

THE NEW YORK CITY COUNCIL
COMMITTEE ON OVERSIGHT AND INVESTIGATIONS
JANUARY 13, 2020

PREPARED REMARKS OF GREGORY M. KRAKOWER

Gregory M. Krakower
Getnick & Getnick LLP
521 Fifth Ave, 33rd Fl.
New York, NY 10175
gkrakower@getnicklaw.com
(212) 698-4501
(917) 478 4353 (c)

Good Morning.

My name is Gregory Krakower. I am Of Counsel at the law firm of Getnick and Getnick, LLP, based in Manhattan. I am an Adjunct Professor at Cardozo Law School, where I teach "*Whistleblower Statutes and Corporate Fraud*," a course that I established in 2015 when I served as Senior Advisor and Counselor to the New York Attorney General. I also played a leading role in drafting and implementing several state whistleblower laws, including the New York False Claims Act. The views I express here are my own.

Let me begin by expressing my appreciation to Chairman Torres for inviting me here, and to other members of this committee.

Mr. Chairman, you asked me here to speak about model whistleblower protections and aspects of whistleblower laws that this Committee, and the City Council as a whole, can examine in order to improve and increase protections for whistleblowers in New York City.

But first I will briefly comment on Intro. 1770. This legislation is timely and important. Intro. 1770, if passed, will augment New York City law to ensure that there is no place here for threats and pressure tactics aimed at intimidating and discouraging whistleblowers from cooperating with the City Council. Eight million New Yorkers rely on the City Council to provide meaningful oversight of programs and officials that directly impact our lives. Such oversight is not possible when public officials and others fear for their livelihood and possibly even their safety when cooperating with the Council.

Intro 1770 is a good first step, Mr. Chairman, in your desire to examine a wide array of potential improvements to the City's whistleblower laws. It is an effort that all New Yorkers should applaud.

Where should the City start when considering adopting new whistleblower laws? All whistleblower laws do one or more of three critical things: protect whistleblowers, reward whistleblowers, and/or empower whistleblowers. And the best do all three.

First: Protection. At a minimum, any whistleblower law protects whistleblowers from unnecessary disclosure and from retaliation by employers. Superior laws also protect against industry-wide blacklisting and recognize that in the so-called "gig" economy, independent contractors and agents need protection as well.

And too often "protection" is couched in terms of merely providing back-pay and hypothetical reinstatement for a whistleblower who has the fortitude and stamina to win a lawsuit.

A whistleblower who has "won" a retaliation lawsuit has lost more than just pay. As some New York laws recognize—but not others—real protection requires awarding whistleblowers at a minimum double back pay, interest and costs. It bears mentioning that few whistleblowers wish to return to work for an employer or contractor who has retaliated against them.

Second: Rewards. Some federal and state programs reward whistleblowers with a percentage of the damages and penalties that government agencies recover because of information they provide. The SEC, CFTC, and IRS run such programs, as do some states. They have been remarkably successful, and endorsed across the political spectrum.

City agencies that have the power to levy significant fines against large-scale illegal activities by major corporations should welcome the adoption of similar programs here in New York City to incentivize whistleblowers who can bring serious illegal activity to light.

Third, Empowerment. Some laws, in addition to rewarding whistleblowers, also grant them the right to initiate enforcement actions on behalf of the government, and a qualified right to pursue them if the government declines to prosecute the case itself.

The New York State False Claims Act, which only covers fraud against the government, is a best-case example of this: it contains model anti-retaliation protections, rewards whistleblowers, and empowers them to initiate enforcement actions, all of which is supervised by government officials to protect the public's interest in fair and effective law enforcement. The results of this statute speak for themselves: dangerous and illegal practices rooted out in government-funded health care facilities; corrupt and discriminatory contracting practices exposed and eradicated; complicated

schemes against the City's pension fund stopped; and hundreds of millions of dollars returned to New York taxpayers.

This model can be expanded to beyond just fraud against the government.

But whistleblower laws can only work as well as they are administered. Government agencies need to actively recruit, listen to, and work with whistleblowers.

Dedicated whistleblower advocates within government agencies, speedy and fair investigations, and prompt and open communication with whistleblowers can make all the difference.

And what good is a whistleblower law if people do not know about it? Government agencies and contractors can and should be required to inform employees, workers, and subcontractors about applicable whistleblower protections. This is not novel. MTA contractors are required to tell employees about the protections and rewards offered by New York state law, along with the contact information of the Attorney General and the MTA Inspector General. Why just MTA contractors?

And when you think of who can be a "whistleblower" you need to think about more than just the archetypical private sector employee or government official who sees corruption at their office. Honest businesses who know of wrongdoing in their industry are increasingly taking advantage

of current whistleblower laws to report on scofflaw or dishonest competitors — because honest businesses are tired of paying an “integrity tax” by losing sales or profits to wrongdoers.

Finally, New York State and City whistleblower laws can be confusing and inconsistent as to who can qualify as a whistleblower, the type of illegal conduct that can be reported, the agencies to which conduct must be reported, and the remedies that are offered. New York City has the authority and opportunity to clarify, modernize, and strengthen these laws, as well as enact new laws, to better serve enforcement agencies and the public.

Laws that protect, reward, and/or empower whistleblowers send a powerful message: that New York City, and New Yorkers, reject the discredited attitude that deems whistleblowers as traitors, snitches, or disloyal individuals. Instead, they establish a public-private partnership in the battle against fraud and illegality.

“See something, say something, get fired” becomes “See something, say something, the City’s got your back.”

* * *