

What impact has New York's expanded employee whistleblower statute had on the scope of workers' protected activities, and what steps can employers take to mitigate the risks of whistleblower claims?

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When an employer disciplines its employees, let's say for unsatisfactory performance or misconduct, employees sometimes respond with accusations that the discipline illegitimately occurred in retaliation for conduct protected by law. For example, an employee may claim that the employer imposed discipline due to the employee's previous expression of a concern relating to the employer's compliance with law in conducting its business. Although the laws do not prohibit the employer from imposing discipline based on the employee's performance or misconduct, the laws often do protect the employee's right to express concerns about compliance with law. Managing such claims requires employers not only to untangle the conflicting factual assertions about the underlying reason for the discipline, but often requires the employer to sort out a complex web of statutes, each with different language and varying requirements for the assertion of a retaliation claim.

As of 2022, New York became one of a number of states that have sought to strengthen the protection of employees' rights to express concerns about their employers' compliance with law. Under an amended New York Labor Law § 740, New York workers may now assert causes of action for alleged retaliation occurring due to complaints about a violation of a "law, rule or regulation." Now, a violation of § 740 provides a right to a jury trial, the possibility of punitive damages for willful violations, civil penalties, a 2-year statute of limitations, and other relief not previously available as remedies for retaliation under myriad federal and state statutes.

In this article we will analyze the broadened scope of § 740, as well as several recent court decisions that have addressed the expanded definition of the term "law, rule or regulation." We will then propose several practices employers may consider when responding to employee concerns regarding their employers' compliance with law.

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Labor Law § 740

Before amendment of New York Labor Law § 740 in 2021, the statute narrowly protected an employee who “discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is 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.” N.Y. Lab. Law § 740(a)(2) (2021). The law required the employee to show not only that the employee disclosed concerns related to public health, safety or healthcare fraud. It also required that the employer had actually violated the law.

The 2021 amendment relaxed this standard. Now § 740 protects an employee who: “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.” N.Y. Lab. Law § 740(a)(2) (2024) (emphasis added). Thus, the statute now prohibits retaliation against an employee if the employee “reasonably believes” an employer activity, policy, or practice violates a law, rule or regulation or poses a danger to public health and safety.

Law, Rule or Regulation

Section 740 now defines “law, rule or regulation” to include “(i) any duly enacted federal, state or local statute or ordinance or executive order; (ii) any rule or regulation promulgated pursuant to such statute or ordinance or executive order; or (iii) any judicial or administrative decision, ruling or order.” N.Y. Lab. Law § 740(1)(c). This updated definition now includes within “law, rule or regulation” executive orders, judicial or administrative decisions, rulings or orders, and rules promulgated pursuant to executive orders. A number of courts have recently interpreted the term “law, rule or regulation” and have set some boundaries employers should consider as they evaluate their policies and practices.

In *Pierce v. Better Holdco, Inc.*, 2023 U.S. Dist. LEXIS 177137 (S.D.N.Y. Sep. 29, 2023), the U.S. District Court for the Southern District of New York held that the plaintiff sufficiently alleged protected activity by raising complaints related to violations of the California and federal WARN Acts, misrepresentations regarding website traffic in a SEC filing, and misrepresentations of profitability to investors. The plaintiff, the vice president of sales, operations, and customer service, was placed on administrative leave and terminated after raising these concerns. The Court emphasized that the plaintiff did not allege that the employer did or even intended to violate the WARN Act and that § 740 no longer requires such allegations. The Court stated that the plaintiff needed to demonstrate only a *reasonable belief* that the WARN Act had been violated. Additionally, although the plaintiff did not explain how the SEC filing misrepresentation violated the law, the Court held that the statute still protected the employee for disclosing “a reasonable belief of a violation of law” to her supervisors. The plaintiff attempted to allege two additional acts of protected conduct related to false statements made in an email and misrepresentations made regarding the company’s platform. However, the

Court held the plaintiff did not plausibly allege she reasonably believed a violation of law had occurred for either act.

Another case from the Southern District of New York held that the plaintiff stated a claim for retaliation after raising concerns regarding certain legal requirements relating to a sales and consumption tax. In *Collison v. WANDRD, LLC*, 2024 U.S. Dist. LEXIS 110062 (S.D.N.Y. June 20, 2024), the plaintiff, a customer service 1099 employee later promoted to a financial management W-2 position, alleged that he raised concerns that his employer violated requirements related to sales and consumption tax filings on multiple occasions. Following expression of these concerns, the plaintiff faced adverse employment actions, including eventual termination of employment. The Court denied the defendants' motion to dismiss the retaliation claim.

In contrast to the outcomes in *Pierce* and *Collision*, other cases have found that the concerns expressed by an employee fell *outside* of the definition of "law, rule or regulation." In *Zhang v. Centene Mgmt. Co.*, 2023 U.S. Dist. LEXIS 68718 (E.D.N.Y. Feb. 2, 2023), the Court considered whether certain policy statements issued by the New York Department of Health's ("DOH") Office of Insurance Programs constituted a "law, rule or regulation" for purposes of § 740. The plaintiff was a registered nurse care manager whose employer agreed to follow Managed Long Term Care ("MLTC") Policy 16.06 promulgated by the DOH. The plaintiff reported her employer's noncompliance with the Policy, resulting in a DOH investigation and restorative action. The plaintiff was terminated and brought an action for retaliation under § 740. The Court determined that MLTC Policy 16.06 provided guidance on regulations related to personal care services and was not a binding rule promulgated by statute or ordinance. The Court further evaluated the Policy under the amended definition of "law, rule or regulation," including regulations promulgated by executive order or judicial or administrative decision, ruling, or order. In doing so, the Court cited to *HC2, Inc. v. Delaney*, 510 F. Supp. 3d 86, 100 (S.D.N.Y. 2020), a pre-amendment case holding that COVID-19 guidances issued by the Centers for Disease Control and Prevention and the New York City Department of Health were not "mandates or dictates" promulgated pursuant to the relevant administrative procedures governing federal and city regulations, and therefore lacked the force of law to predicate § 740 claims. Applying this logic, the *Zhang* Court held that the Policy was merely a notice provision or "directive" that did not give rise to a § 740 whistleblower retaliation claim.

Retroactive Application

Another issue with which courts are grappling under § 740 is whether the expanded definition of "law, rule or regulation" applies retroactively to conduct occurring before the amendment took effect on January 26, 2022. Courts are currently divided as to the retroactive application of the amendment. See *Callahan v. HSBC Sec.*, 2024 U.S. Dist. LEXIS 47106 (S.D.N.Y. Mar. 18, 2024) (collecting cases). Courts allowing retroactive application point to the "remedial" nature of the amendment, finding a legislative intent to correct the "restrictive nature of the prior statutory requirements." *Id.* at *17-18. Other courts find that the amendment's broadened protections provide a new basis upon which

to find relief and therefore cannot be applied retroactively. See *Pisano v. Reynolds*, 2023 N.Y. Misc. LEXIS 2573, at *6 (N.Y. Sup. Ct. May 23, 2023).

Practice Pointers

Now that the New York Legislature has expanded § 740 to cover an employee's assertion of concerns regarding laws in addition to those related to public health, safety, or healthcare fraud, employers should consider implementing several best practices including the following:

- Ensure that employment policies include clearly defined channels of communication which allow employees to raise concerns to supervisory and management staff, including concerns falling outside of the scope of their specific jobs;
- Such policies should include “bypass procedures” which allow the employee to escalate concerns to more senior levels of management, to human resources, internal audit or compliance staff. Such bypass procedures are particularly appropriate in the event that the employee concern involves the employee's direct supervisor or to members of senior management who may be conflicted about considering the employee's concerns;
- Where the company does not have sufficient resources to create an effective bypass procedure, the company should consider whether members of the board of directors should be appropriate avenues for particular concerns;
- Train those in management and supervisory roles on how to document and address employee concerns effectively, or to refer such concerns to the right persons who are best able to address them;
- Keep management up to date regarding changes in industry regulations and employee protections, including those established by federal, state and local law, executive orders and rules promulgated under such laws;
- Address concerns from former employees and independent contractors, inasmuch as such persons are now within the scope of persons protected by § 740; and
- Understand that a lack of an actual violation of law is no longer a viable defense to a claim under § 740, and that an employee engages in protected activity if the employee “reasonably” believes that a violation of a “law, rule, or regulation” has occurred.

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