

Expansive New Whistleblower Protections for New York Employees and Independent Contractors Take Effect This Week

by Laura M. Lestrade, Krista Bolles, and Melissa Raphan

Effective this week, Section 740 of the New York Labor Law has been amended to provide significantly greater protection from retaliation for individuals – including independent contractors – who raise concerns of employer wrongdoing. Prior to the amendment, employees were protected from retaliation only for reporting internally or externally actual violations of law involving (1) “a substantial and specific danger to the public health or safety,” or (2) healthcare fraud. Now, whistleblower protections are available to both employees and independent contractors who raise concerns about *any* activity, policy or practice that they *reasonably believe* violates *any* law, rule or regulation. Proof of an actual violation of law is no longer necessary, and violations need not relate to public health or safety. All that is required is a reasonable belief that a violation of any law has occurred. The amendment also expands the potential remedies available to litigants under the statute.

Independent Contractors and Former Employees Specifically Protected

The definition of “employee” under section 740(a) has been expanded to include “former employees” and “natural persons employed as independent contractors . . . who are not themselves employers.” The expansion of protections to cover both independent contractors and former employees sets New York’s law apart from many other state whistleblower statutes.

Protected Activities Expanded

Under the amended statute, employers may not take retaliatory action against an “employee” for:

- Disclosing or threatening to disclose to a supervisor or a public body an activity, policy or practice of the employer that the employee reasonably believes violates a law, rule or regulation (including executive orders and judicial and administrative

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decisions), or that the employee reasonably believes poses a substantial and specific danger to the public health or safety;

- Providing information to, or testifying before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by the employer; or
- Objecting to, or refusing to participate in, any such activity, policy or practice.

Employees are protected from retaliation for taking such actions regardless of whether they are acting within the scope of their job duties.

Expanded Definition of Retaliation

The amendment expands the definition of “retaliatory action” to include not only discharge, suspension and demotion of an employee, but also any other adverse action taken to “threaten, penalize or in any other manner discriminate against” an employee, or adversely impact an employee’s current or future employment, for exercising his or her rights under the statute. Prohibited retaliatory action specifically includes contacting or threatening to contact U.S. immigration authorities regarding the immigration or citizenship status of the employee or the employee’s family.

Exceptions to the Prior Notification Requirement Added

A significant limitation to whistleblower actions under Labor Law Section 740 is the prior notification requirement. Prior to the amendment, before seeking whistleblower protection for providing information to or testifying before a public body conducting an investigation, hearing or inquiry, the employee must have made a good faith effort to notify a supervisor and afford the employer a reasonable opportunity to correct its actions. The amendment adds numerous exceptions to the prior notification requirement, including when:

- There is imminent and serious danger to the public health and safety;
- The employee reasonably believes that reporting the suspected violation would result in the destruction of evidence or concealment of the activity;
- The suspected violation could reasonably be expected to lead to endangering the welfare of a minor;
- The employee reasonably believes that reporting to a supervisor would result in physical injury to the employee or to others; or
- The employee reasonably believes that the supervisor is already aware of the activity and will not correct it.

Prior notification is no longer required under any of the above circumstances.

Posting Requirement

Employers are now required to post a notice of employees’ rights under the law in a conspicuous and well-lit area of the employers’ premises that is customarily frequented by employees and applicants. The New York State Department of Labor has not yet but is expected to issue a model notice that employers may use to comply with the new posting requirement.

Statute of Limitations Extended

Employees and contractors may now institute civil litigation under the statute within two years of an alleged retaliatory action, up from one year prior to the amendment.

Expanded Remedies

The amendment expands the potential remedies available under the statute by adding front pay, civil penalties and punitive damages. The remedies currently available under the statute are:

- Injunctive relief to restrain continued violation of the statute;
- Reinstatement, or front pay in lieu thereof;
- Reinstatement of full fringe benefits and seniority rights;
- Compensation for lost wages, benefits and other remuneration (back pay);
- Reasonable costs, disbursements and attorneys' fees (attorneys' fees may be awarded to the employer as well, "if the court determines that an action was without basis in law or fact");
- A civil penalty not to exceed \$10,000; and
- Punitive damages for willful, malicious or wonton violations.

Conclusion

New York's amended whistleblower protections add a new weapon to the already burgeoning arsenal of plaintiffs' employment lawyers. Now that whistleblower protections are no longer limited to issues involving public safety and health care, New York employers can expect to see an uptick in state whistleblower claims.

We recommend that New York employers take the following steps to ensure compliance and be in the best position to avoid claims under the new law:

- Make sure the new posting requirement is met.
- Make any necessary updates to existing whistleblower policies or consider developing and adopting them if they are not already in place.
- Train management, including front-line managers, compliance and human resources personnel on how to recognize communications that could be construed as protected activity, as well as the proper procedure for responding to such communications and how to identify and avoid the risk of adverse or retaliatory actions.