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Sweeping Expansions to New York's Whistleblower Protections Take Effect

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New York employers, take heed: sweeping expansions to New York Labor Law (NYLL) Section 740 have fundamentally redefined the protections afforded to whistleblowers within the state. The revised law took effect on January 26, 2022, opening the door to a potential deluge of whistleblower claims against employers.

Notable changes to Section 740 include the following:

- **Broadened coverage:** Coverage under the revised law has been expanded by defining "employees" to include not just individuals who are currently employed by the employer, but also former employees and independent contractors. Relatedly, the amended law removes a former employer defense where an individual was an independent contractor.
- **Drastically expanded protections for employees:** Previously, the law prohibited employers from taking retaliatory action against an employee for disclosing or threatening to disclose an activity, policy or practice of the employer that violated a "law, rule or regulation" which created and presented a "substantial and specific danger to the public health or safety[.]"

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The new revisions clarify that employers shall not retaliate against an employee – whether or not the employee is acting within the scope of his or her duties – if the employee "reasonably believes" the employer's activity, policy or practice violates a law, rule or regulation, or that there is a substantial and specific danger to the public health or safety. In other words, these revisions take away an employer's defense that the activity, policy, or practice at issue actually violated the law.

- **Expanded definition of "law, rule or regulation":** The amendments also expand the definition of "law, rule or regulation" to include executive orders, as well as judicial or administrative decisions, rulings, or orders.
- **Expanded definition of a "retaliatory action":** Section 740 previously defined "retaliatory action" to include discharge, suspension demotion, or another adverse employment action. Now, even the threat of an adverse action constitutes unlawful retaliation.
- **Relaxed requirement to notify employer and exceptions:** The amended law now only requires that employees make a "good faith effort" to notify their employers before reporting an employer's activity, policy, or practice to the attention of a supervisor or public body.

The amendments also add five exceptions to such notification requirements. Specifically, employer notification is not required where:

1. there is an imminent and serious danger to the public health or safety;
2. 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;
3. such activity, policy, or practice could reasonably be expected to lead to endangering the welfare of

a minor;

4. the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
5. 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.

- **Increased statute of limitations:** The statute of limitations under Section 740 has been increased from one to two years.
- **Entitlement to jury trial:** Parties are now entitled to a jury trial. However, the law does not specifically require jury trials, nor does it forbid parties from entering into arbitration agreements.
- **Additional remedies:** Previously, a prevailing plaintiff would be entitled to injunctive relief, reinstatement to the same position or its equivalent, reinstatement of fringe benefits and seniority, lost wages, benefits, and other remuneration, and attorney's fees. The amendments now add front pay in lieu of reinstatement, a civil penalty not to exceed $10,000, and/or payment of punitive damages in the event that the violation was "willful, malicious or wanton."
- **Publication of notice to employees:** Employers are now required to inform employees of their protections, rights, and obligations under Section 740 (and Section 741 which is specific to healthcare employees) by posting a notice in a conspicuous, easily accessible, and well-lighted place that is customarily frequented by employees and applicants. As mentioned above, because "employees" is now defined to also include independent contractors for purposes of the law, employers should ensure that notices are published where both company personnel and independent contractors will see them.

The New York Department of Labor has yet to publish a model notice to satisfy this requirement. While employers await such publication, they may in the meantime post a copy or summary of the amended Section 740.

Takeaway for employers

These recently enacted amendments to New York's whistleblower law are sure to lead to an increased number of complaints from current and former employees, as well as independent contractors. Given the drastically expanded coverage, protections, and penalties now available to whistleblowers, employers are well-advised to review and update their policies to comply with these new requirements, and notably must post the required notice as described above.

For questions regarding New York's whistleblower law, contact your Akerman attorney.
