

> Client Alert

New York Employment Update: Expansion of State Whistleblower Law

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Authors and Key Contacts

If you require any additional information regarding whistleblower laws or any other labor and employment issue, please feel free to contact any of the attorneys listed below.

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On October 28, 2021, New York's Whistleblower Law, codified in New York Labor Law § 740, was amended to add coverage for independent contractors and expand the definition of what constitutes "protected activity" and retaliation under the law. The amendment to the statute also lengthens the statute of limitations for filing a whistleblower claim from one to two years. The expanded Whistleblower Law goes into effect on Wednesday, January 26, 2022.

SPECIFIC CHANGES TO NEW YORK WHISTLEBLOWER LAW

New Individuals and Types of Complaints Covered

The categories of service providers who are now protected from retaliation have been expanded from merely current employees to former employees and natural persons working as independent contractors. Moreover, the law changes the definition of protected activity to include any disclosure about what "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." Prior to amendment, New York's Whistleblower Law only covered employees raising concerns about "substantial and specific danger to the public health and safety" or "health care fraud." The recent amendment, however, considerably expands the types of complaints covered by Labor Law § 740, including (but not limited to) those which cover or are based on:

- Executive orders (such as New York State's Executive Orders from former Governor Cuomo and Governor Hochul)
- Judicial or administrative decisions, rulings, or orders
- Retaliation based on discrimination complaints

The type of activity complained about need not be within the scope of the employee's job duties.

Reduced Employee Reporting Requirements

Under New York's expanded Whistleblower Law, it is now sufficient for an employee to make a "good faith" effort to notify their employer before disclosing the alleged violation to a "public body." Furthermore, notification is not required at all if:

- There is an "imminent and serious" danger to public health or safety

- The employee reasonably believes that reporting alleged wrongdoing to a supervisor will result in destruction of evidence or other concealment
- The employee reasonably believes that reporting the alleged wrongdoing to a supervisor would bring harm upon the employee herself or himself
- If the employee reasonably believes that their supervisor is already aware of the practice and will not correct it

The expanded New York Whistleblower Law also adds to the definition of “public body” to now include any “federal, state or local department of an executive branch of government” and “any division, bureau, office, committee, or commission of any of the public bodies.”

Expanded Definition of Prohibited Retaliatory Action

Previously, under Labor Law § 740, the definition of a prohibited retaliatory action was limited to the “discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in the terms and conditions of employment.” As amended, the definition now includes any action that would “adversely impact a former employee’s current or future employment,” including threatening to contact immigration authorities or reporting the immigration status of employees or their family members.

Longer Statute of Limitations

The amended Whistleblower Law now provides employees with a two year statute of limitations, rather than one, to sue an employer for retaliation.

Expanded Remedies and Relief

Employees claiming whistleblower retaliation under Labor Law § 740 are now entitled to a jury trial and, in addition to other relief, recovery of front pay, civil penalties not to exceed \$10,000, and punitive damages if the conduct was found to be “willful,” “malicious,” or “wanton.” Prevailing plaintiffs are also entitled to attorneys’ fees, however employers are equally entitled to their attorneys’ fees if they are able to show that the retaliation claim was brought “without basis in law or fact.” Thus, this is one of few statutory provisions providing for “equal access to justice” for employees and employers regarding recovery of attorneys’ fees. It remains unclear until the law is tested in court what level of proof will be required to establish that an employer’s conduct was willful, wanton or malicious, but precedent in applying other statutes which provide increased rights or penalties for such conduct suggests that the standard of proof will be relatively low.

New Employer Obligations

Employers are now required to post notice of employee protections, rights, and obligations in an “accessible and well-lighted places customarily frequented by employees and applicants for employment.” Employers can expect the New York State Department of Labor (NYSDOL) and other relevant service providers to publish a model poster prior to January 26, 2022 when the amended law goes into effect.

THE TAKEAWAY

Employers should begin updating any existing whistleblower and retaliation policies that they may have, or implementing those policies if not already in place. Any changes in policy or new policies adopted should be communicated to employees and independent contractors. Notices should be conspicuously posted in accessible areas of the physical workplace as soon as possible. Before the effective date of the law, employers should ensure that managers and responsible departments, such as Human Resources, are trained on the

updated law and their respective responsibilities on reporting and handling purported violations of this law and addressing whistleblower complaints by both employees and independent contractors.

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The Morrison Cohen LLP Labor & Employment Team is available to provide legal advice concerning workplace laws concerning whistleblower laws, or such other employment law questions that should arise from time to time and as needed.