to amend the administrative code of the city of New York, in relation to whistleblower protections for individuals subject to alleged adverse personnel actions

ADMINISTRATIVE CODE: Amends § 12-113

I. INTRODUCTION

On December 16, 2020, the Committee on Oversight and Investigations, chaired by Council Member Ritchie Torres, will hold a hearing on Proposed Int. No. 1770-A, in relation to whistleblower protections for individuals subject to alleged adverse personnel actions. This is the second hearing on this item. The first hearing was held on January 13, 2020, at which the Committee heard testimony from representatives of the Department of Investigation (“DOI”), good government groups, think tanks, higher education institutions, and non-profit organizations.

II. BACKGROUND

DOI is one of the oldest law-enforcement agencies in the country,¹ and the first dedicated to fighting corruption.² As the City’s independent Inspector General, it has authority over more than 45 City agencies as well as those who conduct business with the City, including government contractors and subcontractors.³ DOI can investigate any issue which is deemed to be “in the best interests of the city,”⁴ most notably “fraud, waste and corruption.”⁵ Such investigations are conducted confidentially.⁶

¹ *About DOI*, CITY OF NEW YORK DEPARTMENT OF INVESTIGATIONS, <https://www1.nyc.gov/site/doi/about/about.page>

² Simon Leen et. all, *Oversight and Enforcement of Public Integrity: A State-by-State Study*, COLUMBIA LAW SCHOOL CENTER FOR THE ADVANCEMENT OF PUBLIC INTEGRITY, (May 2018), https://www.law.columbia.edu/sites/default/files/capi-data/reports/newyork_2018.pdf

³ *Supra* note 1

⁴ Charter § 803 (b).

⁵ *Legal and Executive Authority*, CITY OF NEW YORK DEPARTMENT OF INVESTIGATIONS, <https://www1.nyc.gov/site/doi/about/legal-executive-authority.page>

⁶ *See* N.Y. Labor Law § 740; Administrative Code § 12-113; Charter § 803 (c) (5).

City employees who report to DOI, the Council, the Public Advocate or the Comptroller, any “corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority” involving a City official or contractor are protected by the City’s whistleblower law.⁷ This whistleblower law was expanded in 2012 to protect employees of contractors and subcontractors engaged in City contracts valued at \$100,000 or more.⁸ If DOI finds any employee’s complaint to be credible, it may relay its findings to the relevant City agency, and can eventually refer the matter to the Mayor or the entity that appointed the agency head.⁹ Remedies for employees of contractors and subcontractors may include reinstatement to the employee’s former position or equivalent, with back wages; as well as reinstatement of earned seniority and other forms of relief necessary to make them “whole.”¹⁰ However, City employees are not automatically entitled to remedies recommended by DOI—the employing agency has discretion in determining whether to take any recommended remedial action.¹¹ While employees of contractors may file suit to obtain relief under the whistleblower law, City employees do not have this right.¹²

New York City employees have an affirmative obligation to report corruption, criminal activity, and conflicts of interest to DOI pursuant to an Executive Order originally issued by Mayor Koch in 1978.¹³ An employee’s failure to report instances of corruption, waste, fraud or abuse by public officials or City contractors can result in an employee facing disciplinary action or

⁷ Administrative Code § 12-113 (b) (1).

⁸ Administrative Code § 12-113 (b) (2), (3).

⁹ Administrative Code § 12-113 (d), (e).

¹⁰ Administrative Code § 12-113 (e) (2).

¹¹ Administrative Code § 12-113 (e) (1).

¹² Administrative Code § 12-113 (e) (2).

¹³ *Executive Order No. 16*, MAYOR OF THE CITY OF NEW YORK (JULY 26, 1976), available at: https://www1.nyc.gov/assets/records/pdf/executive_orders/1978EO016.PDF

termination.¹⁴ Mandatory reporting strengthens the City’s whistleblower law, as a duty to report places the onus on City employees and contractors to expose corruption, instead of relying on an employees’ good-will.

III. CITY, STATE AND FEDERAL PROTECTIONS FOR CITY EMPLOYEES

As there are many whistleblower laws at the City, State and Federal levels of government, City employees may avail themselves of various whistleblower statutes that apply to their claim. Whistleblower protections in the United States, and particularly in New York, make up a patchwork of laws that range from broad – covering all employees regardless of sector or line of work – to industry-specific. Requirements for gaining whistleblower protection also vary from law to law, for example, with respect to how the incident must be initially reported. Some statutes create a private right of action and others, like the City’s law with respect to City employees, do not.

The two most comprehensive whistleblower laws applying to City employees are the City’s whistleblower law for employees and public contractors, found in Administrative Code § 12-113, and the State’s whistleblower law for public employees (state and local), contained in Civil Service Law § 75-b. The State and City laws diverge in many ways, including: the type of government misconduct that grants whistleblower protection, the entity to whom misconduct must be reported, allowable adjudication and enforcement of the protections, and remedies that may be awarded. For example, City employees seeking protection under the State’s whistleblower law must have

¹⁴ Margaret Garnett and Preet Bharara, *Remaining Silent About Corruption Should Not Be an Option?* THE NEW YORK TIMES (October 17, 2019) <https://www.nytimes.com/2019/10/17/opinion/whistle-blower-trump.html>

reported “a violation of a law, rule or regulation...[that] presents a...danger to the public health or safety” or action by a governmental entity or employee that the employee reasonably believes is a violation of any law, rule or regulation, to “a governmental body.”¹⁵ In contrast, the City requires the report of “corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority” to DOI or to “a council member, the public advocate or the comptroller.”¹⁶ The State’s law allows for a private right of action, unless the employee is subject to a collective bargaining agreement providing for arbitration;¹⁷ the City does not create a private right of action for City employees. The City’s law also covers City contractors and subcontractors,¹⁸ whereas Civil Service Law § 75-b does not.

Notably, the City’s law does not cover private sector employees, or former or prospective public employees. In contrast, Labor Law § 740 extends many of the protections afforded by Civil Service Law § 75-b to private employers. The types of misconduct covered are similar, with the former also encompassing health care fraud.¹⁹ Labor Law § 740 also includes a private right of action for private employees who report misconduct.²⁰ However, when the employee has revealed the misconduct to a public body, the employee must have alerted their employer and provided a “reasonable opportunity” for correction in order to avail themselves of whistleblower protections.²¹

¹⁵ N.Y. Civil Service Law § 75-b (2) (a).

¹⁶ Administrative Code § 12-113 (b) (1).

¹⁷ N.Y. Civil Service Law § 75-b (3).

¹⁸ Administrative Code § 12-113 (b) (2).

¹⁹ N.Y. Labor Law § 740 (2) (a).

²⁰ N.Y. Labor Law § 740 (4).

²¹ N.Y. Labor Law § 740 (3).

The table in Figure 1 illustrates these differences:

Figure 1.

	Administrative Code § 12-113 (“City whistleblower law”)	N.Y. Civil Service Law § 75-b (“State whistleblower law”)	N.Y. Labor Law § 740
Covered parties	City employees and City contractors/subcontractors	Public employees in NYS other than judges and members of the State Legislature	Private employees
Misconduct	Corruption, criminal activity, conflict of interest, gross mismanagement, abuse of authority	Violation of a law, rule or regulation presenting a danger to public health or safety or action by a governmental entity or employee which the employee reasonably believes is a violation of any law, rule or regulation	Violation of a law presenting a danger to public health or safety or which constitutes health care fraud
Reporting requirements	DOI, Council Member, Public Advocate, Comptroller	Governmental body	None
Adjudication/ Enforcement	City employees: DOI determines credibility. DOI issues findings and recommendations to employing agency. If remedial action is not taken, DOI refers matter to agency head and then to the Mayor or other official who appointed the agency head. City contractors/subcontractors: Private right of action against employer, but not City.	Arbitrator or hearing officer if subject to a collectively negotiated agreement; if not, a private right of action	Private right of action

Remedies	City employees: Determined by DOI and agency. City contractors/subcontractors: Range incl. injunction, reinstatement, double back pay plus interest and attorney's fees.	Range that depends on any applicable collective bargaining agreement, but in some cases including reinstatement and compensation for lost wages and attorney's fees.	Range including injunction, reinstatement and compensation of lost wages and attorney's fees.
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Employees may gain whistleblower protection for reports of City²² and State human rights law violations.²³ Other State laws that may be utilized are N.Y. Labor Law § 741 (protections for health care workers who report improper quality of health care) and § 736 (protections for employees reporting violations of the prohibition on the use of psychological stress evaluators). There are also protections for employees in certain specified industries.²⁴

Federal law protects public employees of the United States government only via the Whistleblower Protection Act.²⁵ Local government employees may receive protections under federal law for whistleblowing in particular circumstances, for example, reporting asbestos hazards at schools in violation of the Asbestos Hazard Emergency Response Act.²⁶ However, there is no comprehensive federal statute that protects employees of state or local governments, or of private entities.

IV. STRENGTHENING CITY WHISTLEBLOWER LAWS

²² Administrative Code § 8-107 (7).

²³ N.Y. Executive Law 296 (1) (e).

²⁴ *E.g.* Commercial goods transportation contractors (N.Y. Labor Law § 862-e); construction industry (N.Y. Labor Law § 861-f); nursing home employees and residents (N.Y. Social Services Law § 460-d); and school employees (N.Y. Education § 3028-d).

²⁵ 5 U.S.C. § 2302 (b) (8), (9).

²⁶ 15 U.S.C. § 2651.

City whistleblower laws could be amended in various ways to match ideas present in other statutes and in expert opinion. Unlike the State’s whistleblower law, the City does not contain a private right of action for City employees. In addition, when a City employee commences a cause of action under the State’s whistleblower law, it is unclear what, if any, role DOI may play in such proceedings.

The City’s whistleblower law does not expressly contain protections for former or prospective employees, or for interns.²⁷ The City’s law allows employees to file complaints when their employers “take an adverse personnel action”²⁸ but does not explicitly include threatening to take an action, as the federal whistleblower law and Labor Law § 740 does.²⁹ It also does not protect against retaliation for an employee refusing to participate in the employer’s misconduct, which is protected under Labor Law § 740.³⁰

Some commentators have derided the City’s procedure for resolving whistleblower retaliation claims, since they are resolved wholly within the City administration, and not an independent body.³¹ Finally, the City’s whistleblower law requires DOI to conduct public education efforts for those covered by the law,³² but it does not put in place a concrete standard that ensures the trainings are provided to everyone, or on a large-scale.

V. UTILIZING WHISTLEBLOWER PROTECTIONS

²⁷ Administrative Code § 12-113 (a) (10).

²⁸ Administrative Code § 12-113 (b) (1).

²⁹ 5 U.S.C. § 2302 (b) (8); N.Y. Labor Law § 740 (2) (a).

³⁰ N.Y. Labor Law § 740 (2) (c). *See also* John D. Feerick, *Toward a Model Whistleblowing Law*, Fordham Urban Law Journal, 19 FDMULJ 585 (Spring 1992), p. 594.

³¹ William A. Herbert, *Protections for Public Employees Who “Blow the Whistle” Appear to Be Inadequate*, NEW YORK STATE BAR JOURNAL, 76-FEB N.Y. St. B.J. 20 (February 2004).

³² Administrative Code § 12-113 (h).

It is unclear if existing resources are adequately educating City employees and contractors on the whistleblower law. DOI is mandated to produce an annual report on “Whistleblower Law Complaints” to the Mayor and Speaker pursuant to Section 12-113 of the City Administrative Code. In DOI’s report from Fiscal Year 2019, the report states that “to ensure that City employees understand their obligations and the associated protections for them, DOI has continued to educate the City’s workforce with in-person and online corruption prevention lectures.”³³ The City’s whistleblower statute requires DOI to conduct such trainings.³⁴ Yet, in Fiscal Year 2019, only 16,166 City employees attended one of the almost 450 in-person corruption prevention and outreach lectures conducted by DOI. Approximately 33,539 City employees participated in online anti-corruption training in Fiscal Year 2019.³⁵ The 49,705 City employees³⁶ of the nearly 400,000 total employees of the City who received formal DOI training in Fiscal Year 2019 constitutes approximately 12% of the total City workforce.³⁷ Although over 85% of City employees did not receive educational trainings, the City requires all employees to report corruption and wrongdoing, at the risk of facing disciplinary action or termination.³⁸

³³ See Margaret Garnett, *Whistleblower Law Complaints for Fiscal Year 2019*, DEPARTMENT OF INVESTIGATIONS, (October 31, 2019) https://www1.nyc.gov/assets/doi/reports/pdf/Whistleblower/Annual_WB_Letter-FY_2019.pdf

³⁴ Administrative Code § 12-113 (h).

³⁵ See Margaret Garnett, *Whistleblower Law Complaints for Fiscal Year 2019*, DEPARTMENT OF INVESTIGATIONS, (October 31, 2019) https://www1.nyc.gov/assets/doi/reports/pdf/Whistleblower/Annual_WB_Letter-FY_2019.pdf

³⁶ This number assumes that no City employees were double counted by receiving both educational instructions, which DOI does not specify in its report. Accordingly, 49,705 represents the highest number of City employees that could have received educational training in Fiscal Year 2019.

³⁷ Lisette Camilo, *Workforce Profile Report*, DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES, https://www1.nyc.gov/assets/dcas/downloads/pdf/reports/workforce_profile_report_2017.pdf (Fiscal Year 2017).

³⁸ Executive Order No. 16, July 26, 1978, section 4. See also Margaret Garnett and Preet Bharara, *Remaining Silent About Corruption Should Not Be an Option?* THE NEW YORK TIMES (October 17, 2019) <https://www.nytimes.com/2019/10/17/opinion/whistle-blower-trump.html>.

Because certain City agencies may be more likely to engage in fraud, waste or corruption, or may employ persons exposed to riskier situations in their line of work, the Committee wishes to learn how DOI decides who receives training. The Committee also wishes to explore whether DOI plans to expand online training capacity to most, if not all, City employees. Further, the Committee would like to know the extent to which DOI resources are provided to contractors and subcontractors covered by the City’s whistleblower law.

Perhaps due to the paucity of educational resources DOI provides to City employees, few whistleblowers have come forward in recent years to report wrongdoing. From 2014-2018, only 170 whistleblowers came forward, alleging they faced retaliation for reporting their complaint. Of the 170 cases DOI investigated over the five year period, only one employee was determined to qualify for whistleblower protection.³⁹ In Fiscal Year 2019, DOI received 32 complaints from individuals alleging job-related retaliation or sought protection for reporting misconduct,⁴⁰ but only opened investigations for 20 of them.⁴¹

VI. LEGISLATIVE ANALYSIS

Proposed Int. No. 1770-A would expand whistleblower protections in the following ways:

- Provide that certain persons who report misconduct to the Special Commissioner of Investigation for the New York City School District (“Special Commissioner of Investigation”) are eligible for whistleblower protection;

³⁹ Jarrett Murphy, *Where Have All the Whistleblowers Gone?* CITY LIMITS, (October 10, 2019), <https://citylimits.org/2019/10/10/where-have-all-the-whistleblowers-gone/>

⁴⁰ See Margret Garnett, *Whistleblower Law Complaints for Fiscal Year 2019*, DEPARTMENT OF INVESTIGATIONS, (October 31, 2019) https://www1.nyc.gov/assets/doi/reports/pdf/Whistleblower/Annual_WB_Letter-FY_2019.pdf

⁴¹ See Margret Garnett, *Whistleblower Law Complaints for Fiscal Year 2019*, DEPARTMENT OF INVESTIGATIONS, (October 31, 2019) https://www1.nyc.gov/assets/doi/reports/pdf/Whistleblower/Annual_WB_Letter-FY_2019.pdf

- Require the Special Commissioner of Investigation to investigate allegations of adverse personnel action that fall within the official’s jurisdiction and require the Corporation Counsel to investigate allegations of adverse personnel actions committed by the Special Commissioner of Investigation and high-ranking officials within the Department of Investigation;
- Provide that the investigating officer must provide periodic status updates regarding the investigation to the relevant whistleblower;
- Require that if the relevant agency or entity head fails to take remedial action recommended by or acceptable to the investigating officer with a certain time period, the relevant agency or entity must provide a written explanation regarding such failure to the relevant whistleblower and the investigating officer;
- Establish a private right of action for a relevant whistleblower who suffers adverse personnel action if the whistleblower’s employer does not take remedial actions recommended by or acceptable to the investigating officer; and
- Require more comprehensive annual reporting by the Commissioner of Investigation regarding reports by whistleblowers on misconduct and adverse personnel action.

Section one of Proposed Int. No. 1770-A would add a new paragraph 11 to subdivision a of section 12-113 of the Administrative Code. This paragraph would define the term “special commissioner of investigation,” meaning the Special Commissioner of Investigation established

by mayoral Executive Order No. 11 for the year 1990 or any successor officer, for the entirety of section 12-113 of the Administrative Code.

Section two of Proposed Int. No. 1770-A would amend subdivisions b through d of section 12-113 of the Administrative Code.

Paragraph 1 of subdivision b of section 12-113 would be amended to establish the Special Commissioner of Investigation as another official to which an officer or employee of a City agency can report information concerning alleged corruption, criminal activity, conflict of interest, gross mismanagement or abuse by another City officer or employee, with protection against adverse personnel action. This paragraph would be amended to require reports under this paragraph on alleged conduct within the jurisdiction of the Special Commissioner of Investigation to be referred to the Special Commissioner of Investigation; and such reports on conduct allegedly committed by the Commissioner of Investigation, the Special Commissioner of Investigation, or a Deputy Commissioner of Investigation to be referred to the Corporation Counsel.

Paragraph 2 of subdivision b of section 12-113 would be amended to establish the Special Commissioner of Investigation as another official to which an officer or employee of a covered contractor or covered subcontractor under section 12-113 can report information concerning alleged corruption, criminal activity, conflict of interest, gross mismanagement or abuse by another covered contractor or covered subcontractor, with protection against adverse personnel action. This paragraph would be amended to require reports under this paragraph on alleged conduct within the jurisdiction of the Special Commissioner of Investigation to be referred to the Special Commissioner of Investigation.

This bill would not amend paragraph 3 of subdivision b of section 12-113.

Paragraph 4 of subdivision b of section 12-113 would require the Special Commissioner of Investigation and the Corporation Counsel receiving a report of alleged adverse personnel action to, upon request, make reasonable efforts to protect the anonymity and confidentiality of the officer or employee making such a report.

Paragraph 5 of subdivision b of section 12-113 would be amended to establish the Special Commissioner of Investigation as another official to which an officer or employee of City agency can report information concerning conduct allegedly presenting a substantial and specific risk of harm to the health, safety, or educational welfare of a child by another City officer or employee, with protection against adverse personnel action. Such paragraph would be amended to generally require reports under this paragraph to be referred to the Commissioner of Investigation, but it would specifically require such reports on alleged conduct within the jurisdiction of the Special Commissioner of Investigation to be referred to the Special Commissioner of Investigation and such reports on conduct allegedly committed by the Commissioner of Investigation, the Special Commissioner of Investigation, or a Deputy Commissioner of Investigation to be referred to the Corporation Counsel.

Subdivision c of section 12-113 would be split into two paragraphs. Paragraph 1 would establish the Special Commissioner of Investigation and the Corporation Counsel as additional officials to which an officer or employee of a City agency or of a public agency or entity under the jurisdiction of the Commissioner of Investigation can report alleged adverse personnel actions. However, such an action can only be reported to the Special Commissioner of Investigation if it

falls within the jurisdiction of the Special Commissioner of Investigation; and such an action can only be reported to the Corporation Counsel if it was allegedly committed by the Commissioner of Investigation, the Special Commissioner of Investigation, or a Deputy Commissioner of Investigation. Paragraph 2 would require referral of reports made under subdivision c that are within the jurisdiction of the Special Commissioner of Investigation to the Special Commissioner of Investigation, and referral of such reports on such actions allegedly committed by the Commissioner of Investigation, the Special Commissioner of Investigation, or a Deputy Commissioner of Investigation to the Corporation Counsel.

Paragraph 1 of subdivision d of section 12-113 would be amended to require the Special Commissioner and the Corporation Counsel to investigate complaints made under subdivision c of section 12-113 that they have received. Accordingly, paragraph 2 of subdivision d would be amended to require the Special Commissioner of Investigation and the Corporation Counsel, in connection with such an investigation, to provide written notice regarding receipt of the complaint to the individual who made the complaint. Such notice would have to include the name of the contact person in the office of the Special Commissioner of Investigation or the Corporation Counsel, as applicable. This paragraph would also require the Commissioner of Investigation, the Special Commissioner of Investigation, and the Corporation Counsel to provide written notice at least once every 90 days regarding the status of the respective investigation to the individual who made the complaint. Paragraph 3 of subdivision d would be amended to require the Special Commissioner of Investigation and the Corporation Counsel to provide a written statement of the final determination regarding the investigation to the individual who made the complaint, and the

statement would have to include the recommendations of the Special Commissioner of Investigation or the Corporation Counsel, as applicable, regarding remedial action (or would have to state that such official has determined to dismiss the complaint and terminate the investigation).

Section three of Proposed Int. No. 1770-A would split paragraph 1 of subdivision e of section 12-113 of the Administrative Code into five subparagraphs.

Subparagraph (i) of paragraph 1 of subdivision e of section 12-113 would require the Special Commissioner of Investigation and the Corporation Counsel, upon making a determination that an adverse personnel action has been taken in violation of paragraph 1 or 5 of subdivision b of section 12-113, to report without undue delay such official's findings and any recommendations to the head of the relevant agency or entity. The agency or entity head would be required to report a determination of whether to take remedial action back to the Special Commissioner of Investigation or Corporation Counsel, as applicable.

Subparagraph (ii) of paragraph 1 of subdivision e of section 12-113 would require the Special Commissioner of Investigation or the Corporation Counsel, as applicable, upon determining that the agency or entity head has not taken appropriate remedial action, to consult with the agency or entity head and afford the agency or entity head a reasonable opportunity to take such action.

If an agency or entity head does not take remedial action under subparagraph (ii), subparagraph (iii) of paragraph 1 of subdivision e of section 12-113 would require the Commissioner of Investigation, the Special Commissioner of Investigation, or the Corporation Counsel, as applicable, to report such official's investigative findings and the agency or entity

head's response to the individual who made the complaint regarding alleged adverse personnel action under subdivision c of section 12-113. As is already required of the Commissioner of Investigation, the Special Commissioner of Investigation or the Corporation Counsel, as applicable, would be required to also report such official's investigative findings and the agency or entity head's response to (i) if the reporting individual is employed by an agency whose head or members are appointed by the Mayor, the Mayor; (ii) if the reporting individual is employed by a non-mayoral agency of the City, the City officer or officers who appointed the non-mayoral agency head; or (iii) if the reporting individual is employed by a public agency or another public entity under the jurisdiction of the Commissioner of Investigation, the officer or officers who appointed the head of the public agency or entity.

If the agency or entity head has not taken remedial action recommended by or acceptable to the Commissioner of Investigation, the Special Commissioner of Investigation, or the Corporation Counsel, as applicable, within 60 days from the date of the report made under subparagraph (iii) by the Commissioner of Investigation, the Special Commissioner of Investigation, or the Corporation Counsel to the designated officer or officers, subparagraph (iv) of paragraph 1 of subdivision e would require that the agency or entity head provide a written explanation detailing the specific reasons why the agency or entity has not taken such an action to the individual who made the complaint regarding adverse personnel action under subdivision c of section 12-113, as well as to the Commissioner of Investigation, the Special Commissioner of Investigation, or the Corporation Counsel, as applicable.

Subparagraph (v) of paragraph 1 of subdivision e of section 12-113 would allow the individual who made the complaint regarding adverse personnel action under subdivision c of section 12-113 to bring an action in court, within one year after the written explanation required under subparagraph (iv) is due to the individual, against the individual's employer for relief that is necessary to make the individual whole. However, the monetary value of this relief would not be permitted to exceed the monetary value of the remedial actions recommended with respect to the individual by the Commissioner of Investigation, Special Commissioner of Investigation, or the Corporation Counsel, as applicable. Furthermore, this relief would be required to be comparable to such recommended actions. The court would be required to award the individual litigation costs and reasonable attorneys' fees if the individual prevails in the court action. An individual who brings a court action under subparagraph (v) would be required to provide notice of the action to the Commissioner of Investigation, Special Commissioner of Investigation, or Corporation Counsel, as applicable, but the individual's failure to provide the notice would not be considered a jurisdictional defect and would not be permitted as a defense to a court action under this subparagraph.

Section four of Proposed Int. No. 1770-A would amend subdivision i of section 12-113 of the Administrative Code to require the Commissioner of Investigation to consult with the Special Commissioner of Investigation and the Corporation Counsel in producing and forwarding to the Mayor and the Council a report (annual report to be made no later than October 31) concerning reports and complaints governed by section 12-113. This subdivision would also be amended to increase and specify reporting requirements for the last fiscal year: The comprehensive report

would have to include the number of reports concerning conduct described in paragraph 1 of subdivision b of section 12-113 that were received, directly or by referral, by the Commissioner of Investigation, Special Commissioner of Investigation, and the Corporation Counsel (paragraph 1 of subdivision i); the number of reports concerning conduct described in paragraph 2 of subdivision b of section 12-113 that were received, directly or by referral, by the Commissioner of Investigation and the Special Commissioner of Investigation (paragraph 2 of subdivision i); the number of reports concerning conduct described in paragraph 5 of subdivision b of section 12-113 that were received, directly or by referral, by the Commissioner of Investigation, Special Commissioner of Investigation, and the Corporation Counsel (paragraph 3 of subdivision i); and the number of complaints made under subdivision c of section 12-113 that were received by the Commissioner of Investigation, Special Commissioner of Investigation, and the Corporation Counsel as well as the ultimate results of these complaints (paragraph 4 of subdivision i). Additionally, the report would have to include information about investigations conducted under subdivision d of section 12-113, such as the number of investigations open at the end of the last fiscal year and the median number of days that the investigations had been open, the number of investigations open for 90 or more but fewer than 180 days at the end of the last fiscal year, the number of investigations open for 180 or more but fewer than 365 days at the end of the last fiscal year, the number of investigations open from 365 or more but fewer than 730 days at the end of the last fiscal year, the number of investigations open for 730 or more days at the end of the last fiscal year, and the number of full-time and part-time personnel of the Department of Investigation

(calculated based on full-time equivalency rates) at the end of the last fiscal year whose professional duties included conducting these investigations (paragraph 5 of subdivision i).

Section five of Proposed Int. No. 1770-A would add a new subdivision j to section 12-113 of the Administrative Code, which would provide that a referral of a report or complaint to the Special Commissioner of Investigation under subdivision b or c of section 12-113 would not be interpreted to take away the Commissioner of Investigation's authority to investigate or participate in the investigation of the referred issue.

Section six of Proposed Int. No. 1770-A provides that this local law would take effect 180 days after it becomes law.

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Proposed Int. No. 1770-A

By Council Members Torres, the Public Advocate (Mr. Williams), Kallos, Rosenthal and Ayala

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to whistleblower protections for individuals subject to alleged adverse personnel actions

Be it enacted by the Council as follows:

Section 1. Subdivision a of section 12-113 of the administrative code of the city of New York is amended by adding a new paragraph 11 to read as follows:

11. “Special commissioner of investigation” shall mean the position of deputy commissioner of investigation for the city school district of the city of New York, as established by mayoral executive order number 11 for the year 1990, as amended, or any successor to the duties of such officer.

§ 2. Subdivisions b through d of section 12-113 of the administrative code of the city of New York, as amended by local law number 33 for the year 2012, are amended to read as follows:

b. 1. No officer or employee of an agency of the city shall take an adverse personnel action with respect to another officer or employee in retaliation for his or her making a report of information concerning conduct which he or she knows or reasonably believes to involve corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority by another city officer or employee, which concerns his or her office or employment, or by persons dealing with the city, which concerns their dealings with the city, [(i)] to the commissioner, [or (ii) to] a council member, the public advocate [or], the comptroller, [who

shall refer such report to the commissioner] or the special commissioner of investigation. Such report shall be referred to the commissioner unless (i) such conduct is within the jurisdiction of the special commissioner of investigation, in which case such report shall be referred to such special commissioner, or (ii) such conduct is alleged to have been committed by the commissioner, the special commissioner of investigation or a deputy commissioner of investigation, in which case such report shall be referred to the corporation counsel. For the purposes of this subdivision, an agency of the city shall be deemed to include, but not be limited to, an agency the head or members of which are appointed by one or more city officers, and the offices of elected city officers.

2. No officer or employee of a covered contractor or covered subcontractor shall take an adverse personnel action with respect to another officer or employee of such contractor or subcontractor in retaliation for such officer or employee making a report of information concerning conduct which such officer or employee knows or reasonably believes to involve corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority by any officer or employee of such contractor or subcontractor, which concerns a contract with a contracting agency, [(i) to the commissioner, [(ii) to] a council member, the public advocate [or], the comptroller, [who shall refer such report to the commissioner] the special commissioner of investigation, [or (iii) to] the chief procurement officer, the agency chief contracting officer, or the agency head or commissioner of the contracting agency[, who shall refer such report to the commissioner]. Such report shall be referred to the commissioner unless such conduct is within the jurisdiction of the special commissioner of investigation, in which case such report shall be referred to such special commissioner.

3. Every contract or subcontract in excess of one hundred thousand dollars shall contain a provision detailing the provisions of paragraph two of this subdivision and of paragraph two of subdivision e of this section.

4. Upon request, the commissioner, council member, public advocate [or], comptroller, special commissioner of investigation or corporation counsel receiving the report of alleged adverse personnel action shall make reasonable efforts to protect the anonymity and confidentiality of the officer or employee making such report.

5. No officer or employee of an agency of the city shall take an adverse personnel action with respect to another officer or employee in retaliation for his or her making a report of information concerning conduct which he or she knows or reasonably believes to present a substantial and specific risk of harm to the health, safety or educational welfare of a child by another city officer or employee, which concerns his or her office or employment, or by persons dealing with the city, which concerns their dealings with the city, [(i)] to the commissioner, [(ii) to] a council member, the public advocate, the comptroller [or], the mayor, the special commissioner of investigation or [(iii) to] any superior officer. Such report shall be referred to the commissioner unless (i) such conduct is within the jurisdiction of the special commissioner of investigation, in which case such report shall be referred to such special commissioner, or (ii) such conduct is alleged to have been committed by the commissioner, the special commissioner of investigation or a deputy commissioner of investigation, in which case such report shall be referred to the corporation counsel.

c. 1. An officer or employee [(i)] of an agency of the city, or [(ii)] of a public agency or public entity subject to the jurisdiction of the commissioner pursuant to chapter thirty-four of the charter, who believes that another officer or employee has taken an adverse personnel action in violation of subdivision

b of this section may report such action (i) to the commissioner, or (ii) to the special commissioner of investigation, if such alleged adverse personnel action is within the jurisdiction of such special commissioner, or (iii) to the corporation counsel, if such alleged adverse personnel action is alleged to have been committed by the commissioner, the special commissioner of investigation or a deputy commissioner of investigation.

2. If such report concerns an alleged adverse personnel action that is within the jurisdiction of the special commissioner of investigation, such report shall be referred to such special commissioner, and if such report concerns an adverse personnel action that is alleged to have been committed by the commissioner, the special commissioner of investigation or a deputy commissioner of investigation, such report shall be referred to the corporation counsel.

d. 1. Upon receipt of a report made pursuant to subdivision c of this section, the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, shall conduct an inquiry to determine whether retaliatory adverse personnel action has been taken.

2. Within fifteen days after receipt of an allegation pursuant to subdivision c of this section of a prohibited adverse personnel action, the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, shall provide written notice to the officer or employee making the allegation that the allegation has been received by the commissioner, or the special commissioner of investigation or corporation counsel, as applicable. Such notice shall include the name of the person in the department of investigation, or in the offices of the special commissioner of investigation or the corporation counsel, as applicable, who shall serve as a contact with the officer or employee making the allegation. Thereafter, the commissioner, or the special commissioner of investigation or corporation counsel, as

applicable, shall at least once in every 90-day period provide written notice of the status of such investigation to such officer or employee.

3. Upon the completion of an investigation initiated under this subdivision [c of this section], the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, shall provide a written statement of the final determination to the officer or employee who complained of the retaliatory adverse personnel action. The statement shall include the [commissioner's] recommendations, if any, of the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, for remedial action, or shall state that the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, has determined to dismiss the complaint and terminate the investigation.

§ 3. Paragraph 1 of subdivision e of section 12-113 of the administrative code of the city of New York, as amended by local law number 33 for the year 2012, is amended to read as follows:

1. (i) Upon a determination that a retaliatory adverse personnel action has been taken with respect to an officer or employee of an agency of the city in violation of paragraph one or five of subdivision b of this section, the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, shall without undue delay report his or her findings and, if appropriate, recommendations to the head of the appropriate agency or entity, who [(i)] shall determine whether to take remedial action and [(ii)] shall report such determination to the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, in writing.

(ii) Upon a determination that the agency or entity head has failed to take appropriate remedial action, the commissioner, or the special commissioner of investigation or corporation counsel, as

applicable, shall consult with the agency or entity head and afford the agency or entity head reasonable opportunity to take such action.

(iii) If such action is not taken, the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, shall report his or her findings and the response of the agency or entity head [(i)] to the complainant and if the complainant was employed by an agency the head or members of which are appointed by the mayor, to the mayor[, (ii)]; if the complainant was employed by a non-mayoral agency of the city, to the city officer or officers who appointed the agency head[,]; or [(iii)] if the complainant was employed by a public agency or other public entity not covered by the preceding categories but subject to the jurisdiction of the commissioner pursuant to chapter thirty-four of the charter, to the officer or officers who appointed the head of the public agency or public entity, who shall take such action as is deemed appropriate.

(iv) If, within 60 days from the date of such report to the mayor or to the officer or officers who appointed the head of the agency or entity, such agency or entity has not taken either the remedial action recommended by, or other remedial action acceptable to, the commissioner, the special commissioner of investigation or the corporation counsel, as applicable, such agency or entity head shall provide a written explanation to the complainant and to the commissioner, or the special commissioner of investigation or corporation counsel, as applicable, of the specific reasons why such agency or entity did not take such remedial action.

(v) Within one year after such written explanation is due to be provided to such complainant, the complainant may bring an action in any court of competent jurisdiction against the complainant's employer to recover relief necessary to make the complainant whole; provided that the monetary value of such relief shall not exceed that of the remedial actions recommended by the commissioner, the special commissioner

of investigation or the corporation counsel, as applicable, with respect to such complainant and that such relief shall otherwise be comparable to such recommended actions. If such complainant prevails in such action, such court shall award such complainant litigation costs and reasonable attorneys' fees. A complainant who brings an action pursuant to this subparagraph shall provide notice of such action to the commissioner, the special commissioner of investigation or the corporation counsel, as applicable; provided, however, that failure to provide such notice shall not be a jurisdictional defect and shall not be a defense to an action brought pursuant to this subparagraph.

§ 4. Subdivision i of section 12-113 of the administrative code of the city of New York, as amended by local law number 33 for the year 2012, is amended to read as follows:

i. Not later than October thirty-first of each year, the commissioner, in consultation with the special commissioner of investigation and the corporation counsel, shall prepare and forward to the mayor and the council a report [on the complaints governed by this section during] that shall include, but need not be limited to, the following information for the preceding fiscal year[. The report shall include, but not be limited to, the number of complaints received pursuant to this section, and the disposition of such complaints.];

1. The number of reports concerning conduct allegedly involving corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority, as described in paragraph 1 of subdivision b of this section, received by the commissioner, the special commissioner of investigation and the corporation counsel, whether directly or upon referral, in such fiscal year;

2. The number of reports concerning conduct allegedly involving corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority, as described in paragraph 2 of subdivision

b of this section, received by the commissioner and the special commissioner of investigation, whether directly or upon referral, in such fiscal year;

3. The number of reports concerning conduct allegedly presenting a substantial and specific risk of harm to the health, safety or educational welfare of a child by another city officer or employee, as described in paragraph 5 of subdivision b of this section, received by the commissioner, the special commissioner of investigation and the corporation counsel, whether directly or upon referral, in such fiscal year;

4. The number of complaints made under subdivision c of this section that were received by the commissioner, the special commissioner of investigation and the corporation counsel, in such fiscal year, and the disposition of such complaints; and

5. With respect to investigations conducted under subdivision d of this section:

(a) The number of investigations open at the end of such fiscal year and the median number of days that such investigations had been open at the end of such fiscal year;

(b) The number of investigations open for 90 or more days, but fewer than 180 days, at the end of such fiscal year;

(c) The number of investigations open for 180 or more days, but fewer than 365 days, at the end of such fiscal year;

(d) The number of investigations open for 365 or more days, but fewer than 730 days, at the end of such fiscal year;

(e) The number of investigations open for 730 or more days at the end of such fiscal year; and

(f) As of the end of such fiscal year, the number of full-time plus part-time personnel of the department of investigation, calculated based on full-time equivalency rates, whose duties include conducting investigations under subdivision d of this section.

§ 5. Section 12-113 of the administrative code of the city of New York is amended by adding a new subdivision j to read as follows:

j. Any referral to the special commissioner of investigation pursuant to subdivision b or c of this section shall not be construed to divest the commissioner of authority to investigate or participate in the investigation of the matter that has been referred.

§ 6. This local law takes effect 180 days after it becomes law.

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