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 Torres, Chair

January 13, 2020

**Strengthening Whistleblower Protections**

**INT. NO. 1770:** By Council Member Torres

**TITLE:** A Local Law to amend the administrative code of the city of New York, in relation to whistleblower protections for individuals facing adverse personnel actions

**ADMINISTRATIVE CODE:** Amends § 12-113

1. **INTRODUCTION**

On January 13, 2020, the Committee on Oversight and Investigations, chaired by Council Member Ritchie Torres, will hold a hearing on strengthening the City’s whistleblower laws and the following bill: Int. No. 1770, in relation to whistleblower protections for individuals facing adverse personnel actions. Those invited to testify include representatives from the Department of Investigations (“DOI”), good government groups, think tanks, higher education institutions, and non-profit organizations.

1. **BACKGROUND**

DOI is one of the oldest law-enforcement agencies in the country,[[1]](#footnote-1) and the first dedicated to fighting corruption.[[2]](#footnote-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]](#footnote-3) DOI can investigate any issue which is deemed to be “in the best interests of the city,”[[4]](#footnote-4) most notably “fraud, waste and corruption.”[[5]](#footnote-5) Such investigations are conducted confidentially.[[6]](#footnote-6)

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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-11) While employees of contractors may file suit to obtain relief under the whistleblower law, City employees do not have this right.[[12]](#footnote-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]](#footnote-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 termination.[[14]](#footnote-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.

1. **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 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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-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]](#footnote-19) Labor Law § 740 also includes a private right of action for private employees who report misconduct.[[20]](#footnote-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]](#footnote-21)

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. |

Employees may gain whistleblower protection for reports of City[[22]](#footnote-22) and State human rights law violations.[[23]](#footnote-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]](#footnote-24)

Federal law protects public employees of the United States government only via the Whistleblower Protection Act.[[25]](#footnote-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]](#footnote-26) However, there is no comprehensive federal statute that protects employees of state or local governments, or of private entities.

1. **STRENGTHENING CITY WHISTLEBLOWER LAWS**

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]](#footnote-27) The City’s law allows employees to file complaints when their employers “take an adverse personnel action”[[28]](#footnote-28) but does not explicitly include threatening to take an action, as the federal whistleblower law and Labor Law § 740 does.[[29]](#footnote-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]](#footnote-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]](#footnote-31) Finally, the City’s whistleblower law requires DOI to conduct public education efforts for those covered by the law,[[32]](#footnote-32) but it does not put in place a concrete standard that ensures the trainings are provided to everyone, or on a large-scale.

1. **UTILIZING WHISTLEBLOWER PROTECTIONS**

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]](#footnote-33) The City’s whistleblower statute requires DOI to conduct such trainings.[[34]](#footnote-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]](#footnote-35) The 49,705 City employees[[36]](#footnote-36) 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]](#footnote-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]](#footnote-38)

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]](#footnote-39) In Fiscal Year 2019, DOI received 32 complaints from individuals alleging job-related retaliation or sought protection for reporting misconduct,[[40]](#footnote-40) but only opened investigations for 20 of them.[[41]](#footnote-41)

**VI. LEGISLATIVE ANALYSIS**

Int. No. 1770 would expand whistleblower protections for individuals facing adverse personnel action as a result of cooperating with a Council oversight or legislative matter. Additionally, DOI would be required to complete investigations of whistleblower determinations within 90 days of receiving allegations of adverse personnel actions. Finally, for allegations related to adverse actions taken by the Commissioner of Investigation or DOI, the bill would shift responsibility for such investigations and determinations from the Commissioner of Investigation to the Corporation Counsel.

The bill would take effect immediately.

**VII. CONCLUSION**

The Committee seeks to gain a better understanding of how the City’s whistleblower laws compares to the whistleblower protections on the state and federal levels, and to hear from DOI and good government groups about how City employees and contractors can be best protected from job-related retaliation for reporting misconduct.

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Int. No. 1770

By Council Member Torres

..Title

A Local Law to amend the administrative code of the city of New York, in relation to whistleblower protections for individuals facing adverse personnel actions

..Body

Be it enacted by the Council as follows:

Section 1. Subdivisions b, c, and d of section 12-113 of the administrative code of the city of New York, as amended by local law 25 of 2007, is 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 cooperating with the council in a legislative or oversight matter, or 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. For 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 cooperating with the council in a legislative or oversight matter, or 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, or (iii) to the city chief procurement officer, agency chief contracting officer, or agency head or commissioner of the contracting agency, who shall refer such report to the 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 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 cooperating with the council in a legislative or oversight matter, or 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, or (iii) to any superior officer.

c. 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 to the commissioner.

d. 1. Upon receipt of a report made pursuant to subdivision c of this section, the commissioner 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 shall provide written notice to the officer or employee making the allegation, and the speaker of council when allegations arise from adverse personnel actions taken following an individual cooperating with a council legislative or oversight matter, that the allegation has been received by the commissioner. Such notice shall include the name of the person in the department of investigation who shall serve as a contact with the officer or employee making the allegation.

3. Where practicable, all investigations initiated under subdivision c of this section shall be completed within ninety days of receipt by the commissioner, provided that if such investigation is not complete within ninety days, the commissioner shall provide written notice to the officer or employee making the allegation, and the speaker of council when allegations arise from adverse personnel actions taken following an individual cooperating with a council legislative or oversight matter, explaining the cause of delay and an updated timeframe of expected completion of the investigation. Upon the completion of an investigation initiated under subdivision c of this section, the commissioner shall provide a written statement of the final determination to the officer or employee who complained of the retaliatory adverse personnel action, and the speaker of council when allegations arise from adverse personnel actions taken following an individual cooperating with a council legislative or oversight matter. The statement shall include the commissioner's recommendations, if any, for remedial action, or shall state that the commissioner has determined to dismiss the complaint and terminate the investigation.

§ 2. Section 12-113 of the administrative code of the city of New York, as amended by local law 25 of 2007, is amended by adding a new subdivision j to read as follows:

j. For the purpose of this section, when any allegation of adverse personnel actions arises in relation to conduct committed by the commissioner or any other employee working for the department of investigation, all action mandated by this section to be undertaken by the commissioner, shall instead be the responsibility of the corporation counsel.

§ 3. This local law takes effect immediately after it becomes law.

JDK

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1. *About DOI,* City of New York Department of Investigations, <https://www1.nyc.gov/site/doi/about/about.page> [↑](#footnote-ref-1)
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> [↑](#footnote-ref-2)
3. *Supra* note 1 [↑](#footnote-ref-3)
4. Charter § 803 (b). [↑](#footnote-ref-4)
5. *Legal and Executive Authority,* City of New York Department of Investigations, <https://www1.nyc.gov/site/doi/about/legal-executive-authority.page> [↑](#footnote-ref-5)
6. *See* N.Y. Labor Law § 740; Administrative Code § 12-113; Charter § 803 (c) (5). [↑](#footnote-ref-6)
7. Administrative Code § 12-113 (b) (1). [↑](#footnote-ref-7)
8. Administrative Code § 12-113 (b) (2), (3). [↑](#footnote-ref-8)
9. Administrative Code § 12-113 (d), (e). [↑](#footnote-ref-9)
10. Administrative Code § 12-113 (e) (2). [↑](#footnote-ref-10)
11. Administrative Code § 12-113 (e) (1). [↑](#footnote-ref-11)
12. Administrative Code § 12-113 (e) (2). [↑](#footnote-ref-12)
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> [↑](#footnote-ref-13)
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> [↑](#footnote-ref-14)
15. N.Y. Civil Service Law § 75-b (2) (a). [↑](#footnote-ref-15)
16. Administrative Code § 12-113 (b) (1). [↑](#footnote-ref-16)
17. N.Y. Civil Service Law § 75-b (3). [↑](#footnote-ref-17)
18. Administrative Code § 12-113 (b) (2). [↑](#footnote-ref-18)
19. N.Y. Labor Law § 740 (2) (a). [↑](#footnote-ref-19)
20. N.Y. Labor Law § 740 (4). [↑](#footnote-ref-20)
21. N.Y. Labor Law § 740 (3). [↑](#footnote-ref-21)
22. Administrative Code § 8-107 (7). [↑](#footnote-ref-22)
23. N.Y. Executive Law 296 (1) (e). [↑](#footnote-ref-23)
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). [↑](#footnote-ref-24)
25. 5 U.S.C. § 2302 (b) (8), (9). [↑](#footnote-ref-25)
26. 15 U.S.C. § 2651. [↑](#footnote-ref-26)
27. Administrative Code § 12-113 (a) (10). [↑](#footnote-ref-27)
28. Administrative Code § 12-113 (b) (1). [↑](#footnote-ref-28)
29. 5 U.S.C. § 2302 (b) (8); N.Y. Labor Law § 740 (2) (a). [↑](#footnote-ref-29)
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. [↑](#footnote-ref-30)
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). [↑](#footnote-ref-31)
32. Administrative Code § 12-113 (h). [↑](#footnote-ref-32)
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> [↑](#footnote-ref-33)
34. Administrative Code § 12-113 (h). [↑](#footnote-ref-34)
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> [↑](#footnote-ref-35)
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. [↑](#footnote-ref-36)
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). [↑](#footnote-ref-37)
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>. [↑](#footnote-ref-38)
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/> [↑](#footnote-ref-39)
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> [↑](#footnote-ref-40)
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*](https://www1.nyc.gov/assets/doi/reports/pdf/Whistleblower/Annual_WB_Letter-FY_2019.pdf) [↑](#footnote-ref-41)