

# *In Brief*

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## THE ILLINOIS WHISTLEBLOWER ACT – AMENDED AGAIN

The Illinois Whistleblower Act (the “Act”) (740 ILCS 174/1 et seq.) strikes fear in the hearts of many employers. This is due to the statutory damages associated with employer violations, and recent amendments which make it easier for employees to bring claims under the Act. However, employers need not fear the Act, as long as they understand its provisions and follow simple practice pointers designed to effectively manage “whistleblowing” employees.

### Purpose of the Act

The Illinois Whistleblower Act, as originally enacted, was designed to provide employees who report an employer’s violation of the law with a statutory cause of action for retaliatory discharge. Representative Fritchey, who sponsored the Act in the House of Representatives in 2003, summarized its basic purpose as follows:

You do not have a cause of action for retaliatory discharge today stemming from going to the authorities to disclose a violation of law ... Common sense would tell you that you should have that protection and this law would codify that. Ill. H.R. Trans. 2003 Reg. Sess. No. 63.

### Overview of the Act

The Act prohibits employers from creating work rules which prevent employees from disclosing information to government or law enforcement agencies if the employee has reasonable cause to believe that the information discloses a violation of State or federal law. The Act also prohibits retaliation against employees for making disclosures regarding potential

violations of State or federal laws and for refusing to participate in illegal activity.

The Act has been amended three times in the past two and a half years to provide greater protections for employees who disclose violations of State or federal law or general wrongdoing. The amendments have expanded the Act’s prohibition on retaliation, added additional protected disclosures and changed the definitions of both employer and employee. These recent changes have made it easier for employees to allege violations of the Act.

Employers who violate the Act may be liable for the following:

1. Reinstatement with the same seniority status;
2. Back pay, with interest;
3. Compensation for any damage sustained as a result of the violation; and
4. Litigation costs, expert witness fees and reasonable attorney’s fees.

### Recent Amendments to the Act

Since its enactment, the Illinois legislature has expanded the protections of the Act beyond those originally identified by Representative Fritchey. In 2008, the Act was expanded to protect additional disclosures and to cover additional employers. First, the Act was amended to prohibit retaliation against an employee who discloses information in a court, an administrative hearing, before a legislative commission or committee, or in any other proceeding. To qualify for this protection, the employee must have reasonable cause to believe that his or her information discloses a violation of State or federal law, rule or regulation. The Act was also

expanded to cover many governmental bodies including school districts, community colleges and units of local government.

In 2009, the Act was amended to add two new prohibitions on retaliation. First, Section 20.1 was added. That section prohibits any act or omission by an employer, whether within or outside of the workplace, if it would be materially adverse to a reasonable employee and is made because the employee disclosed or attempted to disclose public corruption or wrongdoing. Second, Section 20.2 of the Act was added to prohibit an employer from threatening to retaliate if the act or omission threatened would constitute retaliation under the Act.

Finally, in July of 2010, yet another amendment to the Act was signed into law. This amendment supplements the definition of “employee” to include a licensed physician who practices his or her profession, in whole or in part, at a hospital, nursing home, clinic or any medical facility that is funded, partially or entirely, by the State. This amendment becomes effective on January 1, 2011.

#### **Practice Pointers**

Knowing and understanding the Act is the first step to limiting whistleblower claims by employees. The second step is to adopt and follow simple practices and policies designed to effectively manage employees who engage in whistle blowing.

First, employers need to educate their managers and supervisors on the specifics of the Act. Managers and supervisory personnel should be notified about the Act and informed that any retaliatory action that deters an employee from reporting a potentially unlawful action may create liability for the employer. Managers and supervisors should also be notified that the threat of such retaliatory action is also prohibited

by the Act and may be enough to subject the employer to liability.

The next step is to implement and enforce a reporting policy for employees to register concerns about suspected violations of the law with management. Employees should be assured that they will not be retaliated against for making valid complaints or cooperating with the employer’s investigation of alleged illegal activity. In addition, employers need to ensure that the policy does not unreasonably restrict employees from reporting concerns. If the policy makes it too difficult for employees to report concerns, the policy could be seen as prohibiting the reporting of illegal activity. Finally, employers should confirm, on an ongoing basis, that the reporting policy is consistently enforced. Providing exceptions to the policy will weaken the policy and provide a potential basis for discrimination claims.

The third step is to ensure that all managers and supervisors have read the reporting policy and understand its provisions. Managers and supervisors, especially the front-line managers, need to be aware of the appropriate steps to take and personnel to contact when they receive complaints involving employer illegal actions.

Finally, employers and their supervisors and human resource staff need to be aware of the importance of keeping employee records and personnel files up to date and properly documenting disciplinary actions, including the basis for the actions. Keeping records updated is essential in refuting allegations by an employee with poor work performance or misconduct issues that he or she was retaliated against for engaging in protected activity.

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