

# ONTARIO'S WHISTLEBLOWER REGIME: CIVIL CAUSE OF ACTION FOR REPRISALS NOW POSSIBLE

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A new statutory cause of action has been added to Ontario's securities legislation, meaning that reprisal claims by whistleblowers may now be filed in court or through arbitration. These legislative changes to whistleblower rules became effective in December 2017, and come just 18 months after the Whistleblower Program of the Ontario Securities Commission (OSC) was introduced.

Ontario's current provincial government has directed substantial resources, publicity and energy towards the adoption and administration of a whistleblower program based on the model in place in the United States. For a summary of the current OSC whistleblower office, which commenced operations in July 2016, please see our previous bulletin: [Ontario-Whistleblowers-OSC-Soon-Open-for-Business](#)

In the fall of 2017, the Ontario government announced its plans to allow for a civil cause of action for whistleblowers who allege that they have subjected to reprisals. The adoption of this cause of action means that any such persons alleging an improper reprisal will have the basis to file a claim in the courts or through arbitration.

Effective December 14, 2017, Ontario's Securities Act and Commodity Futures Act have both been amended to provide for a civil cause of action for whistleblowers who may claim that they have experienced reprisals for cooperating with the OSC. The amendments provide that any relevant whistleblower claiming an improper reprisal may bring an action in the Ontario Superior Court of Justice or make a complaint to be resolved by binding arbitration. In any such case, the company will have the legal burden of proof to demonstrate that it did not engage in a reprisal.

The revised securities legislation also provides for specific powers to courts and arbitrators dealing with improper reprisal claims. In particular, those deciding these cases will have the power to order that any relevant employees be reinstated. There is also a further discretionary power to order back pay to any relevant employees, with any such award being two times the employee's remuneration (being all forms of compensation). The remedies of reinstatement and back pay may be ordered individually or in combination.

## **Takeaway for Companies**

These recent revisions to Ontario's securities legislation emphasize the importance that companies follow proper and well-documented procedures when dealing with their internal processes, including whistleblowing and employee discipline. Given that there is now a reverse onus in place, it is no longer enough to simply hope that a whistleblower is unable to prove their case. Companies have a positive obligation to prove the absence of retaliation, with employers being required to demonstrate that an employee's whistleblower status was entirely unrelated to and played no role in discipline. The need to maintain clear records and make sound decisions is therefore crucial.

by Adam Chisholm, George Waggott

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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