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Cover Page Footnote

This article is largely adapted from presentations made by the author at conferences sponsored by the New York State Law Revision Commission on June 23 and November 17, 1989. The author acknowledges with deep gratitude the help of Paul Sweeney, a student at Fordham Law School.

TOWARD A MODEL WHISTLEBLOWING LAW*

*John D. Feerick***

Without question, the adoption of whistleblowing statutes by the New York State Legislature in 1984,[1] and the passage of New York City's own law that same year,[2] have represented significant developments in the field of employee rights. The examination of the effectiveness of these laws by the New York State Commission on Government Integrity,[3] however, has provided cause for concern. Specifically, the Commission found the existing laws inadequate to serve their intended purpose — that is, to promote the discovery of dishonest and improper conduct in the workplace and to offer protection from retaliation to those who report such conduct.[4] Indeed, over the past ten years, New York City, in particular, has witnessed numerous scandals in the public and private sector. From city government to Wall Street, this corruption has eroded the public's trust in its institutions.

The Commission's work also suggests that New York is ready for another major development in this area as we move into the twenty-first century. Only through reform can the legitimate fear of reprisal faced by the most important source of information regarding misconduct — honest employees — be eliminated. Accordingly, this essay examines the state of the current New York whistleblowing laws and their shortcomings, and offers a number of proposals intended to al-

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1. N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1992); N.Y. LAB. LAW § 740 (McKinney 1988).

2. NEW YORK, N.Y., ADMIN. CODE § 12-113 (1986).

3. The New York State Commission On Government Integrity was a seven person, non-partisan commission created by Governor Mario Cuomo on January 15, 1987, to investigate ethical practices in state agencies, organizations and local government, and to make recommendations for reform. Exec. Order No. 88 (1987). Members of the commission included Richard D. Emery, Patricia M. Hynes, Judge Bernard S. Meyer, Bishop Emerson J. Moore, James L. Magavern, Cyrus R. Vance, and myself as chair.

4. GOVERNMENT ETHICS REFORM FOR THE 1990S: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 689 (Fordham University Press 1991) [hereinafter COMMISSION'S REPORT].

low whistleblowing laws to operate to their fullest potential.[5] This essay concludes that state and local lawmakers must work to expand the scope of the protected conduct, eliminate certain reporting requirements, establish a special investigatory unit, inform employees of their rights and limit the ability of employers to recover attorney's fees from whistleblowers.

A. Defining the Meaning and Purpose of Whistleblowing Laws

Whistleblowing laws prohibit an employer from dismissing or taking other adverse retaliatory action against an employee because the employee "blew the whistle" on certain illegal or otherwise wrongful acts of the employer. Retaliation can take many forms, including being "fired, demoted, denied advancement, harassed or otherwise harmed."[6]

New York State has enacted two whistleblowing statutes; one applies to the private sector,[7] the other to the public sector.[8] New York City enacted its own whistleblowing statute in 1986,[9] covering public employees of the city.[10] Although the protection offered to public employees by both the state and city laws is greater than what is offered to private employees with respect to the type of disclosures which are protected, none of the statutes are sufficiently strong to encourage citizens to speak up when they see their employer acting illegally or wrongfully, and to protect those employees from subsequent retaliation by the employer. While the state and city should be commended for their initiative in enacting these protective statutes, the time has come to strengthen the laws so that the encouragement given to employees to reveal employer misconduct is unambiguous and the fear of retaliation is extinguished.

In order to bolster our present whistleblowing laws, it is essential to understand their underlying purpose. Whistleblowing laws operate to protect those who take steps to combat dishonesty. Without such laws, society effectively conveys a message that condones dishonesty.

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5. Many of the proposals cited here were made by the Commission on Government Integrity in its 1990 report. *See id.*

6. *Id.* at 688-89.

7. N.Y. LAB. LAW § 740 (McKinney 1988).

8. N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1992).

9. NEW YORK, N.Y., ADMIN. CODE § 12-113 (1986)

10. Both N.Y. Admin. Code 12-113 and Civil Service Law 75-b are available to a New York City employee. The New York City law offers the city employee administrative remedies such as reinstatement and possible disciplinary actions against the violator, while Civil Service Law 75-b offers that same city employee the ability to commence a private action in court against a retaliatory employer. In order to fully protect employees of New York City, both laws must be improved.

In other words, the situation in which an employee who calls attention to wrongdoing is left without a remedy if retaliated against, and is given, by the absence of such protection, no encouragement at all to tell the truth, suggests that employer misconduct is something which must be tolerated.

Whistleblowing laws, however, operate with a very different intent. In fact, fundamental notions of what is fair, of what kind of tone we want to set for our society, of what is moral, of what kind of ethical development we want to stimulate and encourage and of how we feel about civic duty, are very much present in the subject of whistleblowing laws. These laws challenge the acceptability of allowing employers to fire employees who see something they believe is wrong and take steps to call it to the attention of a supervisor, or some investigative body which has jurisdiction in the area.

The case for applying whistleblowing laws to public employees is even more dramatic. This is because such laws protect the public by providing an additional check and balance that insures government integrity and prevents government corruption which, as we have seen in recent years, can operate to destroy the fabric of society. It is no secret that we have been badly damaged in New York by corruption over the past ten years at both the city and state level. Basic notions of fair play, therefore, dictate that we assist an employee who believes that government is corrupt. A law on the subject can increase public confidence that government misconduct will be reported. Studies have suggested that in areas of government corruption, particularly with certain types of misconduct, employees are likely to disclose information if adequately protected.[11]

In many instances, unless an employee steps forward with information, illegal or unethical practices may never be discovered. For example, the Commission's investigation of the New York City Mayor's Talent Bank[12] was sparked by information volunteered by a former employee of the Mayor's office. Without such volunteered information, that system of highly politicized personnel decisions and patronage abuses may never have been exposed.

Assuming that public employees are more likely to disclose employer corruption if protected, it follows that the same protection will

11. *See, e.g.*, M. GLAZER & P. GLAZER, THE WHISTLEBLOWERS, EXPOSING CORRUPTION IN GOVERNMENT AND INDUSTRY (1989); STATE & CITY COMMISSION ON INTEGRITY IN GOVERNMENT, REPORT AND RECOMMENDATIONS ON WHISTLEBLOWING PROTECTION IN NEW YORK (October 8, 1986)(Sovern Commission).

12. *See 'Playing Ball' with City Hall: A Case Study of Political Patronage in New York City"*, in COMMISSION'S REPORT, supra note 2, at 492-558.

encourage those in the private sector in a similar fashion. Indeed, society as a whole is hurt by illegal activities, whether they occur in the private or public sector, and individuals who inform authorities of wrongful acts perform a public good. Society should therefore not tolerate punishment in the form of retaliation against a civic-minded individual who has acted for the public good by providing information on employer misconduct.

The need for statutory protection of whistleblowers in the form of whistleblowing laws is reinforced by the refusal of the New York courts to provide such protection through state common law.[13] Indeed, a number of court decisions have stated that it is the legislature's responsibility to deal with protection for whistleblowers.[14]

Without whistleblowing laws, many would-be plaintiffs are left without a remedy for a retaliatory dismissal. The impact on a person who loses a job can be devastating. Whistleblowing laws not only discourage an employer from taking retaliatory actions that result in a

13. In the late 19th century, the New York Court of Appeals adopted the rule that unless an express agreement exists between the parties, an employment is presumed to be at-will, terminable by either the employer or employee at any time. *See* Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416 (1895). The subsequent decisions of the courts of New York State reflect an adherence to the at-will doctrine from its adoption to the current day. For discussion of these cases, see Gary Minda, *The Common Law of Employment-At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939 (1985); John v. Dember, *New York: The Right To Discharge At-Will Employees Post Weiner*, 3 TOURO L. REV. 133, 134-35 (1986). *But see* Weiner v. McGraw Hill, 57 N.Y.2d. 458, 443 N.E.2d 441, 457 N.Y.S.2d 193 (1981).

14. Recent decisions of the court of appeals in the area of employment law demonstrate that even whistleblowers are unlikely to find protection in New York's common law. *See, e.g.*, Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 506 N.E.2d 919, 514 N.Y.S.2d 209 (1987); Murphy v. American Home Products, 58 N.Y.2d 293, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1986). *Murphy* involved a 59 year old plaintiff with a formal employment contract who was fired after 23 years of service and a series of promotions. Murphy alleged he was fired not only because of his advanced age, but also in retaliation for his disclosure of accounting improprieties and his refusal to participate in such improprieties. The court of appeals held that all the causes of action except Murphy's claim for age discrimination were properly dismissed by the court below. 58 N.Y.2d 293. While it acknowledged that a number of other jurisdictions have expanded the protection available to at-will employees, the court suggested that the New York Legislature with its "infinitely greater resources and procedural means to discern the public will, to examine the variety of pertinent considerations, to elicit the views of the various segments of the community that would be directly affected and in any event critically interested" determine whether such a change in the public policy of employment law was appropriate. *Id.* at 302. *Sabetay* involved a plaintiff who claimed that he was wrongfully discharged because he had, in fact, refused to participate in allegedly illegal accounting activities and instead disclosed these activities to his employer in compliance with corporate policy. The plaintiff alleged causes of action for breach of implied contract and for tortious conduct. 69 N.Y.2d 329. The court of appeals again refused to find any grounds for relief and once again recommended that if any change is to be made in the nature of employment relationships, this action should lie with the Legislature. *Id.* at 336.

job loss, but on those occasions when retaliation occurs, the employee is at least afforded a legal remedy.

The arguments that comprehensive whistleblowing laws would open the floodgates of litigation are misplaced. There is something in our culture that holds most of us back from blowing whistles and also from pursuing legal remedies even when we feel we are abused in an employment situation. For this reason, the advancement of whistleblowing statutory reform, or for that matter, judicial expansion of rights in this area, is unlikely to open the litigation floodgates.

B. The Effectiveness of New York's Current Whistleblowing Laws

Present New York State law, although a useful beginning, falls far short of the mark.[15] Under Civil Service Law 75-b,[16] public employees may be protected from retaliatory acts of an employer if the disclosed information concerns an act which the employee reasonably believes to be improper government action. The statute defines "improper government action" as an act which violates any federal, state or local law, rule or regulation.[17] Second, the employee must make a good faith effort to disclose the wrongdoing with a supervisor or manager and allow the employer reasonable time to take appropriate action.

New York State Labor Law 740 governs private sector employer retaliation for disclosures made by employees. Labor Law 740 only protects the private employee who reports a violation of law which "creates and presents a substantial and specific danger to the public health or safety."[18] Neither Labor Law 740 nor Civil Service Law 75-b offers protection to individuals who disclose acts which do not violate the law but are otherwise wasteful or corrupt.

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15. Indeed, the protection afforded public employees in a number of other jurisdiction is greater than what is available in New York. *See, e.g.*, CAL. GOV'T. CODE §§ 10540-10549 (Deering 1992); CONN. GEN. STAT. § 4-61dd (1990).

16. Section 75-b provides:

> A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a rule or regulation which violation creates and presents a substantial and specific danger to the public health and safety; or (ii) which the employee reasonably believes is true and reasonably believes constitutes an improper governmental action.

N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1992).

17. *See id.*

18. N.Y. LAB. LAW § 740(2)(a) (McKinney 1988)

1. The "Actual Violation" Distinction

When examining the state's whistleblowing laws, there are important distinctions in the treatment of public and private sector employees. Both Labor Law 740 and Civil Service Law 75-b protect the employee if the disclosed information concerns a violation of law. However, Labor Law 740 appears to be applicable only when the employee discloses "or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law."[19] Thus, the private employee is protected when revealing an employer's *actual* violation of the law, whereas Civil Service Law 75-b explicitly protects public employees when the disclosed information concerns conduct which the employee *reasonably believes* to be illegal. This distinction appears to leave the private employee who calls attention to a situation that falls short of an actual illegality unprotected from retaliation.

The decision in *Kern v. DePaul Mental Health Services*[20] exemplifies the shortcomings of the "actual" violation standard. In that case, the court interpreted Labor Law 740 to mean that the mere "belief on the part of the employee that a violation has occurred is not sufficient to invoke the statute's protection."[21] Consequently, although the employee acted in good faith, she ran the risk of being fired in retaliation for her disclosure because, according to the court, the facts did not show an actual violation of law.[22]

Fortunately, this limitation is not present in the public employee statute. Civil Service Law 75-b(2)(a) embraces the employee who acts in good faith and reasonably believes that the information disclosed is

19. *Id.* Although the Commentaries to Labor Law 740 state that it "could not be the intent of section 740" to leave good faith and reasonably mistaken employees unprotected, the recent decisions of the New York courts indicate otherwise. *See supra* notes 21-22.

20. 139 Misc. 2d 970, 529 N.Y.S.2d 265 (1989).

21. *Id.* at 974, 529 N.Y.S.2d at 267. The facts in *Kern* indicate that the plaintiff, who worked at a community residence for the mentally handicapped, witnessed what she perceived to be a rape perpetrated by one resident against another. She reported the incident to the local district attorney's office and was subsequently dismissed. The plaintiff then sued under § 740, only to find that she stated no cause of action. The court made the finding that the intercourse was consensual, did not violate any law and granted summary judgment.

22. A similar ruling occurred in Bellingham v. Symbol Technologies, N.Y. L.J., Dec. 12, 1989, at 21 (N.Y. Sup. Ct. 1989). In that case a manager who claimed he was dismissed for disclosing complaints of sexual harassment made by other employees was dismissed. Although the court agreed that sexual harassment is a violation of law sufficient to invoke the protection of § 740, it refused to find that "such a situation existed in this case and that the record is barren of any reasonable investigation by plaintiff premised on an actual violation of law." *Id.*

true and constitutes illegal or improper government action.[23] The "reasonable belief" standard, as opposed to an "actual violation" standard, consequently gives the public employee added protection not offered to the private employee. In this way, a public employee can be reasonable, but wrong, yet still remain protected from employer retaliation. Conversely, the reasonable private employee can not be wrong and remain protected.

There is little doubt that New York City's whistleblowing law is a more protective statute. This law protects a public employee when the disclosure concerns conduct the employee "knows or reasonably believes to involve corruption . . . or conflict of interest."[24] This language thus employs the reasonable belief standard over an actual violation standard while at the same time expanding protection to include disclosures relating to corruption or conflict of interest. New York City employees, therefore, are protected from retaliation even when the disclosed conduct is wrongful — but not illegal — and also when the employee is incorrect, but reasonably believed in good faith that misconduct occurred.

2. *Danger To The Public Health And Safety*

The protection offered to private employees by Labor Law Section 740 is also limited to violations which "create[ ] or present[ ] a substantial and specific danger to the public health or safety."[25] Obviously, all members of society have an interest in the disclosure of acts which endanger public welfare,[26] but there is, at the same time, an overriding societal desire to disclose all violations of law, and simultaneously to protect those who make such disclosures.

The public health and safety limitation has created an unfortunate body of case law by leaving whistleblowers who reveal employer wrongdoings which are unrelated to public health and safety unprotected. For example, private employees who disclose fraudulent activities by their employers can be fired with impunity.[27] Hotel managers may be fired for refusing to take part in illegal check-cashing prac-

23. N.Y. CIV. SERV. LAW § 75-b(2)(a)(ii) (McKinney Supp. 1992).

24. NEW YORK, N.Y, ADMIN. CODE § 12-113 (1986).

25. N.Y. LAB. LAW § 740 (McKinney 1988)

26. When Labor Law § 740 was enacted, its stated purpose was "to encourage those at the working level to report hazards to supervisors." The hope was to avoid accidents, like an elevator crash, the Three Mile Island failure or the space shuttle Challenger explosion, which created actual and immediate harm to the public. N.Y. LAB. LAW § 740 (McKinney 1988) (Practice Commentary). Today, there is an attempt to move past this first step and have whistleblowing laws include the promotion of a just, moral and civic-minded society as their intent.

27. *See* Littman v. Firestone Tire & Rubber Co., 709 F. Supp. 461 (S.D.N.Y. 1989).

tices.[28] Employees who decline to participate in the practice of billing the New York City government for work never performed are also left unprotected by the whistleblowing law.[29] This shortcoming was also apparent in *Kern*,[30] where the court, after finding the plaintiff stated no cause of action because of the absence of an actual violation of law, remarked that even if the plaintiff had stated a violation, the alleged illegality — rape — only created a substantial and specific danger to a particular individual and not the public at large. Surely, a statute that provides no remedy for an employee who has the courage and moral outrage to report what she perceived to be a rape is indefensible.

An additional problem with Labor Law Section 740 is its failure to provide legal protection to a member of a profession which follows an official code of ethics. Indeed, what kind of signal is sent to the public when a nurse, lawyer or doctor does his or her professional duty only to find that there is no job protection upon being terminated for performing this duty? The evidence is clear that it is no longer acceptable to limit protection of private sector employees to situations involving public health and safety.

3. *Notice to the Employer and Communications with the Investigatory Body*

When an employee remains anonymous, the fear of retaliation is generally removed. Thus, one of the best ways to encourage whistleblowing is to insure the anonymity of the individual who discloses the incriminating information. Unfortunately, the fact that the first step of the whistleblowing process requires the employee to bring information of a violation to his or her superiors[31] — and thus surrender anonymity — serves as a severe deterrent to whistleblowers.

The requirement that employees provide evidence of the misconduct to their superiors first not only provides a disincentive to disclose wrongdoing, but also creates a situation that gives those superiors who are involved in the misconduct the opportunity to cover up any

28. *See* Braig v. Palace Co., N.Y. L.J., Aug. 3, 1989, at 17 (N.Y. Sup. Ct. July 16, 1989).

29. Remba v. Federation Employment and Guidance Serv., 149 A.D.2d 131, 545 N.Y.S.2d 140 (1989).

30. 139 Misc. 2d 970, 529 N.Y.S.2d 265 (1989). *See supra* notes 20-21 and accompanying text.

31. *See* N.Y. CIV. SERV. LAW § 75-b(2)(b) (McKinney Supp. 1992); N.Y. LAB. LAW § 740(3) (McKinney 1988). N.Y. Admin. Code § 12-113, on the other hand, provides for city employees to refer evidence in the first instance to the department of investigation, thus offering possible protection against identification of the employee.

wrongdoing. This is an untenable situation given the fact that New York State has created an Office of Inspector General and other kinds of bodies to function in an oversight capacity, without providing protection to a public employee who communicates directly with those bodies prior to contacting a supervisor or an appointed authority within a particular agency. The fact that many public employees find it difficult to communicate either to their employer or to an investigative commission or ethics group further exacerbates the problem. Certainly, suggesting that an individual has no protection without first going to his or her employer is likely to lead to very little communication.

A similarly disturbing aspect of both the public and private New York State whistleblowing laws is that employees are often not protected from retaliation for testifying or cooperating with public investigators. Public employees, unless they believe the information they are providing concerns a violation of law, are not protected, even while their testimony is required by subpoena. For private employees, protection is only available when testifying about the unlawful acts of an employer which create a danger to public safety and health.

Contrary to state law, the New York City Whistleblowing Law does protect a city employee who makes out a report to the Department of Investigation, a city council member, council president or the comptroller, and communicates a wrongdoing which invokes subsequent retaliation. Nonetheless, like the state laws, there is no explicit protection for those who testify or cooperate with public investigators.

C. Constructing A Model Whistleblowing Law

What should we expect from a model whistleblowing law? Above all, the law should not send a conflicting message by dealing with the subject in an inadequate and superficial way. Accordingly, a model law should be strong in terms of the protection offered, the mechanics for enforcing those protections and the manner by which the law is implemented.

More specifically, New York State should eliminate the health and safety limitation[32] on private employee protection, thereby bringing the standards of the public and private statutes closer together. Employees in both sectors should be equally protected against retaliation from an employer regardless of the presumed danger to the public health and safety given that both are performing their civic duty and a public good by blowing the whistle on employer misconduct. By re-

32. *See* discussion *supra* part B.2.

moving the health and safety limitation in Labor Law 740, the standards of private and public employee statutes can be equalized to effectuate this goal.

Secondly, the public employee whistleblowing law's "improper government standard"[33] should not be limited to actual violations of law since the reporting of conduct beyond lawbreaking also deserves protection. We are part of a generation that emphasizes ethics, not merely as expressed in the minimum requirements of law, but as something beyond mere legal pronouncements. Obviously, all of our laws have ethical dimensions, but the kind of conduct which we expect from our public officials exceeds the minimum protection that might be expressed through statutory means. By limiting whistleblowing protections simply to violations of law — as Civil Service Law 75-b does — the state speaks inconsistently at a time when it is stressing higher ethical standards. And while New York Code 12-113 covers criminal activity as well as conflict of interest and corruption,[34] the city law does not protect reports of gross waste of funds and gross mismanagement. Thus, because we expect, preach and teach that public servants conform to a higher set of standards than simply avoiding breaking the law, a model law must account for the problems of corruption, conflict of interest, abuse of position, gross waste of funds and gross mismanagement in order to effectuate this goal.[35]

These considerations do not require the same kind of treatment for private employees. In the public sector, there is a strong public interest in supporting public servants who engage in that higher conduct by calling attention, for example, to waste involving taxpayers' money. That public interest is not present with respect to private employers, since public funds and government activity is not involved. Thus, this is one area in which I believe there should be an expansion for public employees only given that the same considerations do not apply in the private sector.

Another improvement in the Civil Service Law and the New York City law would be to prohibit retaliatory actions against public employees who refuse to participate in wrongful activities. Both laws, although expressly protecting individuals who disclose information, are silent in instances where employees refuse to participate in illegal acts.[36] As a matter of public policy, protection should be provided to

33. *See supra* notes 16-17 and accompanying text.

34. N.Y. ADMIN. CODE § 12-113(a) (1986).

35. *See* COMMISSION'S REPORT, *supra* note 2, at 697.

36. Such protection currently exists in the law which pertains to private employees.

those who refuse to join their employer in wrongful acts to the same extent it is offered to those who provide information concerning the same acts.

On a similar note, protection should be given to those public employees who are retaliated against for cooperating with an investigation by a public body. Certainly, it is discouraging when we fail to take advantage of the legislative potential to encourage public servants to assist in ferreting out corruption in order to maintain government integrity. This goal can be achieved in part by letting those who do help know that they will be protected. Thus, when public employees participate in investigations, hearings and inquiries, they should be protected by the whistleblowing statute. Furthermore, private employee protection in this area should be extended beyond investigations which relate solely to public health and safety.

One of the most important changes necessary to promote effective whistleblowing laws is the elimination of the notice provision which requires an employee to give notice to his or her employer or supervisor prior to notifying an investigatory body. Currently, there is no clear protection in the New York State statute for a public employee who initially reveals the damaging information to some other agency such as the Inspector General's Office, the New York State Ethics Commission or a commission, like the one on government integrity; instead, the employee first must go to his or her supervisor. This provision ultimately undermines the effectiveness of the whole law because it deters employees who have evidence of wrongdoing from coming forward by requiring them to make known that contact to the very object of the disclosure. To correct this problem, New York State should follow New York City's example and eliminate the employer notification requirement. A change in this procedure would go a long way toward insuring anonymity to those who have information to disclose but fear reprisal.

In terms of a model law, it also seems that employees should not be left unaided in dealing with evidence of unethical behavior which comes into their possession. In other words, it is simply unrealistic to expect an employee to disclose to his or her employer the fact that the employee is considering revealing information concerning the employer's unethical conduct. To solve this problem, there should be some arm of government to which employees might turn for assistance. This service might come in the form of a special unit which would protect the employee's identity while seeing that an appropri-

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Compare N.Y. LAB. LAW § 740 (2)(b) (McKinney 1988) *with* N.Y. CIV. SERV. LAW 75-b (2)(a) (McKinney Supp. 1992).

ate examination is made, either by the entity in question or by some other arm of government with respect to the subject matter of the disclosed information.

A model law also presumes that employers, employees and all parts of city, state and local government should be made aware of the legal protection and mechanisms in place for whistleblowing in this state. These individuals should be instructed on the subject as part of training programs for government employees. Proper training on the law will minimize the occurrences of employer retaliation and provide important help to government.

On a related front, the current statutes contain no posting or employee communication requirements like those found in whistleblowing statutes in other states.[37] Similar requirements should be placed in our laws. This procedure should help eliminate the apparent lack of awareness of employees regarding the protection provided to them and the mechanisms which are in place with respect to disclosures of information of wrongdoing.

As a final area for reform, attention must be given to current attorney's fees provisions. In situations where employees have a right to sue in court, Labor Law 740 essentially authorizes the employer, under certain circumstances, to collect attorney's fees against an employee who chooses to exercise the right to sue.[38] The wording of the attorney's fee provision effectively undermines the very right to sue in court by stating that if the employee's suit has no basis in fact or law, the employer may collect attorney's fees from the employee. Furthermore, the fact that the employee may have acted in good faith based on a belief that there was a wrongdoing makes no difference. An employee runs the risk, therefore, of assuming substantial legal fee obligations which, when considered, may discourage, at a minimum, the commencement of a suit in the first instance. Other areas relating to litigation awards — such as provisions for punitive damages and civil fines — have also been neglected in the current whistleblowing statute but are worthy of consideration.

D. Conclusion

It is necessary that each of the three laws discussed throughout this essay — Labor Law 740, Civil Service Law 75-b and New York City Administrative Code 12-113 — be reformed so that all employees can

37. *E.g.*, KAN. STAT. ANN. § 75-2973(e) (1989); MICH COMP. LAWS ANN. § 15.368 (West 1981); NEB. REV. STAT. § 48-1121 (1988); R.I. GEN. LAWS 36-15-8 (1990); TEX. REV. CIV. STAT. ANN. art. 6252-16a, § 6 (West Supp. 1991).

38. *See* N.Y. LAB. LAW § 740(6) (McKinney 1988).

enjoy sufficient protection from employer retaliation, and so that a high standard of fairness, responsibility and honesty can be promoted throughout New York State and New York City. Courts must construe the statute as given to it by the legislature. The legislature created the actual violation of law statute and the health and public safety limitations, not the courts. Because of this statutory standard, only through legislative initiative can the faults be corrected.

In my opinion, it is imperative that we have the strongest law possible with respect to the subject of whistleblowing. It is not merely rhetoric when we say that government is, as stated by Justice Brandeis, "the omnipresent teacher." In his words, "[f]or good or for ill, it teaches the whole people by its example."[39] That example is not only in terms of personal conduct, but it is also in terms of the kind of laws and the kind of standards we have. The time is ripe for whistleblowing reform.

39. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, L., dissenting).