

New York Significantly Expands Protections for Whistleblowers

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Source: Saiber Employment Law Alert

On January 26, 2022, the State of New York enacted new legislation which significantly expands whistleblower protections under Section 740 of the New York Labor Law. The amended law will now provide a broader scope of claims to be pursued against employers.

Who is impacted?

The amended law applies to all employers regardless of size and now extends whistleblower protections concerns raised by current and former employees as well as independent contractors.

What is covered?

An individual is protected under the new law if they:

- Disclose or threaten to disclose any activity, policy or practice that the employee “reasonably believes” is either (i) in violation of any law, rule or regulation; or (ii) presents a substantial and specific danger to public health or safety;
- Participate in the investigation of such conduct; or
- Object to or refuse to participate in such conduct.

Key changes to Section 740

An Expansion of Protected Activity

Prior to the amendment of Section 740, New York law only protected healthcare employees reporting conduct that presented a “significant” threat to public health and safety. The new law applies to all employees and to concerns raised regarding the potential violation of any rule, law or regulation, including federal, state and even local ordinances.

The Opportunity to Correct

Prior to the amendment, the law required employees to give their employer a reasonable opportunity to correct an alleged violation. The new law no longer affords an employer with such an opportunity; rather, it requires an employee to make a “good faith” effort to notify their employer prior to disclosing the alleged violation to a public body. However, this notice is not required if:

- a) there is an imminent and serious danger to the public health or safety;
- b) the employee reasonably believes that reporting to the supervisor would result in a

- destruction of evidence or other concealment of the activity, policy or practice;
- c) such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor;
- d) the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
- e) the employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct such activity, policy or practice.

Adverse Action Definition

Under prior law, retaliation was defined as “discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.” Under the amended law, retaliation action has expanded and is defined as:

- adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion;
- actions or threats to take such actions that would adversely impact a former employee’s current or future employment; or
- threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee’s suspected citizenship or immigration status or the suspected citizenship or immigration status of an employee’s family or household member, as defined by applicable law.

Statute of Limitations

The new statute of limitation for filing a retaliation claim has increased from one to two years.

Notice of Rights

Under the amended law, employers shall inform employees of their protections, rights and obligations under the new section, by posting a notice conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.

Employer Takeaways

With the expansion of the whistleblower protection, employers should expect to see an increase in retaliation claims under the new law. It is advisable, although not legally required, that employers establish a whistleblower policy that demonstrates their commitment to compliance, puts employees on notice and establishes a clear procedure for reporting concerns. Employers with whistleblower policies should amend them to conform with the changes of the new law.

Employers should also consider providing training to their employees, especially their supervisory employees to educate them on the conduct protected by the new law, their obligations to properly address concerns raised to their attention, the prohibitions against retaliation and the consequences for failing to comply with the new law. This new law provides all covered individuals with a private cause of action to be reinstated to their position, lost wages,

costs and attorney fees. In certain situations, employers may also be subject to a penalty of up to \$10,000 and punitive damages.

If you have any questions about this new law or require assistance drafting or modifying your policies, please contact DanaLynn Colao of Saiber LLC's employment law practice.