



EMPLOYMENT LAW HANDBOOK
FOR NON-LAWYERS

COMMITTEE ON
LABOR AND EMPLOYMENT LAW

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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This handbook is designed to assist employees who have legal questions about their rights in the workplace.

Oftentimes, employees are able to resolve work problems at work and have no need for the intervention of the courts or an administrative agency. However, sometimes employees are simply unable to resolve their work place problems at work and require some sort of intervention. This pamphlet is designed for those employees who feel they have a workplace problem and believe they require outside assistance.

Unfortunately for non-lawyers – and occasionally for lawyers as well – the field of labor and employment law can be extremely complex. The law of the workplace is governed by a mixture of Federal, State, and City statutes, some of which overlap and some of which are mutually exclusive. This pamphlet will provide an overview of the laws that govern the workplace. It is divided into eight sections:

- 1) The legal relationship between employer and employee
- 2) Wages and pay
- 3) Discrimination
- 4) Whistleblowing
- 5) Unions and collective action
- 6) Health and safety
- 7) Employment benefits
- 8) Unemployment benefits

If after reading this pamphlet, you have questions about how these laws apply to you or about your rights at work, contact the New York City Bar Association's Legal Referral Service at (212) 626-7373 or <http://www.nycbar.org/get-legal-help> to speak with an attorney.

SECTION 1: THE LEGAL RELATIONSHIP BETWEEN EMPLOYER AND EMPLOYEE

Employment at Will

Approximately three quarters of New York City’s workers are “at will” employees,¹ which means their employers can fire them at any time without warning or justification. “At will” employment is based on the notion that individuals should have the right to contract freely with one another, so an employee can quit at any time without giving notice, and, in turn, their employer can fire them at any time without notice.

As a result of “at will” employment, most New York City employers can legally demote or fire employees, or cut employees’ pay or benefits, at any time without giving any notice, reason, or justification. Employers are not required to consider the seniority or work performance of “at will” employees when making decisions about employment. Employers are also not required to issue verbal or written warnings to employees before firing them, even if they have done so for other workers and even if their employment handbook says they will do so.

The only New York City employees who are not employees “at will” are employees who are union members and those who have individual employment contracts. For workers with union contracts or individual contracts, the terms of their contracts govern when and how their employers can fire them or change the terms of their employment.

Even “at will” employees have some legal protections, however. The following sections of this handbook will outline the legal rights that all employees, including “at will” employees, have in the workplace.

¹ RUTH MILKMAN AND STEPHANIE LUCE, JOSEPH S. MURPHY INSTITUTE FOR WORKER EDUCATION AND LABOR STUDIES, THE STATE OF THE UNIONS 2015 6 (Sept. 2015), *available at* https://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/Communications/1509_Union_Density2015_RGB.pdf.

SECTION 2: WAGE AND PAY

Employee wages and other pay-related regulations are primarily governed by two laws: the Federal Fair Labor Standards Act (FLSA), which sets certain minimum national standards, and the New York Labor Law (NYLL), which applies to all employees working in the State of New York.

Fair Labor Standards Act

The FLSA provides that most employees must be paid at least the Federal minimum wage² for all hours actually worked up to 40 in any given week, and one and one-half their regular rate of pay for each hour actually worked above 40 hours in any given week.

Certain types of workers are not included in the FLSA's definition of "employee" and, therefore, are not covered by the minimum wage and overtime rules described above. For example, student interns who are engaged in a legitimate internship program related to a course of study and in which the intern is the primary beneficiary of the internship are not required to be paid minimum wage or overtime wages. Likewise, non-profit and governmental organizations may employ unpaid volunteers, whereas for-profit entities are generally prohibited from employing unpaid volunteers if their work would replace work normally done by employees. Independent contractors are another category of workers who, if properly classified, are not subject to the rules of the FLSA. Independent contractors are discussed further, below.

Certain types of workers, while considered "employees," are nonetheless not covered by the FLSA minimum wage and overtime provisions. These employees are referred to as "exempt":

- **Executive Employees**: workers who are paid on a salary basis (paid a predetermined amount each pay period regardless of days or hours worked) at least \$455 per week and have, as their *primary duty*, management duties including directing two or more full-time employees, are generally exempt.
- **Administrative Employees**: workers who are paid on a salary or fee basis at least \$455 per week and have, as their *primary duty*, office or nonmanual work directly related to the management or general business operations of the employer, and who exercise discretion and independent judgment regarding significant management matters, are generally exempt.

² The Federal minimum wage changes frequently; check here for the current rate: www.dol.gov/general/topic/wages/minimumwage.

- Professional Employees: workers who are paid on a salary or fee basis at least \$455 per week and have, as their *primary duty*, work that requires advanced knowledge in a field customarily requiring a prolonged course of specialized educational or intellectual instruction (for example, an attorney, a doctor, an architect, or an engineer), and whose work requires consistent exercise of discretion and judgment or invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, are generally exempt.
- Outside Salesperson: workers who, as a *primary duty*, regularly engaged in making sales or obtaining orders or contracts away from the employer's place of business or any fixed location, are generally exempt.
- Computer Employees: workers who perform certain computer systems analysis and programming work are exempt. Generally, only those who perform independent programming work, such as writing original programs, fall into this exempt category. In order to be exempt, these employees must also be paid more than \$27.62 per hour or \$455 per week on a salary basis.
- Highly Compensated Employees: workers with a total annual compensation of at least \$100,000 and customarily perform one or more of the exempt duties of an executive, administrative, or professional employee, are generally exempt. This does not apply to outside salespeople or computer employees.

Employees who are covered by the FLSA and who are not paid minimum wage or overtime wages as set forth in the law can file a legal action in court to recover the wages he or she should have been paid. Additionally, the employee is entitled to recover an additional *equal amount* in liquidated damages from the employer if the employee succeeds in his or her legal action.

New York Labor Law

The NYLL also provides for minimum hourly wages to be paid to most employees performing work within the State of New York,³ although certain industries are bound by specific minimum wage rates for that industry, such as fast food workers and tipped workers.⁴ Under the NYLL, employees who are required to work more than ten hours in any given day or work a "split shift" are also entitled to be paid for an extra hour of work.

³ New York State's minimum wage changes frequently; check the New York Department of Labor for the current rate: www.labor.ny.gov/workerprotection/laborstandards/workprot/lshmpg.shtm.

⁴ For industry-specific minimum wage information, see the New York Department of Labor's website at: www.labor.ny.gov/workerprotection/laborstandards/workprot/MW%20Updates/minimum-wage-update.shtm.

Like the FLSA, certain workers are “exempt” from the provisions of the NYLL, including part-time babysitters, outside salespeople, and live-in companions, although other regulations may apply to such workers.

The NYLL includes many of the same exemptions as the FLSA, including the Executive Employee, Administrative Employee, and Professional Employee exemptions. However, for these exemptions to apply in New York, the employee must be paid a minimum of \$675 per week (rather than \$455 under the FLSA). As a practical matter, this means that an employee in one of these categories of employment who is paid a salary of more than \$455 but less than \$675 may still have legal claims under the NYLL if she or he is not paid the required minimum wage or overtime rates.

Employees who are covered by the FLSA and who are not paid minimum wage or overtime wages as set forth in the law can file a legal action in court to recover the wages he or she should have been paid. Additionally, the employee is entitled to recover an additional *equal amount* in liquidated damages from the employer if the employee succeeds in his or her legal action.

In New York, under the Wage Theft Protection Act, employers are also required to provide every new hire with a written notice of wage rates, which must include:

- The rate or rates of pay, including the overtime rate of pay if applicable;
- How the employee will be paid (by the hour, shift, day, week, commission, etc.);
- The regular pay day;
- The official name of the employer and any other names used by the business, including “doing business as” names;
- The address and phone number of the employer’s main office or principal location; and
- Any allowances that will be taken as part of the minimum wage (tips, meals, and lodging deductions), if applicable.

In addition, employers are required to provide a wage statement or pay stub on each pay day that lists all of this information plus the employee’s name, the employer’s name, address, and phone number, as well as stating the dates of work covered by the payment.

Failure to comply with the Wage Theft Protection Act can lead to the employer being investigated and fined by the Department of Labor, or subject the employer to damages in a civil law suit by an employee.

Independent Contractors

Individuals who perform work for another individual or entity as an independent contractor is not an “employee” under either the FLSA or the NYLL. Independent contractors are not entitled to overtime or minimum wage under the law, and employers are not required to withhold or pay payroll taxes for independent contractors.

In New York, the Department of Labor defines independent contractors as workers who are free from “supervision, direction, and control in the performance of their duties.” They are in business for themselves and generally offer their services to the general public, not just one entity or individual. Some signs that a person is an independent contractor include (but are not limited to): having an established business entity and place of business, advertising that business, carrying appropriate insurance in the individual or business name, paying his or her own business expenses, setting his or her own business and work hours, refusing work offers when he or she wishes to, and hiring help when appropriate.

Similarly, under Federal law, including the FLSA, courts apply what is referred to as the “economic realities” test to determine whether someone has been misclassified as an independent contractor. Although there are many relevant factors, similar to those set forth above, this rule essentially looks to whether the worker had economic independence from the business he or she provided services to or if the worker was actually economically dependent on the employer.

These definitions and tests are important, since employers sometimes arbitrarily classify and pay workers as independent contractors even though they are performing work in a way that actually fits the definition of “employee.” This kind of situation is referred to as “misclassification” and if it results in an employee not being provided with the benefits of an employee, including but not limited to minimum wage and overtime pay, it can lead to legal action and investigation of the employer by State and Federal agencies. Accordingly, both State and Federal law make it clear that the ultimate inquiry is about the actual duties of the worker and relationship between the worker and employer, and not about the label given to the relationship.

SECTION 3: DISCRIMINATION

All employees have the right to a workplace free from unlawful discrimination. However, not all types of unfair or differential treatment are legally-prohibited discrimination. For example, an employee who is fired because of nepotism, favoritism, or a misunderstanding is not protected by the anti-discrimination laws. Federal, state, and city anti-discrimination laws each have a list of reasons that employers are forbidden from relying on when making employment decisions. If an employer relies on one of these prohibited reasons, they have engaged in unlawful discrimination.

Federal law	State Human Rights Law	City Human Rights Law
Age (over 40 years old)	Age	Age
Race	Race	Race
Color	Color	Color
National origin	National origin	National origin
Religion	Creed/Religion	Creed/Religion
Sex	Sex	Gender
		Gender identity/expression
	Sexual orientation	Sexual orientation
Pregnancy	Pregnancy	Pregnancy
	Familial status	Caregiver status
Disability	Disability	Disability
Genetic characteristics	Genetic characteristics	
	Marital status	Marital/Partnership status
	Military status	
		Alienage/Citizenship status
	Arrest/Conviction record	Arrest/Conviction record
	Status as a victim of domestic violence	Status as a victim of domestic violence, sexual violence, or stalking
		Unemployment status
		Credit history

Age: Federal law only protects employees who are over 40 years of age, but state and city anti-discrimination law prohibits discrimination against employees of any age.

Race/Color/National Origin: All three laws protect individuals from discrimination based on the shade of their skin, their racial or ethnic heritage, their ancestry, or characteristics related to their ancestry or national origin, such as an accent or speech pattern. Discrimination can occur within a racial or ethnic group, or across groups.

Religion: Employers cannot discriminate against employees because of their religious beliefs, regardless of whether those beliefs are shared by an organized religion or faith. In addition, employers are required to accommodate employees' religious practices and observances by, for example, not scheduling them to work on their Sabbath.

Sex/Gender/Gender Identity and Expression: Employees are protected from discrimination on the basis of their sex, gender, gender identity, or gender expression.

Sexual Orientation: City and State anti-discrimination law protect employees from discrimination based on their sexual orientation, which includes workers who are straight, gay, bisexual, or any other orientation.

Pregnancy: In addition to prohibiting discrimination against pregnant workers, employers are required by the city anti-discrimination law to provide reasonable accommodations to employees for their pregnancy, childbirth, or related medical conditions.

Familial Status/Caregiver Status: State and city law protect employees from discrimination based on their familial or caregiving responsibilities. However, employers are not required to provide accommodations to employees to meet their familial or caregiving responsibilities.

Disability/Genetic Characteristics: Employers are restricted in what types of questions they can ask applicants and employees regarding their health, illnesses, medical conditions, and genetic information. Under the city's anti-discrimination law, a disability includes any physical, medical, mental, or psychological impairment, regardless of duration or severity. Employers are not allowed to discriminate against people because they have disabilities, and they must provide accommodations to enable people with disabilities to perform their jobs successfully.

Marital/Partnership Status: Employers cannot discriminate against employees because they are married, unmarried, in a domestic partnership, or divorced.

Military Status: Employers cannot discriminate against employees because of their service in the U.S. armed forces, the army national guard, the air national guard, the New York State naval militia, the New York guard, or any other similar forces.

Alienage/Citizenship Status: Under the city anti-discrimination law, employers cannot discriminate against employees because of their citizenship or immigration status. Employers are not required to hire workers who do not have authorization to work, but they cannot treat existing employees differently because of their citizenship or immigration status.

Arrest/Conviction Record: Under both state and city anti-discrimination law, employers cannot refuse to hire applicants because of their criminal convictions, unless they have considered a variety of factors to determine whether the convictions have a direct relationship to the job in question or create an unreasonable risk to people or property. Under the city's anti-discrimination law, employers cannot ask any questions about an applicant's criminal convictions until after a conditional offer of employment has been made. In addition, employers who decide to deny an applicant a job after reviewing their criminal convictions must provide the applicant with notice of their decision and an opportunity to respond.

Victim of Domestic Violence, Sexual Assault, or Stalking: The city anti-discrimination law prohibits employers from discriminating against victims of domestic violence, sexual assault, or stalking, and also requires employers to provide reasonable accommodations to employees who are victims of domestic violence, sexual assault, or stalking.

Unemployment Status: Employers cannot discriminate against applicants because they are unemployed at the time of their application.

Credit History: For most job applicants, employers cannot request or review the applicant's consumer credit history as part of the hiring process.

Another difference between federal, state, and city anti-discrimination law is the employers they apply to. For an employer to be covered by federal anti-discrimination law, they must have at least fifteen employees, or, in the case of an age discrimination claim, twenty employees. In contrast, employers are subject to state and city anti-discrimination law if they have at least four employees. That means that a New York City employee can only make a legal claim of discrimination if her or his employer has at least three additional employees.

Federal, state, and city anti-discrimination laws prohibit broadly the same types of treatment. They all make it illegal for an employer to refuse to hire, to fire, to harass, or to offer worse terms or conditions of employment to a worker because of his or her membership in one of the protected classes listed above. All three laws also prohibit retaliation against workers who speak out in opposition to discrimination at work, participate in an investigation into discrimination in their workplace, or file claims of discrimination. Following are some examples of illegal discrimination:

- An employer refuses to hire a job applicant because of her criminal conviction without considering whether that conviction has a direct relationship to the job at issue or would create an unreasonable risk to persons or property.
- An employer refuses to hire a job applicant because she is a young, married woman, and he assumes she will soon start a family and leave the workforce.
- An employer pays undocumented workers less per hour than workers with work authorization.
- An employer allows an employee who is attending school to leave early two days per week but doesn't allow an employee who is caring for his ill mother to leave early two days per week to accompany her to medical appointments.
- An employer who runs a restaurant will only hire Chinese employees to work as waitstaff, while Latino employees are only allowed to work in the kitchen or making deliveries.
- An employee is harassed because of his sexual orientation and gender expression – his coworkers call him offensive names, refer to him with female pronouns, and sometimes push or shove him. The harassment happens in front of managers, but nothing is done to stop it.
- A workplace is permeated with racist insults and "jokes." An African-American employee repeatedly complains to supervisors about her coworkers using the n-word, but they tell her to "lighten up."
- A pregnant employee asks for a stool to sit down during breaks, but her employer denies her request.
- An employee whose religious beliefs require him to wear a beard is disciplined for violating his employer's "clean look" policy.
- An employee informs her boss that she is a victim of domestic violence and that her abuser is stalking her. She asks for his picture to be distributed to security so that they can bar him from the building. Instead, her boss tells her to stay home on unpaid leave until further notice out of fear that her abuser will come to the workplace and harm the employee and her coworkers.

- An employee informs his boss that he has been diagnosed with cancer. Without consulting the employee, his boss cuts his schedule from fulltime to parttime to ensure the employee doesn't push himself too hard.

An employee who brings a successful discrimination claim against their employer can recover the value of lost pay and benefits due to the discrimination, compensation for emotional distress they experienced as a result of the discrimination, and, in limited cases, punitive or penalty damages for the employer's willful bad behavior.

One key difference between federal, state, and city anti-discrimination law is the amount of time an employee has to file a claim. To file a claim under federal law, the employee must file a charge of discrimination with the Federal Equal Employment Opportunity Commission within 300 days of the discriminatory act. In contrast, to file a claim under state or city anti-discrimination law, the employee has up to one year to file a claim with the agencies that enforce those laws, or up to three years to file a claim in court. Under the state and city anti-discrimination laws, an individual must choose to either file with an agency or in court – they cannot do both.

Because all three agencies work together, your rights under all three laws should be protected no matter which agency you go to first. Here is contact information for the federal, state, and city agencies that enforce the anti-discrimination laws:

Federal law

Equal Employment Opportunity Commission
33 Whitehall Street, 5th Floor
New York, NY 10004
Phone: (800) 669-4000
Website: <http://www.eeoc.gov/field/newyork>

State law

New York State Division of Human Rights
Phone: (888) 392-3644
The New York State Division of Human Rights has multiple offices in various parts of New York City. They also accept claims filed online or by mail. For more information about how to file a claim, go to: <http://www.dhr.ny.gov/how-file-complaint>.

City law

New York City Commission on Human Rights
Headquarters: 22 Reade Street, New York, NY 10007
Phone: Dial 311 and ask for "human rights"
Website: <http://www.nyc.gov/cchr>

SECTION 4: WHISTLEBLOWING

A whistleblower is a person, sometimes a current or former employee, who reports illegal or fraudulent activity by a business, government, or other organization. Whistleblower laws are intended to provide some protection to individuals who report such activity, usually providing a mechanism for properly reporting the illegal or fraudulent activity and protecting against retaliation. While many of the whistleblower laws on the books apply regardless of whether the person “blowing the whistle” is an employee of the business, government, or organization engaging in illegal behavior, employees who blow the whistle on their employers are in particular danger of suffering retaliation once their actions are discovered. When these laws are referring to employment situations, the term “retaliation” usually means that adverse personnel action is taken against the whistleblower. But “adverse personnel action” can take many different forms, including termination and demotion, but sometimes also a transfer, shift change, harassment, a poor evaluation, or other negative actions.

It is important to note that some whistleblower laws only protect against retaliation if the whistleblower follows the law’s *specific procedures* for reporting the wrongful conduct, and if those procedures are not followed, whistleblowers may lose their rights under the law.

This section gives an overview of the State and Federal Laws available to whistleblowers, but because these laws can be very complicated, we strongly urge non-attorneys to quickly seek out legal counsel before taking steps to report illegal or fraudulent conduct that could subject you to retaliation or other negative consequences.

NEW YORK WHISTLEBLOWER LAWS

New York Labor Law § 215

The New York Labor Law (“NYLL”) contains several sections that protect employees who speak out against their employers about certain types of illegal and/or dangerous conduct. NYLL § 215 protects employees from retaliation from their employer because the employee has made a complaint about certain labor conditions, whether that complaint was made directly to the employer, or to the New York State Department of Labor, New York State Attorney General, or any other person.

The law protects:

- Employees who make complaints against employer conduct that violates any other section of the NYLL, including (but not limited to) failing to pay minimum wage and overtime, where required; withholding money from employee paychecks illegally; stealing tips from tipped workers; and any other section of

the NYLL;

- Employees who are preparing to file or have already filed a lawsuit against the employer claiming that the employer violated the NYLL; or
- Employees who provide information to the New York State Department of Labor or New York State Attorney General regarding violations of the New York Labor Law, even if that employee was not the person who started the investigation;

In addition, if the New York State Department of Labor investigates an employer and issues a determination against the employer and in favor of an employee—even if the investigation was not started by the employee—that employee is protected from retaliation under this law.

Even if it is later determined that an employer did not violate any law, an employee who reports actions or conduct that the employee reasonably believed was unlawful, in good faith, cannot be retaliated against by the employer. Sometimes employers believe an employee reported conduct and target that employee for retaliation based on that belief. If that happens, even if the employee did not actually report the employer in the first instance, the employer's retaliation is unlawful and the employee could still have a claim against the employer.

Claims under NYLL § 215 must be filed in court within two years of the employer's retaliatory actions, or the employee will not be able to pursue them. If the employee is successful, he or she can recover the cost of filing any legal action, may be able to force the employer to re-hire him or her, can be awarded damages for lost wages and other monetary damages, and can win up to \$10,000 in liquidated damages on top of the employee's actual damages.

New York Labor Law §§ 740 and 741

These sections of the NYLL are also aimed at protecting employees who “blow the whistle” on their employer for certain conduct. Specifically, § 740 makes it illegal for an employer to retaliate against an employee who:

- discloses or threatens to disclose to a supervisor or to a public body, activities, policies or practices that violate a law or regulation, and which create a “substantial and specific danger to the public health or safety”;
- discloses or threatens to disclose to a supervisor or to a public body, activities, policies or practices that violate a law or regulation, and which constitute health care fraud;
- provides information or testifies before a public body who is investigating or inquiring about the employer's violation of a law, rule or regulation; or
- objects to or refuses to participate in an activity, policy or practice that would

violate the law.

Section 741 is aimed specifically at health care workers and protects employees that supply health care services as part of their job from retaliation for disclosing improper quality of patient care. “Improper quality of patient care” has a specific meaning under the law, and includes:

- any practice, procedure, act or omission that violates a law, rule, or regulation; and
- that may cause a substantial and specific danger to public health or safety or pose a significant threat to a specific patient.

Employees who report these practices, procedures, acts or omissions are protected from retaliation by their employer even if it turns out that what they reported did not actually violate a law, rule, or regulation, as long as the employee reported it in good faith and had a reasonable basis for their belief that it did.

Before disclosing an unlawful activity, policy or practice described in NYLL §§ 740 or 741 to a public body, such as the New York State Department of Labor or Department of Health, an employee first has to bring it to the attention of a supervisor and give the employer a chance to correct the activity, policy or practice. If an employee fails to do this, and goes directly to a public body, the employee will not be protected from retaliation by the employer. The only exception to this is where improper quality of patient care presents an imminent threat to public health or safety, or to the health of a specific patient, and the employee has reason to believe that reporting it to a supervisor would not address the problem.

If an employee has been retaliated against by an employer for actions that fall under NYLL §§ 740 or 741, the employee only has one year to file a claim in court or else they will lose their legal rights under the statutes. If a claim is successful, an employee who has been retaliated against unlawfully may be able to be reinstated to his or her job with all the seniority rights and fringe benefits he or she would have otherwise had, recover back pay and lost wages or benefits, and force the employer to pay for the cost of bringing the lawsuit.

New York Civil Service Law § 75-b

Only permanent (non-probationary) public employees of one of the following are covered by New York Civil Service Law § 75-b:

- New York State;
- A county, city, town, village or other municipality;

- A school district or other entity running a public school, college, or university (including charter schools);
- Any public improvement district or other special district;
- A public authority, commission, or benefit corporation; or
- Any other public corporation.

If an employee of one of the above discloses information that he or she reasonably believes exposes violation of a law, rule or regulation that creates and presents a “substantial and specific danger to the public health or safety,” that employee is protected from retaliation for his or her disclosure under the Civil Service Law. An employee who reports information that he or she reasonably believes is both true and constitutes “improper governmental action” is also protected from retaliation, even if it turns out he or she was wrong. “Improper governmental action” includes actions “in violation of any federal, state or local law, rule or regulation.”

In order to be protected by the Civil Service Law, before a public employee discloses the information or actions to any *other* government agency or official, he or she has to make a good faith effort to bring the issue to the attention of his or her own employer and allow the employer a reasonable time to correct the action. The only exception is where there is an imminent and serious danger to the public health and safety.

A public employee who does not report internally first could find that his or her actions were not protected and that he or she has no claim against his or her employer for retaliation.

Because most public employees are subject to a collective bargaining agreement (or union contract), Civil Service Law § 75-b is generally used as a defense in a disciplinary proceeding where the employer is trying to impose some level of punishment on an employee and the employee claims that it is in retaliation for engaging in protected whistleblowing under Section 75-b. In that instance, the arbitrator or hearing officer will consider the evidence and defense as part of the disciplinary proceedings and can order reinstatement with back wages, and other appropriate action to remedy any retaliation if the employee succeeds.

If the public employee is *not* subject to a collective bargaining agreement, he or she can bring an action against the employer in court in the same way as described above under New York Labor Law § 740.

New York False Claims Act

The New York False Claims Act prohibits any person or entity from knowingly

submitting false claims for payment to New York State or to a local government. This could include false health care claims, fraudulent billing in government construction or other contracts, fraudulent charges for private prison, housing, or other industries and services, and more.

In addition to prohibiting submitting false claims for payment, the law also prohibits fraudulently *avoiding* payment that they rightly owe to the government. This could include fraudulently avoiding payment of owed taxes, but only where the fraudulent filing is by a person or entity with income or sales over \$1 million a year and the fraudulent amounts are more than \$350,000.

The New York False Claims Act allows an individual with unique knowledge of conduct that violates the law to bring an action in court on behalf of the defrauded government, within six years of the fraudulent conduct. The whistleblower does not have to be an employee, but very often it is employees who have information necessary to pursue a False Claims Act case. **Note:** the False Claims Act does not give employees license to take documents, files, or other paper or electronic records that they would not otherwise be entitled to in order to pursue a False Claims Act case, and courts have punished employees who do.

Whistleblowers who think they may have a False Claims Act case should beware, however, because there are strict procedures and requirements in order to succeed in this kind of case.

First, the whistleblower (who is called a “relator” in False Claims Act cases) must be the first person to bring this information to the attention of the government. If the violations or fraudulent actions have been reported in the media, have been the subject of a government investigation—even if the exact specifics that the relator knows of weren’t revealed—or have been reported by another individual, the relator may find that the cannot win their case.

If the relator has a good case, is the first to report the information, and it is within the statute of limitations, the relator files a secret, sealed complaint in court and then provides it to the New York State Attorney General’s Office *only*. The Attorney General’s Office has a chance to investigate and can either take the case over for the relator, allow the relator (or the relator’s attorney) to pursue the case and make it public, or determine that it does not believe the case is strong and try to get it dismissed.

If the case is ultimately successful based on the information provided by the relator, he or she could be awarded up to 30 percent of what the government recovers from the defendant, depending on a variety of factors including how essential the relator’s assistance was to winning the case. The relator is also entitled to recover any

costs or attorney's fees related to the case from the defendant if he or she is successful.

If the relator is employed by the defendant, he or she is protected from retaliation from the employer because of his or her participation in the case. If the employer-defendant does take retaliatory action against the relator, that can become part of the False Claims Act case and the employee may be able to recover damages, like lost wages, depending on the type of retaliation he or she suffered.

FEDERAL WHISTLEBLOWER LAWS

Whistleblower Protection Act of 1989 and Whistleblower Protection Enhancement Act of 2012

Federal employees are protected for reporting or disclosing information that they reasonably believe reveals:

- a violation of any law, rule or regulation;
- gross mismanagement;
- a gross waste of funds;
- an abuse of authority; or
- a substantial and specific danger to public health or safety.

This protection applies whether the disclosure was made as part of the employee's regular job duties or not, and without regard to whether the information was revealed previously or not.

Retaliation under the 2012 law can include removal, demotion, reassignment, pay decisions, and significant changes in duties, responsibilities, or working conditions, among other negative actions. The law also makes it clear that an agency that institutes a retaliatory investigation of a whistleblower is in violation of the law and subject to damages.

Although Federal employee whistleblowers can report wrongdoing to the Inspector General's office at the agency where the wrongdoing occurred, the Office of Special Counsel (OSC) operates a confidential whistleblower disclosure hotline (800-572-2249) and keeps the identity of whistleblowers confidential during its investigations. OSC is an independent agency that is specifically charged with interpreting, investigating, and prosecuting claims of retaliation brought by Federal employees.

If a Federal employee is disciplined in a manner that is appealable to the Merit System Protection Board ("MSPB"), the employee can raise the retaliation as a defense to the agency's attempt to discipline him or her. There are various deadlines for appealing different disciplinary actions, so Federal employees should seek additional

information from the agency or the MSPB to determine the appropriate deadline.

Some personnel actions are not normally appealed to the MSPB; in those situations, Federal employees can contact OSC and go through its complaint procedure. The employee can then file what's called an Individual Right of Action with the MSPB. There is no statute of limitations or deadline to report retaliatory personnel actions to OSC.

Additionally, some Federal employees are unionized and have an alternative venue for filing grievances and entering into arbitration under their collective bargaining agreement. Employees should consult their collective bargaining agreement for the proper procedures and time limits for filing a grievance.

Federal Statutes Enforced by the Occupational Safety & Health Administration

There are many industry-specific Federal laws that are regulated by the Occupational Safety & Health Administration ("OSHA") and that provide various levels of whistleblower protections when employees engage in "protected activity" under any of the covered laws. These statutes usually require that complaints of retaliation be filed with OSHA within 30 to 180 days:

- **Affordable Care Act Section 1558:** Prohibits retaliation for any employee because he or she reports a violation of the Affordable Care Act by the employer, testifies about or assists in investigating a violation, or objects to or refuses to participate in activity that would be a violation of the law. (180 days)
- **Asbestos Hazard Emergency Response Act:** Protects employees of a State or local educational agency (including private, nonprofit elementary or secondary schools) who provide information relating to a violation of the law to any other person or government. (90 days)
- **Clean Air Act:** Employees who start or intend to start a proceeding under the law, or who testify or participate in such a hearing, cannot be retaliated against. (30 days)
- **Commercial Motor Vehicle Safety Act:** (180 days)
- **Comprehensive Environmental Response, Compensation and Liability Act:** Protects employees from retaliation for providing information to a State or Federal government, or filing, participating in, or testifying at any proceeding related to enforcement of the act. (30 days)
- **Consumer Financial Protection Act of 2010 (Dodd-Frank):** Employees whose job relates to offering or providing consumer financial products or services are protected from retaliation for 1) reporting information relating to a violation of the laws and regulations of the Consumer Financial Protection Bureau or reporting

acts or omissions he or she reasonable believes to be a violation; 2) testifying in any proceeding related to enforcement of the law; 3) starting any proceeding under any Federal consumer financial law; or 4) objecting to or refusing to participate in any activity, policy, practice or task that is reasonably believed to violate any of the laws or regulations enforced by the Bureau. (180 days)

- **Consumer Product Safety Improvement Act:** (180 days)
- **Energy Reorganization Act:** (180 days)
- **FDA Food Safety Modernization Act Section 402:** (180 days)
- **Federal Mine Safety and Health Act:** (60 days)
- **Federal Railroad Safety Act:** (180 days)
- **Federal Water Pollution Control Act:** (30 days)
- **International Safe Container Act:** (30 days)
- **Migrant and Seasonal Agricultural Worker Protection Act:** (180 days)
- **Moving Ahead for Progress in the 21st Century Act:** (180 days)
- **National Transit System Security Act:** (180 days)
- **Occupational Safety and Health Act:** (30 days)
- **Pipeline Safety Improvement Act:** (180 days)
- **Safe Drinking Water Act:** (30 days)
- **Sarbanes-Oxley Act:** (180 days)
- **Seaman's Protection Act:** (180 days)
- **Solid Waste Disposal Act:** (30 days)
- **Surface Mining Control and Reclamation Act:** (30 days)
- **Surface Transportation Assistance Act:** (180 days)
- **Toxic Substances Control Act:** (30 days)
- **Wendell H. Ford Aviation Investment and Reform Act for the 21st Century:** (90 days)

Employees who are covered by any of these statutes and who believe they have suffered retaliation for reporting violations of the statute(s) can file a complaint with OSHA in person, over the phone, or by sending a written complaint to the nearest regional or area office. The date the complaint is sent is the date used by OSHA to determine whether it was timely under the relevant law, so however the complaint is made, employees should take care to keep evidence of sending or send using a trackable method. Much more information about OSHA's complaint process and what is covered by each of the above laws can be found at its website: www.whistleblowers.org.

Department of Defense Authorization Act of 1987

The Department of Defense Authorization Act of 1987 applies to Federal defense contractors and their employees. Defense contractors are prohibited from retaliating against employees who report information about a substantial violation of law related to the contract with the government, including violations during the competition for the contract or the negotiation process. Other protected activity includes reporting gross waste of funds, abuses of authority, and dangers to the public health and safety.

Employees can disclose information to a member of Congress, an authorized official of an agency, or the Department of Justice.

Employees who are retaliated against for this protected conduct can file a complaint to the Inspector General, who will conduct an investigation and could be ordered to pay the employee for related damages, including back pay.

Federal False Claims Act

The Federal False Claims Act very closely mirrors the New York State False Claims Act, discussed above. Any person or entity that knowingly submits a false claim to the Federal government for payment, or knowingly makes a false statement to get a false claim paid by the federal government, can be liable under the False Claims Act. Additionally, anyone who improperly acts to avoid having to pay money they rightly owe to the Federal government, can also be liable. However, unlike the New York statute, the Federal False Claims Act specifically excludes claims related to taxes.

The law allows an individual with unique knowledge of violations to file an action on behalf of the government, usually within six years of the violation. Again, the person filing the action is referred to as a “relator”. The complaint is filed confidentially, under seal, in United States District Court and then served on the United States Attorney for the district where it was filed and the United States Attorney General’s Office. The government then has an opportunity to investigate while the action is sealed, after which it must either take over the case or decline to take over the case and allow the relator to pursue the case him or herself.

If the case is ultimately successful, the relator can get between 15 and 30 percent of any recovery, depending on the way the case is prosecuted. In addition, a relator can get reimbursement for costs and attorney’s fees related to the case.

The Federal False Claims Act provides that certain circumstances will bar a relator from pursuing an action:

- The relator was convicted of criminal conduct related to his or her role in the violations;
- Another action was already filed relating to the same conduct;

- The government already started a proceeding related to the conduct; or
- The relator's information was already disclosed through other means, including a criminal, civil, or administrative hearing, other government hearing, audits, reports, or investigations, or even through the news media.

SECTION 5: UNIONS AND COLLECTIVE ACTION

The National Labor Relations Act (“NLRA”) is a federal law that protects the rights of employees to self-organization, to form, join or assist labor organizations, to bargain collectively through representation of their own choosing, and to engage in other “concerted activities” for the purpose of collective bargaining or other “mutual aid or protection.” It also protects the rights of employees who wish to refrain from engaging in such organization or union activity.

Employees who are represented by a union are generally also covered by a union contract, also referred to as a Collective Bargaining Agreement or “CBA”. These agreements are not specific to any individual employee but are intended to address common issues relevant to the employment of a specific group of employees. If your employment is governed by a CBA, you are unlikely to be an employee “at will” and the terms of your employment, and possibly the permissible grounds for your termination, are expressly set forth in the agreement. CBAs often contain restrictions on an employer’s ability to impose discipline or set forth precisely how alleged infractions must be investigated before discipline can be imposed. Many CBAs have a detailed grievance procedure and mandate certain steps to arbitrate or mediate grievance disputes when they arise.

In addition to the protections spelled out in any particular CBA, as stated earlier the NLRA contains protections for all employees. Specifically, under the NLRA it is an “unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of the rights” guaranteed by the statute. While many violations of the NLRA arise in the context of a union organizing campaign, individual employees covered by the statute who are disciplined for taking steps on behalf of their fellow employees are protected by the NLRA, even when those steps are not in the context of a union organizing campaign. For example, an employee who asked his or her employer for a raise *on behalf of his or her colleagues* cannot be disciplined or terminated for doing so. Because this conduct was on behalf of his or her fellow employees, it is considered “concerted activity” regarding the terms and conditions of employment and is, therefore, protected by the NLRA. Any employee or union (on behalf of an employee or employees) may file a charge against an employer alleging violations of the NLRA with the federal agency that is charged with enforcing the law: the National Labor Relations Board.

Another important aspect of the NLRA relates to the duties owed by a labor union to its members, specifically the Duty of Fair Representation. As mentioned earlier, most CBAs set forth grievance and arbitration procedures for resolving disputes under the contract. If an employer disciplines or discharges an employee, and the employee claims the action violated the CBA, these procedures must be followed to resolve the

dispute. At this point, the union is required to represent any employee covered by the CBA. The union is obligated to investigate the grievance to determine its merits, evaluate the facts, and analyze your likelihood of success. Of course, not every grievance is meritorious and the union is not obligated to pursue every case to arbitration.

However, meritorious grievances cannot be treated in an arbitrary and capricious manner by the union, and the union may not unlawfully discriminate against you by refusing to process your grievance. Whether the union has engaged in this conduct or not requires a fact-specific analysis that is outside the scope of this handbook, but if an employee believes the union has failed to satisfy its Duty of Fair Representation in this manner, he or she may file an unfair labor practice charge against *both* the employer and the union at the National Labor Relations Board. The employee would also have the option of commencing a lawsuit in either state or federal court. In either case, however, you must file your charge or commence your lawsuit within six months of the violation.

SECTION 6: HEALTH AND SAFETY

All New York City employees are entitled to a workplace that is free of known health and safety hazards. For example, employees have the right to:

- Receive training on safe practices in a language they understand
- Work on safe machines
- Be provided with safety gear, such as gloves
- Be protected from toxic chemicals
- Report a workplace-related illness or injury
- Review records of workplace-related illnesses or injuries

Employees also have the right to speak out about unsafe workplace conditions without retaliation. It is illegal for an employer to fire, demote, transfer, or otherwise retaliate against an employee because they have exercised their right to a safe workplace.

Employees of private companies who believe their workplace is unsafe or who believe they have been retaliated against should immediately contact the Federal Occupational Safety and Health Administration at (800) 321-OSHA or https://www.osha.gov/workers/file_complaint.html. Employees of public agencies, including state, city, county, town, and village governments, school districts, and fire departments, should contact the New York Public Employees Safety and Health Bureau at (518) 457-1263 or https://www.labor.state.ny.us/workerprotection/safetyhealth/DOSH_INDEX.shtm.

SECTION 7: EMPLOYMENT BENEFITS

Employers offer many different types of benefits. Some are mandatory, while others are voluntary. Some are monetary, while others are unpaid privileges such as time off work. This section will explore each of these types of benefits. Note that this section may not apply to employees who are unionized or have individual employment contracts.

Vacation time

There is no legal entitlement to paid or unpaid vacation time. That means employers can make prospective changes to their policies on vacation time without violating the law. However, an employer cannot retroactively take away an employee's vacation pay. An employee who believes they have been illegally deprived of their vacation pay should contact the New York State Department of Labor at (888) 469-7365 or https://labor.ny.gov/workerprotection/laborstandards/lis_ContactUs.shtm.

Employers who provide paid vacation time are not required to pay employees for their accrued but unused vacation time if the employment relationship ends; however, employers are not allowed to deny employees accrued but unused vacation time for unlawful discriminatory reasons. An employee who believes they have been denied vacation benefits for discriminatory reasons should contact one of the agencies listed in Section 3 on Discrimination.

Paid sick time

Under the Earned Sick Time Act, New York City employers with five or more employees are required to provide their employees with up to five paid sick days per year. Employers with four or fewer employees still have to provide their employees with sick time, but the sick time is unpaid.

Employees earn sick time as they work: they earn one hour of sick time for every thirty hours worked. Employees can use sick time for their own medical or preventive care, or to provide care for a family member who needs medical or preventive care. Employers cannot retaliate against employees for requesting or using sick time.

Employees who believe they have been denied legally-earned sick time or retaliated against for requesting or using sick time should contact New York City's Department of Consumer Affairs by calling 311 and asking for "consumer affairs" or going online to <http://www.nyc.gov/PaidSickLeave>.

Severance pay

There is no legal entitlement to severance pay. Employers are not required to give employees notice before firing them, nor are they required to offer severance pay, even to employees who have worked for the employer for a long time. However, employers are not allowed to deny employees severance pay for unlawful discriminatory reasons. An employee who believes they have been denied severance pay for discriminatory reasons should contact one of the agencies listed in Section 3 on Discrimination.

Health insurance

The Affordable Care Act requires employers with fifty or more full-time employees to offer affordable health insurance policies to their employees. Smaller employers are not required to offer health insurance to employees, although they can do so if they want. If you believe your employer is violating the Affordable Care Act, visit the IRS's website at <https://www.irs.gov/Affordable-Care-Act> or call the United States Department of Labor at (866) 444-3272.

If you have employer-sponsored health insurance and lose your job, you may have the right to take over payment of your health insurance premiums from your employer in order to keep your insurance active. Your employer should send you a notice in the mail pursuant to the Consolidated Omnibus Budget Reconciliation Act, or COBRA, regarding your rights to continue your health insurance. If you believe your employer has violated your rights under COBRA, contact the United States Department of Labor at (866) 444-3272.

Pensions and retirement accounts

Employers are not legally required to offer retirement plans, such as pensions, 401(k), or 403(b) plans. If they do choose to offer such plans, however, those plans must comply with the Employee Retirement and Income Security Act, or ERISA. If you believe your employer is unlawfully denying you retirement benefits or failing to comply with the terms of a retirement benefits plan, contact the United States Department of Labor at (866) 444-3272.

Disability benefits

There are three types of government benefits available to employees who are unable to work due to illness or injury.

Workers' Compensation Benefits are available to employees who are injured or become ill as a direct result of their job. They cover medical bills and provide cash benefits to replace a portion of the employee's wages while they are out of work. For more information about Workers' Compensation Benefits or to apply, call the New York

Workers' Compensation Board at (866) 396-8314, or file a claim online at <http://www.wcb.ny.gov/content/main/onthejob/howto.jsp>.

Short-Term Disability Benefits are available to employees who are injured or become ill off the job. They provide a weekly cash benefit equal to half of the employee's average weekly wage up to a maximum of \$170 per week. Benefits are available for a maximum of twenty-six weeks. For more information or to file a claim, visit http://www.wcb.ny.gov/content/main/offthejob/FileClaim_DB.jsp.

Federal Social Security benefits are available to employees who are unable to work due to a medical condition that is expected to last at least one year. For more information and to apply for benefits, visit the Social Security Administration's website at <https://www.ssa.gov/disabilityssi/>.

Some employers also offer private short- and long-term disability policies as an additional benefit of employment. These policies are usually administered by private insurance companies, and questions about qualification and benefits should be directed to the insurance company that issues the policy.

Family and Medical Leave Act

The Federal Family and Medical Leave Act (FMLA) provides eligible employees with up to twelve weeks of unpaid leave to care for their own or a family member's serious health condition, or to recover and bond with a new child. Only employers with fifty or more employees are required to provide FMLA leave. For an employee to be eligible for FMLA leave, he or she must have worked for the employer for at least one year and must have worked 1,250 hours (approximately twenty-five hours per week) during the past year.

FMLA leave is unpaid, but many employers allow, or even require, employees to use accrued paid time, such as personal days or vacation days, concurrently with FMLA leave. The FMLA prohibits employers from interfering with an employee's right to take FMLA leave or retaliating against employees for requesting or taking FMLA leave.

If you believe your employer has violated the FMLA, call the United States Department of Labor at (866) 487-9243.

SECTION 8: UNEMPLOYMENT BENEFITS

Unemployment insurance is temporary income provided to New York State workers who have lost their jobs. This benefit does not come out of a worker's salary but is paid for by employers. In order to be eligible to receive unemployment insurance the following conditions must be met:

- An individual must have worked in New York State for 18 months.
- They must have been employed in a covered position.
- They must be actively seeking employment.
- They must be ready, willing, and able to work.
- They must have lost their job through no fault of their own (for example, due to downsizing or because the employee could not meet applicable performance or production standards).

Employees who are at fault for losing their jobs are ineligible to receive unemployment benefits. An employee is at fault when:

- The employee quit the job without good cause.
- The employee was fired for misconduct.

It is recommended that applicants apply for unemployment online. In order to do so, an applicant must have a NY.GOV ID which can be created through the New York State Department of Labor website. Filing online can be done 7 days a week at the following times: Monday – Thursday from 7:30 am to 7:30 pm (Eastern Time); Friday from 7:30 am to 5:00 pm; Saturday – all day; Sunday until 7 pm. If an individual does not have access to a computer, they can file their claim by calling the Telephone Claim Center at 1-888-209-8124, Monday through Friday from 8- 5 PM. Translation services are offered to those applicants who file by telephone.