

CLIENT ALERT

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New York Expands Whistleblower Protections

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On October 28, 2021, New York Governor Kathy Hochul signed legislation (S.4394-A/A.5144-A) that significantly expands protections for workers who engage in whistleblowing activity.

This legislation amends New York Labor Law Sections 740-41, which previously afforded anti-retaliation protections only to current employees who complained of unlawful conduct constituting a “substantial and specific danger” to public health and safety or “health care fraud.”

The new amendments expand not only the type of whistleblowing activity covered under the law but also the categories of workers protected, the forms of retaliatory action prohibited, the statute of limitations to bring a claim, and the remedies available in the event that a violation is found, while also creating new obligations for employers. These provisions will become effective on January 26, 2022.

A more detailed summary of the legislation is below.

Expansion of Definitions and Protections

Most notably, the amended law will apply to a much broader range of activity.

Previously, a substantial and specific danger to public health or safety – which must have also been an *actual* violation of a law, rule or regulation relating to the issue – or acts or omissions constituting health care fraud, must have occurred for the employee to obtain protection under the

law. The amended law provides that, in order to be protected, an employee need only *reasonably believe* that the reported activity, policy or practice (a) is a violation of law, rule or regulation, or (b) poses a substantial and specific danger to public health or safety. The main caveat is, subject to certain exceptions, the employee must first make a *good faith* effort to notify the employer of the activity, policy or practice at issue to afford the employer with a reasonable opportunity to correct it.

Moreover, the definition of “law, rule or regulation” will no longer be limited to federal, state or local statutes and ordinances, or their implementing rules and regulations. The amended law includes any executive order (such as the governor’s COVID-19 related pronouncements), or its implementing rules and regulations, and any judicial or administrative decision, ruling or order.

Of similar importance, the definition of a protected “employee” will be extended beyond current employees to encompass both *former employees* and *individual independent contractors* as well. This change is particularly notable, as former employees are generally more inclined to, and have greater incentive to, engage in whistleblowing activity and file a claim against the employer after doing so.

Accompanying this expanded definition of “employee,” the scope of what constitutes “retaliatory action” by the employer will extend beyond standard adverse employment actions such as discharge, suspension or demotion. The

definition will include mere threats of discharge, suspension or demotion against a current worker, as well as actions or threats that may affect a former worker's new or future employment, reporting or threatening to report a whistleblower to immigration authorities, and any other form of discrimination against an individual for exercising his or her rights under the whistleblower law.

Lengthening of Statute of Limitations

The amended law expands the statute of limitations for filing a retaliation claim from one (1) to two (2) years, and also expressly entitles the parties to a jury trial.

Additional Remedies

Prevailing employees may be able to recover front pay, civil penalties not exceeding \$10,000 and punitive damages, along with the pre-existing remedies of injunctive relief, reinstatement, compensation for lost wages, benefits and other remuneration, as well as reasonable costs, disbursements and attorneys' fees. However, an employer may be awarded costs, disbursements and attorneys' fees if a court finds that a retaliation claim was brought "without basis in law or in fact."

Publication Requirement

Whereas the prior law contained no notice obligations, the amended law requires employers to post a conspicuous notice of employee protections and rights under this law in an accessible and "well-lit" area.

Recommended Actions for Employers

Employers should anticipate an increase in internal complaints and potential claims given the expansive changes above. In particular, complaints by, and/or actions taken against, former employees cannot be ignored since they are now also protected.

In addition to publicizing the protections and rights of employees under this law, employers should implement a new or revised whistleblower policy that is consistent with this law. Employers may want to consider including the following in any such policy:

- (i) identifying a specific individual or role to which employees can report activities, policies or practices they reasonably believe constitute a violation of any law, rule or regulation or a threat to public health and safety;
- (ii) providing additional channels for internal reporting, such as an employee or ethics hotline, which is then directly reviewed by a third party (or the company's outside board members or counsel) who does not have the authority to adversely impact an employee's job;
- (iii) implementing a third-party review of all whistleblower complaints and responses, as well as implementing training and protocols for those responsible for investigating whistleblower complaints; and
- (iv) adding additional training for managers on minimizing the risk of retaliation, as well as receiving and escalating whistleblower complaints promptly.

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