



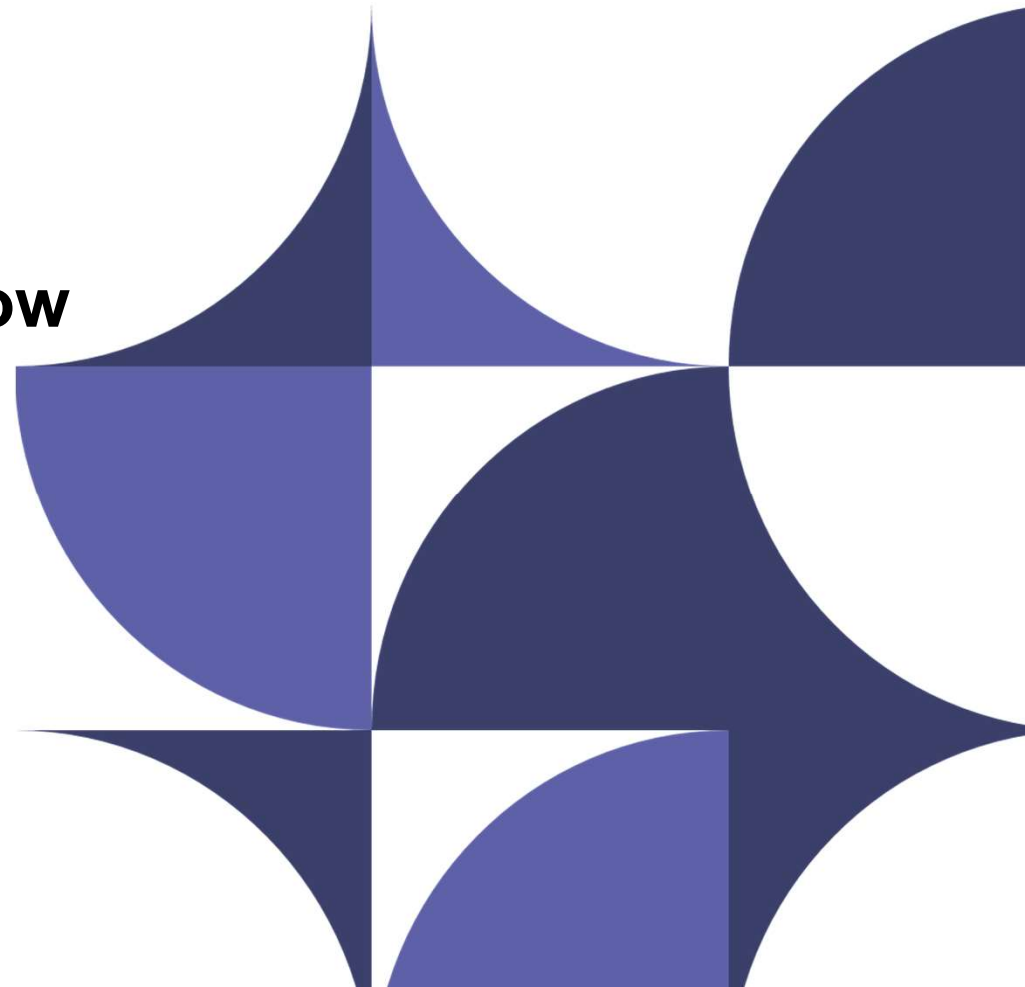
# Expanded New York Whistleblower Protections: What Employers Need to Know

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**Seyfarth Shaw LLP**

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# Speakers

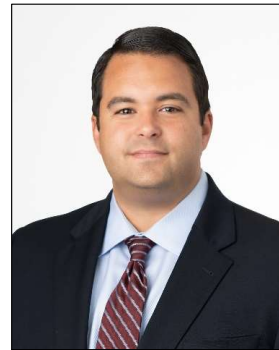
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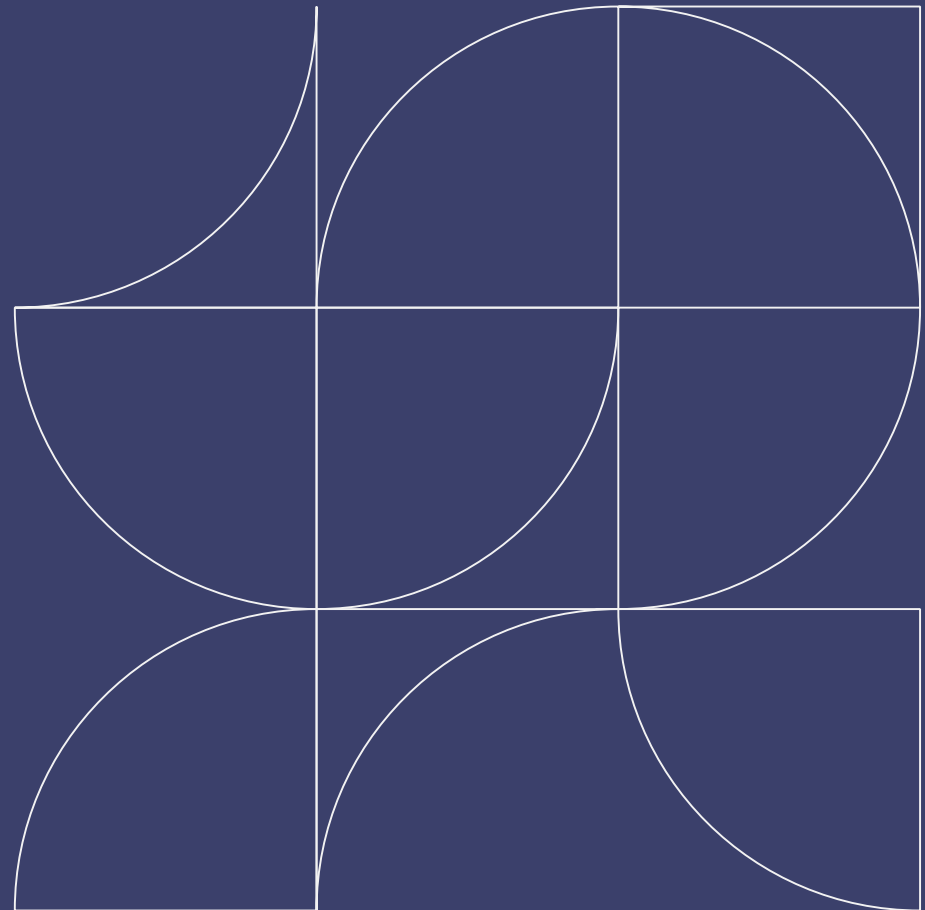
# Agenda

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- 01** Welcome and Introductions
- 02** New York Whistleblower Law
- 03** Other New York Whistleblower Protections
- 04** Federal Whistleblower Protections
- 05** Examples of Whistleblower Activity
- 06** Employer Considerations

# New York Whistleblower Law

Section 740 of the Labor Law



# New York Whistleblower Law to Date

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- Through today, New York’s whistleblower law prohibits private-sector employers from retaliating against current employees who disclose or threaten to disclose practices that actually constitute a “substantial and specific danger to the public health or safety.”
- Retaliation includes discharge, suspension, or demotion, or other adverse employment action.

# The Expansion of the New York Whistleblower Law

- Starting tomorrow, January 26, 2022, the law will prohibit private-sector employers from retaliating against:
  - (1) both current and former employees and independent contractors
  - (2) for disclosing or threatening to disclose, to a supervisor or public body,
    - any conduct that they reasonably believe violates any law, rule or regulation, executive order, or any judicial or administrative decision, ruling, or order; *or*
    - any conduct that they reasonably believe constitutes a substantial and specific danger to the public health or safety
- Who is regulated?
- Who is protected?



# The Expansion of the New York Whistleblower Law

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- What is a whistleblowing protected activity?
  - Disclosing or threatening to disclose an activity, policy or practice that the employee reasonably believes (1) is in violation of law, rule or regulation, or (2) poses a substantial and specific danger to the public health or safety
- To whom does the employee report?
  - Supervisor or public body
    - Disclosure to a public body is protected only if an employee made a good faith effort to notify the employer. However, such employer notification is not required in five situations:
      - (a)** there is an imminent and serious danger to the public health or safety; **(b)** the employee reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy or practice; **(c)** such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor; **(d)** the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or **(e)** the employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct such activity, policy or practice.

# The Expansion of the New York Whistleblower Law

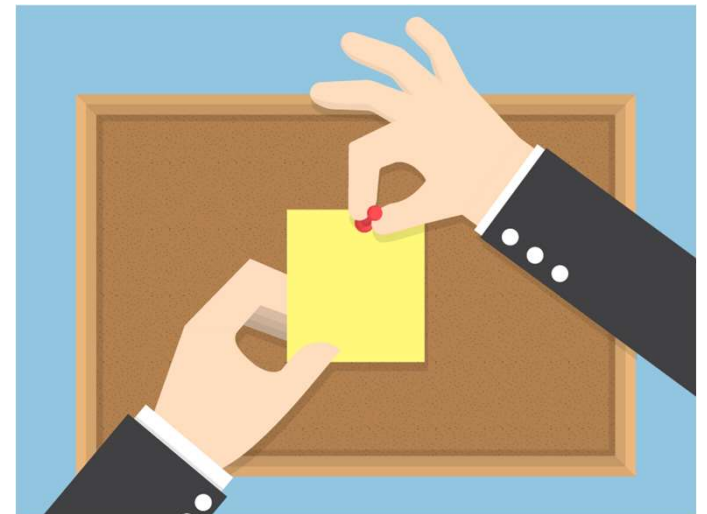
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- What does “law, rule or regulation” include?
  - Any federal, state or local statute, ordinance, rule, regulation, executive order, or judicial or administrative decision, ruling, or order
- Are there other whistleblowing protected activities?
  - Providing information to or testifying before a public body
  - Objecting to or refusing to participate
- What is prohibited?
  - An employer shall not take any retaliatory action against an employee, whether or not within the scope of the employee’s job duties, because such employee engaged in a protected activity.
- What is a “retaliatory action”?
  - No longer limited to discharge, suspension, or demotion
- What does “whether or not within the scope of the employee’s job duties” mean?

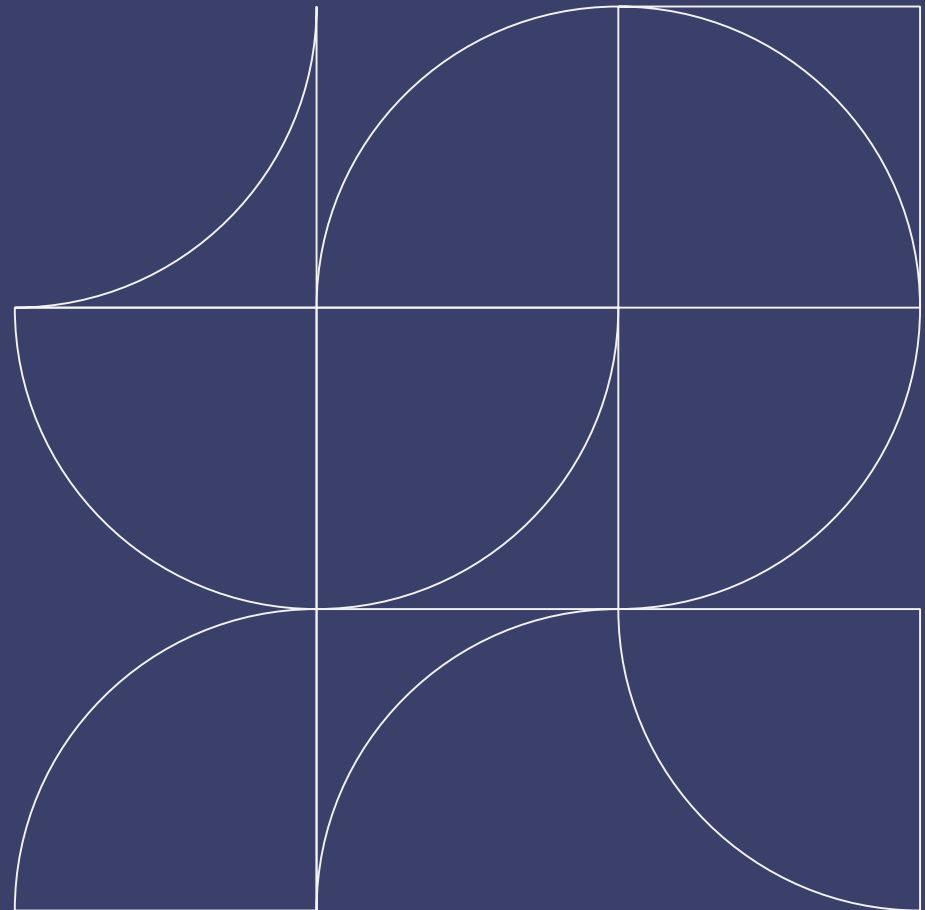


# The Expansion of the New York Whistleblower Law

- Posting notice requirements
  - Notice to be posted “conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment”
- Private right of action with entitlement to a jury trial
- Expanded statute of limitations
  - 1 year → 2 years
- Expanded remedies
  - Front pay in lieu of reinstatement, civil penalty not to exceed \$10,000, and punitive damages for “willful, malicious, or wanton” violations



# Other New York Whistleblower Protections



# New York Nonprofit Whistleblower Protections

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- The Nonprofit Revitalization Act of 2013 (“NPRA”) amended New York’s nonprofit laws and updated Whistleblowing protections for those working in non-profit spaces.
  - Nonprofit entities that have 20 or more employees *and* an annual revenue over \$1,000,000 in the previous fiscal year must have a whistleblower policy.
  - There are some exceptions for entities that already are in substantial compliance, or 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.

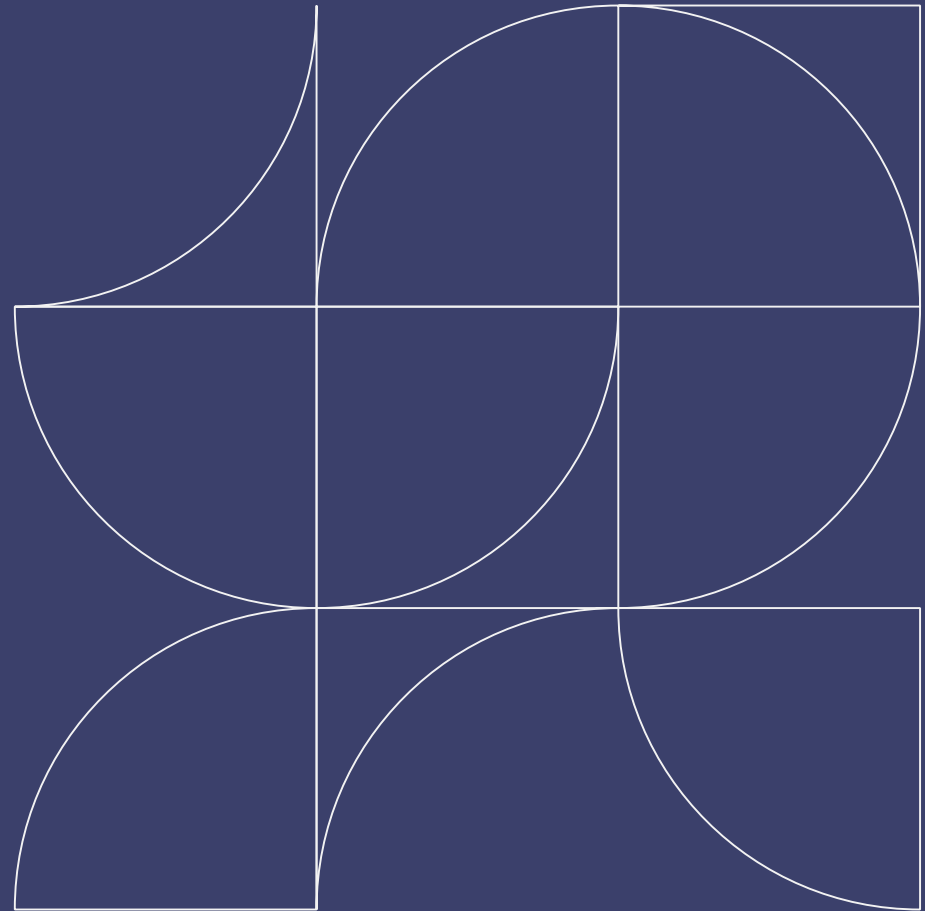


# New York Nonprofit Whistleblower Protections

- An NPRA Whistleblower Policy must:
  - Include procedures for reporting violations or suspected violations, even those made in “good faith”;
  - Designate one or more employees, officers, trustees, or directors to administer the policy;
  - Include appropriate protections from retaliation for those who report activity that is “illegal, fraudulent, or in violation of any adopted policy” of the entity;
  - Be given to all “directors, officers, key persons, employees and to volunteers.”



# Federal Whistleblower Protections



# Federal Protections

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- Federal laws protect employees from retaliation for engaging in protected activity.
- Five agencies enforce whistleblower protection laws:
  - Occupational Safety and Health Administration (OSHA)
  - Mine Safety and Health Administration (MSHA)
  - Office of Federal Contract Compliance Programs (OFCCP)
  - Wage and Hour Division (WHD)
  - Veterans' Employment and Training Service (VETS)



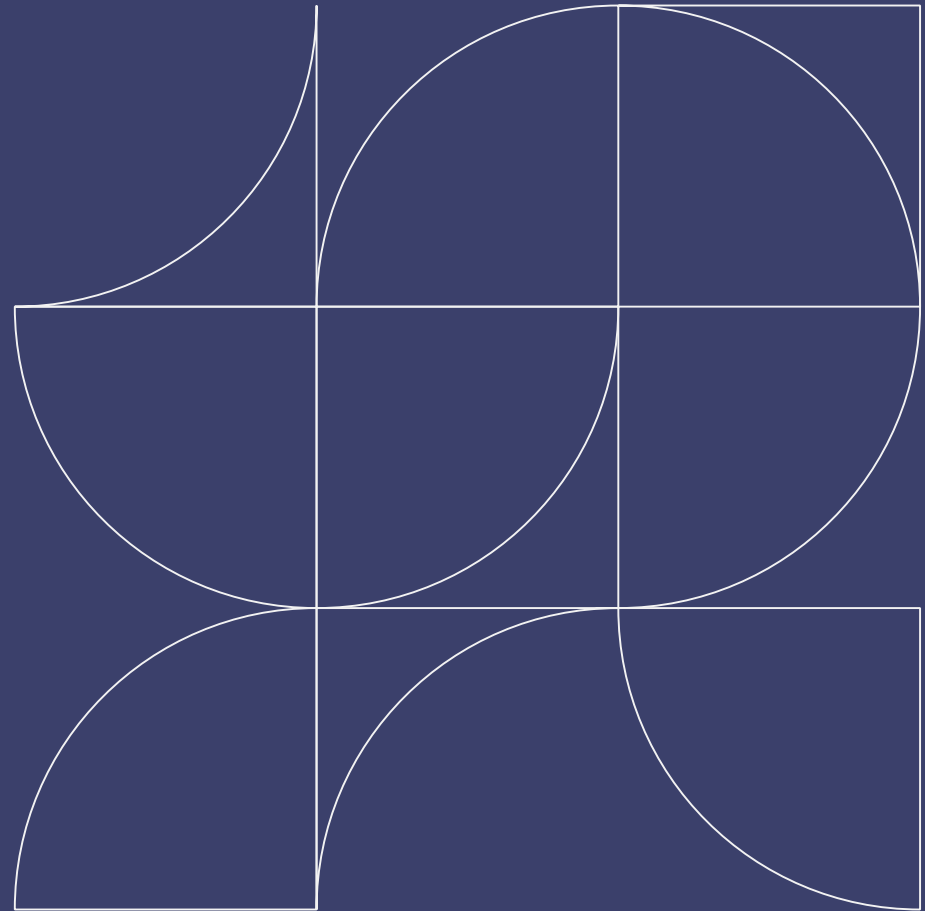
# The Dodd-Frank Wall Street Reform and Consumer Protection Act

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- Dodd Frank expanded Whistleblower Protections and broadened prohibitions against retaliation:
  - This generally means that employers may not discharge, demote, suspend, harass, or in any way discriminate against an employee in the terms and conditions of employment who has reported conduct to the Commission that the employee reasonably believed violated the federal securities laws.
  - Dodd-Frank also created a private right of action to give whistleblowers the ability to file a complaint for retaliation in federal court.



# Examples of Whistleblowing Activity



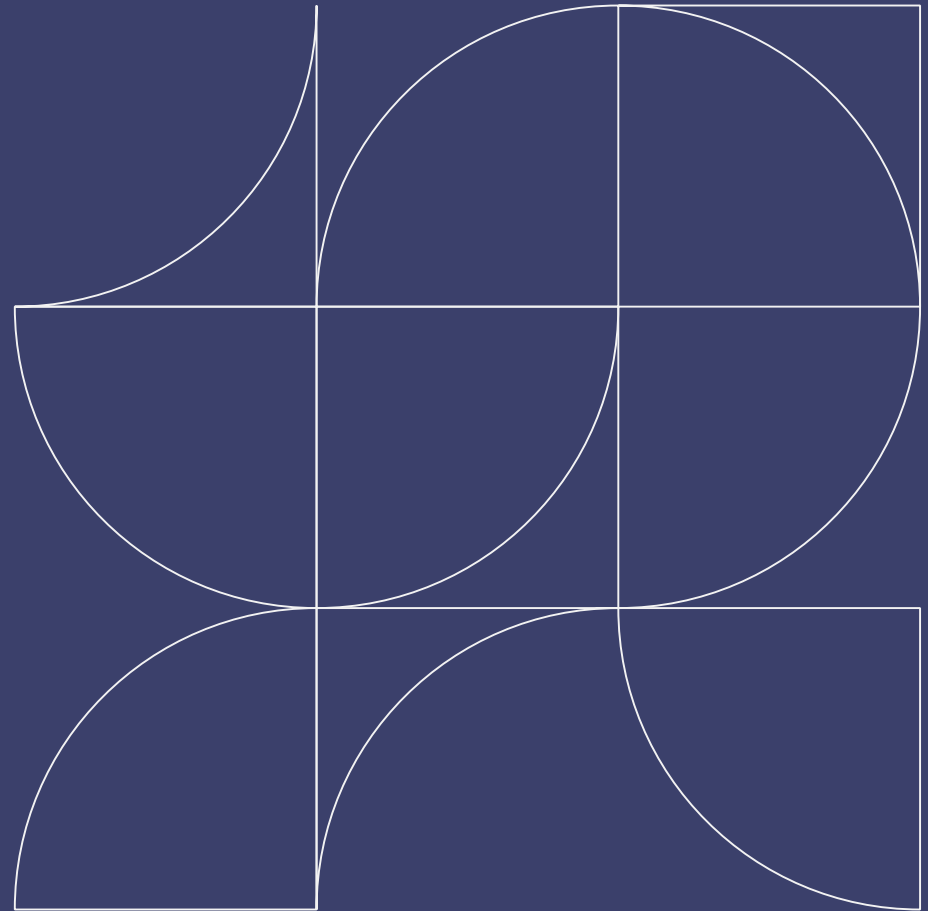


# Examples of Whistleblowing Activity

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- **How broad is the law that an employee can rely upon?**
  - *Hitesman v. Bridgeway, Inc.*, 218 N.J. 8 (2014); *Parson v. Home Depot USA, Inc.*, 2014 WL 820066 (2014)
- **What is a “reasonable belief”?**
  - *Dzwonar v. McDevitt*, 177 N.J. 451 (2003); *Roach v. TRW, Inc.* 164 N.J. 598 (2000); *Battaglia v. UPS*, 214 NJ 518 (2013); *Backburn v. UPS*, 3, F. Supp. 2d 504 (1998), *aff’d* (3d Cir. 1999)
- **“Watchdog” employees**
  - *Lippman v. Ethicon*, 217 N.J. 292 (2015)
- **Are in-house attorneys covered?**
  - *Perker v. M & T Chemicals, Inc.*, 236 N.J. Super. 451 (App. Div. 1989); *Trzaska v. L’Oreal USA, Inc.*, 865 F.3d 155 (2017)
- **How might this impact employees who have limited contacts with NY State?**
  - *Mehlman v. Mobil Oil Corp.*, 153 N.J. 163 (1998)
- **What constitutes “retaliation”?**
  - *Aiellos v. Zisa*, 2010 WL 421084 (2010); *Klein v UMDNJ*, 377 N.J. Super 28 (2005); *Caver v. City of Trenton*, 420 F.3d 243 (2005)

# Employer Considerations



# Employer Considerations

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- Consider providing specific training to managers on:
  - What constitutes a whistleblowing protected activity
  - How to respond to employee complaints of alleged wrongdoing
  - How to respond to employee claims of retaliation
- Revisit whistleblower and compliance policies
- Provide additional channels for internal reporting of employees' concerns
- Inform employees of their rights under the new law by posting notice
  - A model notice from the New York State Department of Labor



# Thank you

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