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Employee Benefit Plan Review

Whistleblower Protections for Employees Expand in New York

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New York Governor Kathy Hochul recently signed legislation[1] that expands one of the state's whistleblower laws with significant revisions ("Amendments") to NY Labor Law § 740 ("Section 740").[2] The Amendments increase coverage for workers who allege they have been retaliated against for reporting suspected employer wrongdoing. The Amendments took effect on January 26, 2022, and broaden the scope of private-sector whistleblower protections[3] by expanding whistleblower protections outside the scope of health care fraud and reporting of health and safety concerns. The Amendments also expand the pool of individuals protected by Section 740, among other changes.

Who Can Claim Protection Under the Amended Law?

The Amendments make it much easier for individuals to bring a retaliation claim under Section 740.

Current Employment No Longer Required

Section 740 prohibits retaliatory action by employers against an employee who engages in any activity related to exposing an employer's violation(s) of law or regulation. The Amendments expand the definition of "employee" under Section 740 to include former employees as well as independent contractors who "carry out work in furtherance of an employer's business enterprise and who are not themselves employers." Previously, the definition was limited to individuals who perform services "for and under the control and direction of an employer for wages or other remuneration," implying that only current employees could bring a claim under Section 740. Further, the statute had expressly provided, at paragraph 4(c), that if a claimant was an independent contractor, that would be a defense to an action brought under Section 740. The Amendments strike this sentence from the provision.

Whether former employees can pursue claims of whistleblower retaliation is a hot topic nationally. Last year, the U.S. Court of Appeals for the Sixth Circuit ruled that former employees could pursue such claims, creating a split in the circuits, as the U.S. Court of Appeals for the Tenth Circuit had previously held that former employees cannot pursue retaliation claims.

The U.S. Supreme Court may take up the issue, pending its decision on a petition challenging the Sixth Circuit ruling.

No Health and Safety or Health Care Fraud Limitation

The law previously limited protection to claims where the employer was "in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety or which constitutes health care fraud."

First, the Amendments eliminate the reference to health care fraud.

Second, and more significantly, the Amendments remove the requirement that the protected whistleblowing activity be linked to public health or safety.

Instead, the Amendments create two separate whistleblowing protections – for a reasonable belief that (i) a violation of law, rule, or regulation has occurred, or (ii) there is a substantial and specific danger to the public health or safety. In other words, whistleblowing no longer needs to be about public health and safety or health care fraud, but is broadly applicable to any potential violation of law, rule, or regulation. This could give rise to claims previously unavailable under this statute, including complaints about fraud and other financial improprieties.

No Laws Broken? Whistleblowing Can be Based on "Reasonable Belief"

Moreover, to be protected under the law, a claimant will no longer need to disclose, or threaten to disclose, an *actual* violation of law, rule, or regulation. That language has been stricken, allowing instead for a claimant to invoke "whistleblower" status by making a showing that the basis for allegations was a reasonable belief that the employer committed a violation. Thus, an employer's ability to prove that, in fact, no violation or offense was committed will no longer serve as an effective affirmative defense to a retaliation claim under Section 740.

No Adverse Employment Event? Other Actions May Qualify as Retaliation

The Amendments also modify the statute's language to expand considerably its definition of an employer's unlawful "retaliatory action." No longer will the meaning of retaliation be confined to personnel actions in the context of employment by the employer. While adverse employment action against a whistleblower remains illegal, the Amendments broaden the meaning of unlawful retaliatory action. The expanded definition includes claims of discrimination for exercising one's rights under the Amendments, actions or threats to take actions affecting current or future employment, and contacting or threatening to contact U.S. immigration authorities or otherwise reporting or threatening to report the suspected immigration or citizenship status of a whistleblower or a whistleblower's family or household member. Thus, while discharge, suspension, demotion, and other such employment actions will remain actionable, other employer actions, including threats, may be alleged as retaliatory action.

Expanded Whistleblower Protections

Protected Activity Expanded

Qualifying protected activity now includes alleged violations of executive orders and any judicial or administrative decision, ruling, or order, in the new definition of "law, rule or regulation."

Notification Rules Changed: Fewer Obligations for Whistleblowers, More for Employers

Additions to Section 740, as well as Labor Law § 741,[4] which applies to whistleblowing in the context of health care employment, include new notice posting requirements. The Amendments require that employers inform workers (including independent contractors) of their protections, rights, and obligations under the Labor Law by conspicuously posting a notice in an easily accessible and well-lighted place customarily frequented by employees and applicants for employment. Note that the New York State Department of Labor has not yet released a model notice, so employers may consider posting copies of Section 740 and Section 741 (if applicable) for technical compliance.

While the Amendments create more tasks for employers, they ease obligations for those who would make a claim under Section 740. Previously, whistleblowers had to afford employers a notice and cure period. Employees were required to bring the activity, policy, or practice that was the subject of the disclosure to the attention of a supervisor of the employer and afford the employer a reasonable opportunity to correct such activity, policy, or practice before disclosing it to a public body. Thus, employers had a defense against retaliation claims by whistleblowers who reported alleged wrongdoing to a public body, but not to their employer.

Under the Amendments, while whistleblowers must generally still make a "good faith effort" regarding such employer notification, employer notification is not required when:

- There is an imminent and serious danger to the public health or safety;
- The whistleblower reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy, or practice;
- Such activity, policy, or practice could reasonably be expected to lead to endangering the welfare of a minor;
- The employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
- 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.

Increased Litigation Risk

Longer Statute of Limitations

The Amendments extend the statute of limitations for civil claims under Section 740 to two years from one year. Parties are also now expressly entitled to a jury trial in a civil action alleging violations of Section 740.

Expanded Remedies

The Amendments state that additional penalties are now available for plaintiffs who successfully prove a violation of Section 740. In addition to compensatory damages and attorneys' fees already available, new remedies include front pay in lieu of reinstatement, a civil penalty of up to $10,000, and punitive damages where the violation was willful, malicious, or wanton.

What New York Employers Should do Now

- Review any applicable whistleblower or "speak up" policy to check for compliance with the Amendments.
- Strongly consider training frontline managers on the evolving issues of what constitutes "protected activity" and "adverse action." Frontline managers often receive the majority of complaints from whistleblowers, so it is critical that they understand, and are trained on, the important role they must play in properly handling these issues (including not allowing ostracism within their department by co-workers).
- Review any notification or complaint procedures to ensure an effective response in the event individuals disclose an activity, policy, or practice reasonably believed to be in violation of any law, rule, or regulation.
- Document compliance efforts, including communications with employees and independent contractors. While compliance is no longer a defense to a retaliation claim, evidence of compliance and communication thereof may prove helpful to disproving that a complainant's belief that a violation occurred was "reasonable." This may be particularly important after the effective date of the Amendments (January 26, 2022), when individuals no longer have to notify the employer if they satisfy the exceptions detailed above.
- Note that COVID-19 health and safety complaints could qualify under the exception concerning imminent and serious danger to the public health or safety.
- Comply with the notice posting requirements under Sections 740 (applicable to private employers in general) and 741 (specific to health care workplaces). ✪

Notes

1. *https://legislation.nysenate.gov/pdf/bills/2021/s4394a*.
2. *https://www.nysenate.gov/legislation/laws/LAB/740*.
3. In general, whistleblowing in the context of public-sector employment in New York State is covered by N.Y. Civil Service Law § 75-b, which is not affected by this legislation.
4. *https://www.nysenate.gov/legislation/laws/LAB/741*.

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