

A review of new whistleblower protections under Ontario's Securities Act

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In connection with the establishment of the Ontario Securities Commission's (OSC) new Whistleblower Program in July 2016, which includes monetary incentives for whistleblowers in Ontario, the Ontario government has approved amendments to the *Securities Act* (Ontario) (the Act) to provide additional protection to persons who report a potential violation of Ontario securities law or a by-law or other instrument of a self-regulatory organization. The amendments were proclaimed into force on June 28, 2016.

The additional protections provided for by the amendments consist of (1) a prohibition against reprisals against whistleblowers (the Anti-Reprisal Provision) and (2) a prohibition against contractual restrictions against reporting potential violations (the Anti-Confidentiality Provision).

The Anti-Reprisal Provision will prohibit any person or company (or a person acting on their behalf) from taking a reprisal against an *employee* of that person or company because the employee has:

(a) provided information, expressed an intention to provide information, or sought advice about providing information to the OSC, a recognized self-regulatory organization, or a law enforcement agency (regulatory authorities) or to the person or company about an act by that person or company (or a person acting on their behalf) that the employee reasonably believes is contrary to Ontario securities law or a by-law or other regulatory instrument of a recognized self-regulatory organization (collectively, applicable information); or

(b) in relation to information of the type described above, has cooperated, testified or otherwise assisted (or expressed an intention to do so) with an investigation by a regulatory authority or a proceeding of the OSC or a recognized self-regulatory organization or a judicial proceeding (collectively, applicable proceedings).

The Anti-Reprisal Provision defines reprisals as being any measure taken against an *employee* that adversely affects his or her employment, *including* doing or threatening to do any of the following:

(a) terminating the employee's employment;

(b) demoting, disciplining or suspending the employee;

(c) penalizing the employee; or

(d) intimidating or coercing the employee in any manner related to his or her employment.

The Anti-Reprisal Provision protects employees against reprisals for a broader range of the conduct than corresponding provisions under both the Canadian *Criminal Code* – which applies only to reprisals on the part of the employer (or person acting on behalf of the employer or in a position of authority in respect of an employee of the employer) that are taken *with the intent* to compel the employee to abstain from providing information or *with the intent* to retaliate against the employee because the employee has provided information – and under the Dodd-Frank Act – which prohibits reprisals for actions taken at a relatively more advanced stage of proceedings, such as any lawful act done by the whistleblower in *providing* information to the U.S. Securities and Exchange Commission (SEC), initiating testifying in or assisting in any investigation or judicial or administrative action of the SEC based upon or related to that information or making disclosures that are required or protected by certain U.S. securities laws. However, it is important to note that the Anti-Reprisal Provision (as with the *Criminal Code* and Dodd-Frank Act provisions) applies only to *employees* of the relevant person or company and does not, for example, appear to provide protection to directors, consultants or others not in any employee/employer relationship with that person or company.

The Anti-Confidentiality Provision provides that a provision in an agreement, including a confidentiality agreement, between a person or company and an employee of that person or company will be void *to the extent* that it precludes or purports to preclude the employee from whistleblowing, whether by providing applicable information to a regulatory authority, or from cooperating, testifying or otherwise assisting in an applicable proceeding (or expressing an intention to do so). It is important to note that, while the Anti-Confidentiality Provision voids a confidentiality provision *to the extent* it prevents disclosure, the approach in the U.S. is somewhat different, as in the U.S. it is a breach of securities law to *impede disclosure* (including through the use of overly broad confidentiality language). Last year, the SEC took its first enforcement action against an issuer for trying to ‘muzzle’ whistleblowers. In that case, KBR, Inc., a Houston-based global technology and engineering firm, was sanctioned for the use of improperly restrictive language in its confidentiality agreements with terminated employees, even though the SEC did not find that KBR had, in fact, prevented whistleblowers from talking to its investigators. Whether similar enforcement proceedings based on Ontario’s new Anti-Confidentiality Provision are possible remains to be seen since Ontario’s approach to contractual restrictions on disclosure to securities regulators is very different from the SEC’s.

The full text of these changes is set out in section 3 of Schedule 26 of *Bill 173, Jobs for Today and Tomorrow Act (Budget Measures), 2016*.