

## New York Enhances Protections for Whistleblowers

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Effective January 26, 2022, New York will greatly expand whistleblower protections provided to employees and independent contractors, creating new compliance challenges and avenues of liability for employers. [Senate Bill S4394A](#) (the “Amendment”), recently signed into law by Governor Hochul on October 28, 2021, amends New York’s whistleblower protection law (codified at Section 740 of New York’s Labor Law) in four principal ways:

- Expanding the definition of protected activity under the law;
- Expanding the scope of individuals entitled to whistleblower protection;
- Expanding the definition of adverse actions under the law; and
- Watering down the requirement that whistleblowers notify their employer of the challenged conduct prior to reporting it to law enforcement or other government bodies.

Most importantly, the amendment expands the scope of protected activity under the whistleblower law. Previously, a whistleblower was protected only when disclosing employer conduct that violated a law, rule, or regulation **and** created a substantial and specific danger to public health or safety or constituted health care fraud. Now, whistleblowers will also have protection when reporting employer conduct that the whistleblower *reasonably believes* violates a law, rule, or regulation **or** is a substantial and specific damage to public health or safety. What constitutes “reasonable belief” will likely be determined by future case law, but will likely include both objective and subjective analyses as is the case under other whistleblower protection laws (similar to Section 806 of the Sarbanes-Oxley Act).

The law also expands the universe of individuals who may be entitled to whistleblower protection. Previously, New York’s whistleblower law protected only employees. The new amendment clarifies that the whistleblower law also protects former employees and expands protection to independent contractors. Further, the amendment broadens the definition of “retaliatory action” under the law to include (1) actions or threats to a former employee’s current or future employment; and (2) threats to

contact U.S. immigration authorities on an employee or an employee's family member.

Finally, the new amendment allows employees or independent contractors to, in some cases, obtain protection without reporting the alleged illegality or threat to health and safety to the employer. Whereas previously employees were required to report violations of law to the employer to obtain protection, now they merely need to make "a good faith effort" to do so. In addition, employer notification is excused entirely if: (1) there is an imminent and serious danger to public health and safety, (2) the employee reasonably believes that reporting would result in the destruction of evidence or concealment of the conduct, (3) the conduct could reasonably be expected to endanger the health of a minor, (4) the employee reasonably believes that reporting would result in physical harm to the employee or another person, or (5) the employee reasonably believes their supervisor is aware of the conduct and will not correct it.

Employers should be aware that the amendment imposes a posting requirement for employers. Employers must post a notice of employee rights in a well-lit place that is "customarily frequented by employees and applicants." The New York Department of Labor will likely publish a model notice prior to the effective date of January 26, 2022.

The new whistleblower protection under New York state law joins the ever-proliferating layers of employee whistleblower protections under state and federal law. Employers who receive complaints about illegality or health and safety issues will need to carefully document both the receipt of the complaint itself and the employer's response. Employers would be well-advised to consult counsel before taking an adverse employment action following a whistleblower's report.

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