

NEW YORK'S EXPANDED WHISTLEBLOWER PROTECTION LAW: WHAT CHANGED IN 2022?

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by Krista Bolles

Sweeping amendments to New York's whistleblower law took effect in 2022. The law was amended to provide significantly greater protection from retaliation for individuals who raise concerns of employer wrongdoing. The amended New York Labor Law § 740 is now one of the broadest and most powerful whistleblower laws in the U.S.

How has New York's whistleblower law changed?

New York's whistleblower law was broadly expanded in 2022. Prior to the 2022 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 categories of protected individuals as well as the potential remedies available to litigants.

Who is protected?

The amendment expanded the definition of "employee" to include "former employees" and "natural persons employed as independent contractors . . . who are not themselves employers."

What qualifies as protected activity?

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

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law, rule or regulation (including executive orders and judicial and administrative 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.

What constitutes retaliation?

The definition of “retaliatory action” was also expanded. It now encompasses adverse action taken by an employer to “discharge, threaten, penalize, or in any other manner discriminate against an employee” for exercising his or her rights under the statute, including:

- (i) adverse employment actions or threats to take such adverse employment actions against an employee in the terms or conditions of employment, including but not limited to discharge, suspension or demotion;
- (ii) actions or threats to take such action that would adversely impact a former employee’s current or future employment; or
- (iii) contacting or threatening to contact U.S. immigration authorities regarding the immigration or citizenship status of an employee or the employee’s family.

Has the notification and cure requirement changed?

The notification and cure requirement poses a significant limitation to whistleblower actions. 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 notification and cure 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.

Notification is no longer required under any of the above circumstances.

Is there a publication requirement?

The New York State Department of Labor issued a model notice for employers. Employers are required to post a notice of employee rights under the law in a conspicuous and well-lit area of the employer's premises that is customarily frequented by employees and applicants. For fully remote employees, this notice should be provided by email and included in remote employees' standard onboarding documentation.

Has the statute of limitations changed?

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

What new remedies are available?

The amendment provides a right to a jury trial and 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.