

New York Labor Law Section 740: Amendments Expand Whistleblower Protections

Changes to New York Labor Law Section 740

On October 28, 2021, Governor Hochul signed Senate Bill S4394A, which significantly amended Section 740 of the New York Labor Law. The legislation expanded whistleblower protections under Section 740 for employees, former employees, and independent contractors. These groups now have greater protection against retaliation from employers if they disclose or threaten to disclose to a supervisor or 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." An employee is also protected from retaliation if they provide information to or testify before a public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by the employer, or if they object or refuse to participate in any such activity, policy or practice. The amended law recently went into effect on January 26, 2022. Employers should be aware that the amended law requires employers to post a [notice](#) regarding employees' protections, rights and obligations under Section 740; employers should post this notice immediately.

Previously, the statute only applied when an employee disclosed or threatened to disclose to their supervisor or a public body an *actual* violation of a law, rule or regulation that presented a "substantial and specific" danger to public health or safety, or healthcare fraud. Now, an employee need only have a "reasonable belief" that an employer's activity, policy or practice is in violation of law. Moreover, the requirement that the violation in question presents a "substantial and specific" danger has been removed. The law now also covers employees whether or not they are acting within the scope of their job duties.

Employers should note that the legislation increased the one-year statute of limitations applicable to whistleblower claims to two years; instated a right to a jury trial for such claims; and expanded the available monetary relief beyond lost wages and benefits and attorneys' fees and costs to include front pay, a civil penalty of up to \$10,000, and punitive damages (in the case of willful violations). As with the prior law, an employee pursuing such a claim may also seek equitable relief, including an injunction or reinstatement.

The legislature further expanded the scope of the law by amending several definitions:

- The definition of "employee" now includes former employees and independent contractors, increasing the number of individuals who can sue under the law.
- The definition of "law, rule or regulation" now includes federal, state, or local statutes, ordinances, executive orders, and judicial or administrative decisions, rulings, or orders.
- The definition of "public body" now includes any federal, state or local department of an executive branch of government; and any division, board, bureau, office, committee, or commission of any of the defined public bodies.
- The definition of "retaliatory action," has been changed from "the discharge, suspension, or demotion of an employee, or other adverse employment action," to also include, for example, threatening to take an adverse employment action against the individual or threatening to contact immigration authorities.

The change to the definition of "employee" is particularly significant because the prior version of the law allowed for a complete defense if the individual alleging a statutory violation was an independent contractor.

The employer notification requirements have also been enhanced. Employees are now required to make a “good faith effort” to notify their employer of any violations so that the employer can correct the alleged violation. No such “good faith” caveat existed under the previous version of the law. Additionally, there are now five exceptions to the notification requirement. Employees do not have to notify their employer of the alleged violation before disclosure when:

- 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.

Lastly, as mentioned at the outset of this alert, the statute now requires employers to post a notice alerting employees of their protections, rights and obligations, which must be posted “conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.” A link to the requisite notice can be found above.

Steps Employers Can Take

Employers should be aware that this is the third and most substantial change to the law since it was enacted in 1984. The 2002 amendment added “health care fraud” as a reporting activity, and the 2019 amendment removed language providing that the institution of an action under the statute was deemed a waiver of other rights and remedies associated with the retaliatory activity.

Employers should be mindful that the expanded scope of individuals and activities covered under Section 740, as well as the changes to the definition of “retaliation” is likely to result in an increased number of claims against employers under this Section.

Employers must comply with the law by posting the required notice. Additionally, employers are encouraged to alert and train supervisors about the changes to the law. Employers should confirm that all internal policies and procedures are currently in accordance with the amended statute.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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