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New York Significantly Expands its Whistleblower Law

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New York has greatly expanded its "whistleblower" law. The amendments to New York Labor Law §740 go into effect on January 26, 2022 and undoubtedly enhance employee protections and require New York employers to take certain steps to come into compliance. We discuss in greater detail below.

The Amendments Expand Who is Considered an "Employee".

Once the amendments become effective, employees will no longer be confined to individuals currently employed by the employer, but will also include "former employees" as well as self-employed independent contractors – a significant expansion.

The Amendments Broaden the Scope of Protected Activity.

Arguably the most notable aspect of the amendments is that Section 740 now protects employees against retaliation for reporting or complaining about an employer activity, policy, or practice that the employee *reasonably believes* violates the law or that poses a substantial and specific danger to the public health or safety. Previously, employees were only protected under Section 740 for reporting or complaining about *actual violations* of law that created or presented a substantial and specific danger to the public health or safety.

Specifically, the changes outlined in the legislation prohibit retaliation against an employee because the employee:

1. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule or regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety;

2. Provides information to, or testifies before, any public body conducting an investigation, hearing, or inquiry into any such activity, policy or practice by such employer; or

3. Objects to, or refuses to participate in any such activity, policy or practice.

The amendments confirm that these protections exist regardless of whether the employee is acting within the scope of their job duties. Further, because the law is now so expansive to cover all violations of the law or substantial and specific dangers to the publish health and safety, the amendments eliminate the reporting of and complaining about "health care fraud" as a protected activity.

The amendments also expand the types of "law, rule or regulation" about which an employee can report or complain of to include: (1) "federal, state, or local" statutes and ordinances"; (2) federal, state or local "executive orders"; and (3) "any judicial or administrative decision, ruling or order." Additionally, the amendments broaden the types of public bodies to which an employee may report or complain of illegal activity or before which an employee may testify, to include "any federal, state or local department of an executive branch of government;" or "any division, board, bureau, office, committee, or commission of any of the [other] public bodies" as defined under the law.

The Amendments No Longer Require The Employee to First Notify His or Her Employer in Certain Situations.

Previously, Section 740 required that an employee first notify their employer of the illegal activity, policy, or practice and provide the employer with a reasonable opportunity to cure the problem before disclosing the violation to a public body. The amendments have loosened these prerequisites in two important ways. First, employees now need only make a "good faith effort" to notify their employer of any potential violation, before providing them with an opportunity to cure. Second, employees are relieved entirely from the notification and cure requirements where:

- There is imminent and serious danger to public health and safety;
- The employee reasonably believes that telling the employer would result in the destruction of evidence or concealment of the activity;
- The activity could reasonably be expected to lead to the endangering of a minor;
- The employee reasonably believes that reporting to the supervisor would result in harm to the employee or other person; and
- The employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct such activity, policy, or practice.

The Amendments Expand the Types of Actions Considered Retaliatory.

In addition, retaliatory action now includes a broader range of employment actions. Specifically, the amendments define retaliatory action as "an adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee exercising his or her rights under this section." This includes three categories of retaliatory actions:

- adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion;

- actions or threats to take such actions that would adversely impact a former employee's current or future employment; or

- threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee's family or household member (as defined by applicable law).

The Amendments Expand Employee Remedies and Entitlement to a Jury Trial.

First, the amendments extend the statute of limitations for bringing a claim from one to two years from the date of the alleged retaliatory action. Second, the law now entitles employees to a jury trial. Finally, the amendments further expand the remedies and damages available to an employee, which now include front pay in lieu of reinstatement, punitive damages if the violation was willful, malicious or wanton, and eligibility for a civil penalty not to exceed $10,000.

The Amendments Include a New Posting Requirement.

The law now adds an explicit requirement that employers post a notice that informs employees of their protections, rights, and obligations under the whistleblower law. The notice must be posted "conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment." The law also extends this publication requirement to Section 741 of the New York Labor Law—the counterpart to Section 740 which applies to certain health care employers.

Takeaways and Next Steps for Employers.

New York now joins other states, such as its neighboring state New Jersey, which have similar whistleblower statutes, in providing broad protections to employee whistleblowers. Employers must be aware of the expanded protections afforded by these amendments, especially considering the constant flurry of executive orders, rules, and regulations being announced and implemented during the COVID-19 pandemic. But employers should not focus solely on the headline-grabbing whistleblower claims. Indeed, seemingly less-significant actions or omissions might now be actionable under the amended law. For example, a minor legal deficiency in an employer's handbook, while previously innocuous, could potentially serve as the predicate for a whistleblower action if the employer fails to remedy the issue. And remember: the employee's ability to successfully seek recourse no longer depends on an actual violation of the law; rather, it depends, in part, on the employee's *reasonable belief* of a violation.

Thus, to ensure compliance with the amended law and reduce potential exposure, employers should consider taking the following next steps:

- **Confirm the viability of the employer's reporting and investigation mechanisms.** Employers should already have a whistleblowing reporting structure in place for complaints by employees. However, it is strongly recommended that employers review their existing

policies and procedures to ensure they adequately address the broad array of complaints that may be protected under the amended law.

- **Post a notice of employee protections, rights, and requirements.** We would expect the New York State Department of Labor to release a sample notice that employers can post ahead of the January 26, 2022 posting deadline. But employers should also consider creating a Section 740-compliant policy, whether on a standalone basis or by adding one to their employee handbook or updating their existing whistleblowing policies. Employers should also consider how best to notify "applicants" for employment of their rights.

- **Train Managers and Supervisors Regarding the Whistleblower Law.** As the amendments to Section 740 greatly broaden its scope, employers are advised to incorporate a 740 whistleblower component into their training programs, including by creating an awareness of the range of activities about which an employee and independent contractors may complain, what constitutes protected and retaliatory activities, and the supervisor or manager's reporting obligations under the law.

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