

New Whistleblower Rights Heighten Risk For NY Employers

By **Sara Begley, Ashley Hart and Jeremy Sternberg** (January 18, 2022)

If employers did not already have enough to keep up with in this ever-changing COVID-19 landscape, on Oct. 28, 2021, New York Gov. Kathy Hochul signed a bill amending New York Labor Law 740, drastically expanding whistleblower protections in the state.

The law, which will go into effect on Jan. 26, makes it significantly easier for an employee to bring a retaliation claim under Labor Law 740, making New York's once employer-friendly whistleblower laws a thing of the past.

Among other things, the amended law expands the scope of protected activity, the definition of prohibited retaliatory action, the categories of workers protected against retaliation, and the statute of limitations.

The immediate commentary following the announcement of Labor Law 740's amendment focused primarily on the general implications, but in the context of an ongoing global pandemic, there are additional considerations for employers, as well as proactive steps that must be taken.

Employers should be prepared for the real possibility that the significant changes to Labor Law 740, combined with aggressive new COVID-19 mandates, will spur whistleblower claims in New York.

In anticipation of the Jan. 26 effective date, employers are urged to review the key changes to Labor Law 740 and consider the recommended actions set out below.

Increased Exposure: An Overview of the Key Changes to Section 740

Under the amended law, the definition of "employee" is expanded to cover not only current employees, but also former employees and independent contractors.

Additionally, retaliatory action will no longer be 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,"[1] but will include any actual or threatened action that would "adversely impact a former employee's current or future employment." [2]

Notably, this includes actions taken by an employer to report or threaten to report the employee or the employee's family or household members to immigration authorities.

Another key change includes a lengthened statute of limitations.

The previous one-year limit for whistleblower claims will increase to two years. The amended law also provides additional forms of relief for whistleblowers.

The previous version of Labor Law 740 provided that a plaintiff-employee could seek injunctive relief; reinstatement to the same or equivalent position as held prior to the retaliatory action; reinstatement of full fringe benefits and seniority rights; compensation



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for lost payments and benefits; and payment by the employer of reasonable costs and attorney fees.

The amended law retains these forms of relief and additionally entitles plaintiffs to jury trials, recovery of front pay, and civil and punitive damages.

Furthermore, under the amendment, employers will now be required to inform employees of their rights under Labor Law 740 by posting a notice of the whistleblower protections, rights and obligations. Employers are required to post the requisite notice "conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment." [3]

What is possibly the most dramatic and effectual change under the amended law is the expanded scope of protected activity. Previously, Section 740 only prohibited employers from taking retaliatory action against an employee who had objected to or refused to participate in, or had disclosed or threatened to disclose to a supervisor or a public body, an unlawful activity, policy or practice that "creates and presents substantial and specific danger to the public health or safety, or which constitutes health care fraud." [4]

This required that an actual legal violation had occurred.

The new law disposes of the requirement that an actual violation of law, rule or regulation has taken place. Instead, the amended law bars the employer from retaliating against the employee where the employee objected to or refused to participate in, or disclosed or threatened to disclose to a supervisor or a public body "an activity 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." [5]

The employer is no longer protected by innocence or a good faith effort to abide by laws, rules and regulations, and absence of an actual violation is now irrelevant.

The definition of "law, rule or regulation" was similarly expanded to include local, state and federal executive orders, administrative decisions, and judicial rulings or orders. And employees are now protected from such retaliatory actions "whether or not they were acting within the scope of their job duties." [6]

Finally, under the amended law, employees are no longer required to first report violations to the employer before reporting the violation to a public body. Instead, an employee is simply required to make a good faith effort to notify the employer. Employees, however, are not required to make a good faith effort to first notify the employer where:

- (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 it.] [7]

Employers should anticipate that, in practice, this will likely remove the employee notice requirement in most situations.

General Steps for Employers to Avoid Exposure

Review and update any existing whistleblower and retaliation policies.

Ensure that the policies are clear, easy to follow, and include channels for internal reporting and promptly addressing employee concerns.

Prepare and train management and the human resources department.

Employers should conduct immediate training on the updates and changes to the law, how to appropriately and quickly respond to and escalate complaints regarding alleged violations and changes to any internal policies.

Post the requisite notice.

Ensure that a notice of employee whistleblower protections, rights and obligations is posted by Jan. 26. The notice should be posted "conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment." [8]

In addition to the required notice, employers should post the workplace-specific whistleblower policies and procedures in the same area.

Create a centralized complaint procedure.

Employers must have a centralized complaint procedure through which employees can submit complaints. The procedure must be communicated broadly and clearly to all employees.

Respond to complaints.

There must be a process through which designated employees or a responsible unit is prepared to respond to all complaints immediately and consistently.

Document everything.

Now more than ever, employers must ensure that every whistleblower complaint, response, remedy and investigation is thorough and well documented.

In addition, employers should document evidence of all efforts to comply with Labor Law 740 as well as all other local, state and federal executive orders, administrative decisions, and judicial rulings or orders — including the COVID-19-related recommendations below.

COVID-19-Related Complexities and Recommendations for Employers

The ever-changing COVID-19-related mandates and policies create additional complexities and increased exposure for employers in New York. In 2021, federal COVID-19-related whistleblower and retaliation complaints increased significantly as compared to the previous year, with 6,148 complaints filed through Dec. 26, 2021 — compared to just 4,344 filed through the end of 2020. [9]

The rise in COVID-19-related complaints will likely continue in 2022 due to aggressive new COVID-19-related mandates that create additional avenues for employees to bring whistleblower complaints against the employer, while simultaneously creating additional hurdles and liability for employers.

For example, the recently announced New York City vaccine mandate for private employers creates a host of new obligations for employers in addition to those under Labor Law 740.

The expansive mandate went into effect on Dec. 27, 2021, and covers (1) any private employer that employs more than one employee or has a workplace in New York City, and (2) any self-employed individual that works within a workplace in New York City or interacts with other workers while conducting his or her business.

This one mandate alone requires employers to:

- Institute a policy requiring employees who work on-site to be vaccinated against COVID-19, with no testing options available in lieu of the vaccine;
- Create a separate confidential medical file that complies with the Americans with Disabilities Act to retain detailed records with employees' proof of vaccination;
- Comply with the mandate's notice posting requirement by filling out and posting in a conspicuous place, the one-page attestation sign created by New York City's Department of Health and Mental Hygiene; and
- Follow a specific checklist when evaluating employee requests for exemptions, which includes examples of when an accommodation may be granted and when accommodation is not appropriate. Employers are also required to keep detailed records of any reasonable accommodations made.[10]

The New York City private employer vaccine mandate is just one example of the extensive and detailed mandates employers must comply with.

Such aggressive and expansive COVID-19-related mandates — on state, local and federal levels — combined with the broadly expanded scope of protected activity under Labor Law 740, magnify the need for employers to take proactive COVID-19-related actions, in anticipation of the law's Jan. 26 effective date.

Further Recommendations

Delegate the obligation of conducting regular checks on COVID-19-related orders and compliance to appropriate management personnel or a responsible unit.

The responsibility of overseeing and checking for any COVID-19-related updates or changes to local, state and federal laws should be delegated to appropriate personnel. Updates or changes to rules, regulations, executive orders, administrative decisions, and judicial rulings or orders should also be tracked.

Establish a procedure for immediately implementing or updating existing policies to reflect any changes, and to update any notices posted. The New York City private employer vaccine mandate is one example of how vital this is.

Create a policy regarding COVID-19 precautions and proper reporting of and response to COVID-19-related complaints.

Employers should have a clearly stated policy regarding COVID-19 precautions and safety measures that must be taken in the workplace. In addition, employers should consider whether COVID-19-related complaints will be submitted through a separate centralized complaint procedure or through the same procedure as other whistleblower complaints.

Where employer resources permit, a separate complaint procedure is ideal.

Train employees and management on COVID-19-related rules and safety measures.

Employees and management should be trained on how to follow the employer's COVID-19-related policies and safety measures. Employers should also promptly update all employees on any changes or updates to the COVID-19 policies and require additional training where appropriate.

Employers can reduce exposure and prepare for whistleblower complaints by understanding the changes to Labor Law 740 and taking the recommended steps.

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[1] N.Y. Lab. Law § 740(1)(f).

[2] S.B. 4394, 244th Leg. Sess. § 3 (N.Y. 2021).

[3] Id.

[4] N.Y. Lab. Law § 740(2).

[5] S.B. 4394, 244th Leg. Sess. § 3 (N.Y. 2021).

[6] Id.

[7] Id.

[8] Id.

[9] U.S. Dept. of Labor, COVID-19 Response Summary - Whistleblower, (last updated Jan. 9, 2022) COVID-19 Response Summary - Whistleblower | Whistleblower Protection Program (whistleblowers.gov).

[10] NYC Health, Vaccination Requirement: Workplaces, (last visited Jan. 13, 2022) COVID-19: Vaccination Workplace Requirement - NYC Health.