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New York's Expanded Whistleblower Protections Take Effect

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As of January 26, 2022, New York expanded legal protections for workplace whistleblowers. Amendments to Section 740 of the New York Labor Law significantly expand: (1) the population of individuals who are protected; (2) the scope of protected activities; (3) the range of prohibited employer actions; (4) the statute of limitations for bringing a claim; and (5) remedies in civil actions. The amendments also create an employer posting requirement and relax the requirement that an employee must first bring the matter at issue to the attention of the employer and provide the employer a reasonable opportunity to correct the situation.

Who is now protected?

Section 740 previously only protected current employees. With the amendments, former employees and independent contractors who work in furtherance of an employer's business enterprise are also covered.

What activities are now protected?

Previously, to warrant protection, the activity reported by the whistleblower had to *both* (1) actually violate a law, rule, or regulation, and (2) create and present a substantial and specific danger to public health or safety. The amended Section 740 protects reporting if the individual *reasonably believes* that the reported activity *either* violates a law, rule, or regulation *or* poses a substantial and specific danger to public health or safety.

The amended law also expands the definition of "law, rule, or regulation" to include federal, state, and local statutes; executive orders; any rules or regulations promulgated pursuant to such statutes or executive orders; and judicial or administrative decisions, rulings, and orders.

Finally, the amended law now protects whistleblowers who provide information to or testify before an executive branch of any federal, state, or local government. The law previously only covered reporting to or testifying before a federal, state, or local legislature; court; grand or petit jury; administrative agency; or law enforcement agency.

What actions are now prohibited?

The meaning of "retaliatory action" has been broadened too.

Retaliation under Section 740 previously included only discharge, suspension, demotion, and other adverse actions regarding the terms and conditions of the whistleblower's employment. "Retaliatory

action” now encompasses any “adverse action taken by an employer or his or her agent to discharge, threaten, penalize, or in any other manner discriminate against” whistleblower employees, even if the action is not employment-related. While the amendments do not define “discriminate,” they do provide a non-exhaustive list of examples of retaliatory actions:

- actual or threatened actions against an employee in the terms or conditions of employment, including but not limited to discharge, demotion, and suspension;
- actual or threatened actions that would adversely affect a former employee’s current or future employment; and
- contacting or threatening to contact United States immigration services based on suspected citizenship or immigration status of the employee, their family member, or a member of their household.

What is the new statute of limitations?

The statute of limitations has been extended from one year to two years.

What new remedies are available?

Employees are now entitled to a jury trial and may seek front pay; civil penalties not to exceed \$10,000; and punitive damages for willful, malicious, or wanton violations, in addition to the previously-available remedies of backpay, compensatory damages, and attorneys’ fees and costs. If an employee brings an action that has no basis in law or fact, an employer may be awarded reasonable attorney’s fees, court costs, and disbursements at the discretion of the court.

Relaxed notification requirements for whistleblowers

With the amendment, individuals are only required to make “a good faith effort” to notify their employer and provide a reasonable opportunity to correct the situation. Moreover, the new law exempts individuals entirely from the employer notification requirement where: (1) an imminent and serious danger to public health or safety exists; (2) the employee reasonably believes notification would lead to the destruction or concealing of evidence; (3) the reported activity, policy, or practice could reasonably be expected to lead to endangering the welfare of a child; (4) the employee reasonably believes notification would result in physical harm; or (5) the employee reasonably believes the supervisor is aware of the activity, policy, or practice and will not correct a violation.

Posting requirement

Employers must post a notice informing employees of their rights and obligations under Section 740. The notice must be posted conspicuously in a well-lighted area that is easily accessible and frequented by employees and applicants for employment.

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