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New York Expands Whistleblower Law

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New York Governor Kathy Hochul recently signed a new law dramatically expanding protections for whistleblowers in New York. New York's whistleblower law (New York Labor Law Section 740) previously limited anti-retaliation protections to employees who raised concerns about "substantial and specific danger to the public health and safety" or "health care fraud". As outlined below, the amended law, which will go into effect on January 26, 2022, expands the scope of who is protected and what is deemed "protected activity" under Section 740. It also contains additional key changes and requirements for employers.

In sum, the amendments to Section 740:

- Broaden the categories of workers protected against retaliation;
- Expand the scope of protected activity entitling employees to anti-retaliation protection;
- Expand the definition of prohibited retaliatory action;
- Require employers to notify their employees of the whistleblower protections;
- Lengthen the statute of limitations for bringing a cause of action against an employer;
- Allow courts to order additional remedies; and
- Entitle plaintiffs to a jury trial.

Key Changes to NYLL Section 740

Below, we outline the key changes to New York's whistleblower law, effective January 26.

Expanding The Definition of "Employee" – The amendments expand the range of individuals protected from retaliation to include current and former employees as well as independent contractors.

Expanding Protected Activity – The amendments prohibit employers from retaliating against any employee because the employee:

a. 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:

b. provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into such activity, policy or practice by such employer; or

c. objects to, or refuses to participate in any such activity, policy or practice.

Prior to the new amendments, the law required that, before disclosing violations to a public body, employees first report violations to their employer to afford employers a reasonable opportunity to correct the alleged violation. The new law merely requires employees make

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a “good faith” effort to notify their employer before disclosing the violation to a public body. Additionally, employer notification is not required for protection under the amended statute if the employee reasonably believes that reporting alleged wrongdoing to their employer will result in the destruction of evidence, other concealment, or harm to the employee, or if the employee reasonably believes that their supervisor is already aware of the practice and will not correct it.

Expanding Prohibited Retaliatory Action – Prior to the amendments, conduct constituting retaliatory action was limited to “discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.” Adverse action now also includes actions that would “adversely impact a former employee’s current or future employment,” including contacting immigration authorities or reporting the immigration status of employees or their family members.

Statute of Limitations – The new law expands the statute of limitations for filing a retaliation claim from one to two years.

Additional Remedies – Aggrieved plaintiffs are entitled to jury trials, and the amendments allow the recovery of front pay, civil penalties not to exceed $10,000, and punitive damages. Prevailing plaintiffs are also entitled injunctive relief, reinstatement, compensation for lost wages, benefits, and other remuneration, and reasonable costs, disbursements, and attorneys’ fees. Notably though, if a court finds that a retaliation claim was brought “without basis in law or in fact,” a court may award reasonable attorneys’ fees and court costs and disbursements to the employer.

Employee Notification – Employers must post notice of the protections, rights, and obligations of employees under the law. Such notice should be posted conspicuously and in “accessible and well-lighted places.” The New York Department of Labor will likely publish a model posting in advance of January 26.

Recommendations for Employers

In addition to complying with the new posting requirement, New York employers should consider steps to prepare for an uptick in internal complaints and potential claims. For example, employers may, as appropriate, consider revisiting their whistleblower and compliance policies, including opening up additional channels for internal reporting of employee concerns. Employers may also consider additional training for managers on receiving and escalating whistleblower complaints, as appropriate.

Gibson Dunn’s lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm’s Labor and Employment practice group, or the following authors:

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