



MODRALL SPERLING

L A W Y E R S



Employment Law Alert

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Employment Law at Modrall Sperring

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperring has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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New Mexico's Whistleblower Statute 101: A Crash Course

In 2010, New Mexico's Legislature enacted the Whistleblower Protection Act (WPA). Generally, the purpose of a whistleblower protection act is to protect employees who risk job security for the good of the public by disclosing unlawful and improper actions of public officials. Since it was enacted, New Mexico's WPA is proving to be a popular and attractive cause of action for disgruntled public employees. The purpose of this article is to provide employers with a crash course on New Mexico's WPA.

Does the WPA apply to you?: The WPA applies to public employers. As defined by the WPA, public employers include: (1) any department, agency, office, institution, board, commission, committee, branch or district of state government, (2) any political subdivision of the state, (3) any entity of the state specifically provided for by law, and (4) every office or officer of any entity listed in paragraphs (1)-(3).

A public employee can sue the entity for which he works as well as individuals within the entity who are considered "public officers." Although the WPA does not define what makes someone a "public officer," the New Mexico Court of Appeals considered that question and came to the conclusion that the mere fact someone is a supervisor does not make that person a public officer under the WPA. The test for determining whether someone is a public officer (and therefore can be sued directly under the WPA) is whether the person has autonomy and independence in his or her duties – meaning, not subject to ultimate decision-making authority of a higher-up supervisor.

What does the WPA prohibit?: The WPA prohibits a public employer from taking retaliatory action against a public employee for the following actions: (1) raising the

alarm about a public employer's unlawful or improper acts, (2) testifying about a public employer's unlawful or improper acts in a public investigation, and (3) refusing to participate in the public employer's unlawful or improper act.

Recently, the New Mexico Court of Appeals clarified that the WPA does not apply to grievances that primarily benefit a single employee. In its 2015 opinion in *Wills v. Board of Regents of the University of New Mexico*, the court affirmed dismissal of an employee's WPA claim. The employee filed a lawsuit against his employer for breach of his employment contract and related claims. He was terminated four days after he filed the lawsuit. Thereafter, he amended his lawsuit and added a WPA claim in which he alleged that the University retaliated against him for filing his initial complaint. The district court and court of appeals disagreed with the employee and found that the employee's personal employment grievance with his employer did not constitute a protected whistleblowing activity.

What awards can an employee obtain if she wins her WPA claim?: A public employer who violates the WPA will be liable to the employee for (1) actual damages, (2) reinstatement with the same seniority status that the employee would have had but for the violation, (3) two times the amount of back pay with interest on the back pay and (4) compensation for any special damage sustained as a result of the violation. In addition, an employer will be required to pay the litigation costs and reasonable attorney fees of the employee.

Three reasons the WPA is attractive to employees: The WPA is attractive to employees because the statute is broadly written and there is little authority interpreting it. This makes it hard for employers to get a WPA claim

dismissed early on in the litigation. As a general rule, it is easier for a judge to dismiss a claim where there is clear guidance in the statute or direct authority on point. At this time, there is very little guidance or direct authority with respect to New Mexico's WPA. Second, the WPA is attractive to employees because it is not an exclusive remedy. The WPA specifically provides that its remedies "shall be in addition to any other remedies provided for in any other law." This means that the employee can add it to other claims, effectively expanding the types of recovery he can obtain against his employer. Third, the WPA is also attractive to employees because the protections of the act apply as long as the employee had a "good faith" basis to report the alleged unlawful acts. Stated differently, the employee does not need to prove that the employer actually committed unlawful or improper acts – simply that he had a good faith basis to make the report.

Defenses an employer has to the WPA: Most of the applicable defenses will depend upon the specific allegations of the employee's claim. However, there are

two standard defenses that will apply to every WPA claim. First, claims under the WPA must be brought within two years of the date on which the retaliatory action allegedly occurred. Claims brought by the employee after this limitation period will not be permitted. Second, an employer can defend against a WPA claim by showing that the action it took against the employee was not retaliation for the employee's WPA activity but rather due to the employee's misconduct, the employee's poor job performance, a reduction in work force or other legitimate business purpose.

Make room on the bulletin board: Pursuant to the WPA, "Every public employer shall keep posted in a conspicuous place on the public employer's premises notices prepared by the employer that set forth the provisions of the Whistleblower Protection Act."

Contact [Megan Muirhead](#) by emailing her at Megan.Muirhead@modrall.com or calling (505) 848-1800 for further information.

Do You Have a Hands-Free Cell Phone Policy Yet?

Cell phones and multitasking is a way of life for most employees. In 2014, New Mexico issued a statewide "distracted-driving" ban which prohibits texting and talking on hand-held cell phones while driving. Nevertheless, we routinely see people – including employees in company identified vehicles - texting at stoplights or talking on cell phones while driving. Although the prohibition of "distracted driving" is clear, employers who issue company cell phones or who contact employees who are in transit may be sending mixed signals to their employees. Accordingly, employers should implement a hands-free cell phone policy to clarify their expectations regarding the circumstances under which cell phones may be used.

Although each employer should tailor the policy to its own needs, basic criteria include:

- **Hand-held devices:** If an employee must make or take a work-related call or send a work-related communication while driving, the employee must wait until he can pull over safely and stop the car before initiating or accepting a verbal or written communication.
- **Hands-free devices:** The employer expects that safety will always be the first priority for all employees. If, because of weather, traffic conditions, or any other reason, an employee is

unable to concentrate fully on the task of operating the motor vehicle even while using a hands-free device, the employee must either end the communication or pull over and safely park the vehicle before resuming the communication.

by example in order to be able to credibly enforce the organization's policy. Properly crafted and enforced, a policy regulating cell phone use by employees can limit an employer's exposure to liability for traffic accidents involving employees.

As with any policy, merely having it is not enough. The employer must train its employees and enforce the policy. More importantly, the leaders of the organization must lead

Contact [Jennifer Anderson](#) by emailing her at Jennifer.Anderson@modrall.com or calling (505) 848-1800 for further information.

Discrimination and Harassment Training

A New Mexico employer with statewide offices recently benefited from a Modrall Sperling training on discrimination and harassment in the workplace. Alana De Young, a litigation associate in the firm's Employment Group, put together the annual training to provide updates and reminders. The in-person training was Skyped live to employees around the state, and also was recorded so that others could download the presentation at a later date. Please contact a member of our employment group if you are interested in providing your employees with similar training on workplace discrimination and harassment issues.