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**Legal Alert: New NY Court Decision Increases Risk of Liability for Violations of Whistleblower Protections**

A nonprofit organization's whistleblower policy provides procedures by which people may come forward with information about unethical or unlawful practices within the organization, and it protects the whistleblower from retaliation for doing so. Such policies improve accountability and ultimately benefit organizations by allowing leadership to promptly address potential improprieties from within. Section 715-b of the New York Not-for-Profit Corporation Law (N-PCL) requires every nonprofit organization with 20 or more employees and annual revenue in excess of \$1 million to adopt a whistleblower policy.<sup>1</sup> Although this requirement does not apply to smaller organizations, establishing similar protection for whistleblowers is considered a best practice for every nonprofit organization.

A recent decision by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, clarified the ability of individuals to bring causes of action as whistleblowers by holding that a private right of action exists to enforce the N-PCL's whistleblower provision. By allowing employees to bring lawsuits under the N-PCL against employers who retaliate against whistleblowers, the decision could expose New York nonprofits who do not follow proper procedures to increased liability. This Legal Alert provides an overview of the decision and discusses some of its implications for whistleblower protection compliance.

***The Decision***

In *Ferris v. Lustgarten Foundation*, the plaintiff had been an employee of the defendant Lustgarten Foundation, a nonprofit corporation, for nearly 10 years before she was fired in 2015.<sup>2</sup> She alleged that following her report of improper fundraising practices at Lustgarten Foundation, the organization retaliated against her in various ways, including by ultimately terminating her employment. Claiming that the retaliation was a violation of N-PCL Section 715-b, the plaintiff sued to recover damages against Lustgarten Foundation. In response, Lustgarten Foundation argued, among other things, that private individuals do not have a right to sue their nonprofit employers under Section 715-b because the statute does not explicitly provide this remedy. The trial court, the Nassau County Supreme Court, sided with Lustgarten Foundation, but on appeal, the Second Department disagreed.

Holding that nonprofit employees do have a right to sue under Section 715-b, the Second Department's decision empowers individuals to initiate lawsuits on their own to hold nonprofits accountable for violations of whistleblower protections. This enforcement authority had been generally understood to belong only to the New York State Attorney General, but the *Ferris* decision extends it to nonprofit employees as well.

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<sup>1</sup> See Not-for-Profit Corporation Law §715-b(a).

<sup>2</sup> 189 A.D.3d 1002, 1003–04 (App. Div. 2nd Dept. 2020).

### ***Implications for Whistleblower Protection Compliance***

The Second Department is the first intermediate appellate court in New York to hold that nonprofit employees can pursue individual claims under N-PCL Section 715-b. Therefore, the *Ferris* decision is only binding on lower courts in the Second Department.<sup>3</sup> The remaining appellate divisions in New York State are free to reach different conclusions when they are faced with a similar issue. But decisions without binding authority can still have considerable influence, which means other judicial departments may follow the *Ferris* decision and facilitate an expansion in private enforcement of whistleblower protections under N-PCL Section 715-b.

In light of this development, New York nonprofits subject to N-PCL Section 715-b should carefully review their whistleblower protection policies. Nonprofit organizations should ensure that the policies are comprehensive to cover a broad range of actions that might constitute wrongdoing. In addition, organizations should specifically identify the senior employees or board members to whom wrongdoing can be reported. Efforts should also be made to educate the designated individual or individuals on the proper procedures for handling reported concerns.

***This memo is meant to provide general information only, not legal advice. Please contact Rafi Stern at Lawyers Alliance for New York at [rstern@lawyersalliance.org](mailto:rstern@lawyersalliance.org) or visit our website, [www.lawyersalliance.org](http://www.lawyersalliance.org), for further information. For their assistance in preparing this Legal Alert, Lawyers Alliance would like to thank Peter F. Martin, a Legal Fellow working with Lawyers Alliance through NYU School of Law's National Center on Philanthropy and the Law, and Amy Zhang of Columbia Law School.***

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<sup>3</sup> The Second Department encompasses New York City (other than Manhattan) along with Long Island and some areas in upstate New York.