



May 29, 2015

Charities Bureau Guidance *Whistleblower Policies Under the Nonprofit Revitalization Act of 2013*

The Non-Profit Revitalization Act of 2013 (the "Act") is the first comprehensive update of New York's Not-for-Profit Corporation Law (the "N-PCL") since it was enacted nearly fifty years ago. The Act was signed into law on December 18, 2013, and most of the provisions of the Act became effective on July 1, 2014.

The New York Attorney General Charities Bureau has issued a number of "Guidance Documents" to assist non-profit organizations in implementing the Act's requirements. While not formal regulatory guidance, these Guidance Documents can provide valuable insight to the Attorney General's interpretation of the Act's requirements.

The Act requires not-for-profit corporations and charitable trusts with (1) twenty or more employees and (2) an annual revenue in excess of \$1,000,000 in the prior fiscal year to adopt a whistleblower policy. (For more information on the Act generally, see [here](#).)

On April 13, 2015, the New York Attorney General Charities Bureau issued Guidance Document 2015-5, V.1.0, *Whistleblower Policies Under the Nonprofit Revitalization Act of 2013*. Below is a summary of this Guidance Document:

Who must have a Whistleblower Policy?

- The Guidance indicates that smaller nonprofits, although not required by the Act, should consider adopting a whistleblower policy.
 - The Guidance indicates that whistleblower policies are generally recognized as part of an effective compliance program and an important part of an effective enterprise risk management and internal control assessment program.
 - The Guidance cites IRS Form 990, which requires organizations to disclose whether or not they have a written whistleblower policy. The Guidance also cites to other federal or state laws that provide protection against whistleblower retaliation and prohibit destruction of certain documents.
- Under the Act, if a nonprofit organization (a) "has adopted and possesses" a whistleblower policy pursuant to federal, state or local law, and (b) that policy "is substantially consistent with" the Act's whistleblower policy requirements, the organization will be considered in compliance with the Act and does not need to adopt a new whistleblower policy.

- The Guidance interprets “has adopted and possesses” to mean that the nonprofit has formally adopted a whistleblower policy by action of the board or a committee of the board and acts in compliance with that policy.
- As an example of a policy which would meet the exemption, the Guidance points to a whistleblower policy contained in 18 NYCRR 521 for Medicaid Provider Compliance programs, which applies to New York Medicaid providers with Medicaid revenues above a dollar threshold.
- If a nonprofit has a whistleblower policy *but* that policy does not meet either of the two requirements above, it must either revise its policy or adopt a new whistleblower policy in compliance with the Act.

What should be included in the Whistleblower Policy?

- The whistleblower policy must include procedures for reporting violations or suspected violations of laws or corporate policies, including procedures for maintaining the confidentiality of the reported information, and for tracking and reporting on the results of whistleblower reports.
- In addition to the requirements set forth in the Act, the Guidance suggest that the whistleblower policy should address: (i) the individual(s) or entity(ies) to whom violations may be reported; (ii) the possible means of reporting, such as email or telephone; (iii) the investigative steps the organization will take; (iv) the consequences for violating the policies designed to protect from retaliation persons who report improper conduct, and (v) any other procedures the organization deems appropriate. The Guidance suggests that anonymous reporting should be an option.
- The whistleblower policy must designate one or more employee(s), officer(s), trustee(s) or director(s) of the nonprofit to administer the policy.
 - As an example, the Guidance states that the policy could (a) designate the Chair of the Audit Committee to receive and investigate complaints regarding financial improprieties, and (b) designate the head of the Human Resources Department to receive and investigate complaints regarding violations of the corporation’s applicable human resources policies, problems with co-workers or managers, or issues related to alleged employment discrimination or sexual or any other form of unlawful harassment.
 - The Guidance indicates that the designated person or persons must accept and implement this responsibility, and should have sufficient knowledge, resources, and training to carry it out, maintain records of whistleblower interactions, and identify and address needs for improvement in the policy.
 - The Guidance states that organizations can form or use internal compliance committees under the guidance of the Board or a Board Committee.
 - Each designated person must be required to report on the policy, its implementation, and the general type and resolution of whistleblower complaints to the Audit Committee or other committee of the Board consisting of independent Directors, or to the Board itself.
- Nonprofits must provide whistleblower protection regarding complaints of violations of “adopted policies.”
 - The Guidance defines “adopted policies” to include policies formally adopted by the nonprofit’s governing body that are designed to: prevent financial

wrongdoing, such as internal and external financial controls, accounting policies, and policies prohibiting fraud, theft, embezzlement, bribery, kickbacks, and abuse or misuse of corporate assets; conflict of interest policies; policies addressing unethical conduct; and harassment and discrimination policies.

- The Guidance indicates that some complaints of violations of policies adopted by the Board may not be entitled to whistleblower protection, e.g., a complaint that a co-worker is wearing sandals in violation of the dress code in the employment manual adopted by the Board.
- The Act prohibits “retaliation” or “adverse employment consequences” against the reporting party. The Guidance indicates that retaliation and adverse employment consequences include those identified in the Act (intimidation, harassment and discrimination) and can include failure to promote, adverse impact on compensation, termination, discharge, suspension, demotion, other change in responsibilities, whether formal or informal, and other negative consequences.
- The whistleblower policy must provide that no director, officer, employee, or volunteer who in “good faith” reports any action or suspected action taken by or within the corporation that is illegal, fraudulent, or in violation of legally required policies of the corporation shall suffer intimidation, harassment, discrimination, or other retaliation or, in the case of employees, adverse employment consequence.
 - According to the Guidance, a good faith report is one which the whistleblower reasonably believes to be true, and reasonably believes to constitute illegal conduct, fraud, or a violation of an organization's policy.
 - The Guidance indicates that the good faith requirement focuses on the existence of the violation or suspected violation, and not necessarily on the motives of the whistleblower in bringing it to the attention of the organization.
 - The Guidance sanctions provisions in a whistleblower policy that provide that a whistleblower does not necessarily get immunity for participating or being complicit in the violation or suspected violation that is the subject of her or his report or subsequent investigations.

Who must receive the Whistleblower Policy?

- A copy of the policy must be given to all officers, employees, trustees, directors and volunteers who provide substantial services.
 - In making a determination as to who is a covered volunteer and whether a volunteer provides “substantial services,” the Guidance indicates that a corporation should look to the circumstances of the organization and the role of and relationship with people who assist it in carrying out its mission. Each nonprofit’s definition will reflect its activities and the role played by individuals who assist it without being paid.
 - The Guidance indicates that a nonprofit may refer to the criteria used to determine who is a volunteer in determining the number of volunteers required to be reported in its IRS Form 990.
 - The Guidance notes that some nonprofits may have a volunteer policy that will guide them in identifying who qualifies as a volunteer.
 - Note that at charitable trusts, unlike nonprofit corporations, the policy must be given to all volunteers, not just those who provide substantial services.

- The Act requires a nonprofit to distribute a copy of its whistleblower policy to the individuals described above.
 - According to the Guidance, best practices would include an initial distribution of the whistleblower policy to each of the necessary individuals (for example, as part of the new employee handbook or new director, employee or volunteer orientation), with the requirement that they acknowledge that they have received and reviewed the policy.
 - The Guidance indicates that the distribution requirement may be satisfied by posting the policy on the organization's publicly available website. However, it is incumbent on the organization to ensure that every individual entitled to receive the policy actually has access to it, so the Guidance states that a "hard copy" should be given to anyone who requests it.
 - The Guidance also states that nonprofits should promote ongoing awareness of the whistleblower policy and its requirements and protections as part of their normal compliance training and communication.

Additional Guidance:

- A not-for-profit corporation is not required to adopt a new whistleblower policy if: (1) it is a "state authority" or "local authority" under New York's Public Authorities Law; (2) its board members have already established written policies and procedures protecting employees from retaliation for disclosing information concerning misconduct; and (3) the organization is prohibited by the Public Authorities Law from taking adverse actions against the whistleblower.
- In addition to complying with the whistleblower provisions of the Act, nonprofits must comply with other applicable laws.
 - Organizations that receive funds from the federal government, or from the State of New York or New York county and municipal governments, must follow the additional requirements under Article XIII of the State Finance Law (New York's False Claims Act), which apply to whistleblowers and whistleblower policies.
 - New York's Labor and Civil Service Laws protect whistleblowers in certain situations.

Note that in some instances the Guidance Documents contradict or provide more lenient standards than the Act, and in other instances they provide more restrictive standards than the Act.

This alert is for general information purposes and should not be construed as legal advice. If you would like information about this alert, please contact one of the firm's attorneys:

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