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Labor & Employment Alert

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New York expands protections for whistleblowers

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We highlight what employers need to know — and post — in connection with recent amendments to New York’s whistleblower protection statute set to take effect in January 2022.



What’s the Impact?

- / The amped-up whistleblower law expands employee coverage, protects additional reporting avenues, broadens the definition of actionable retaliation, and strengthens penalties against employers
- / Employees now only need to “reasonably believe” that an employer’s actions constitute a violation of the law or a danger to public health and safety to be protected under the statute
- / Notice informing employees of their rights under the statute must be posted in the workplace

On October 28, 2021, Governor Kathy Hochul signed into law new legislation expanding protection for whistleblowers in the workplace, as well as imposing additional obligations on employers. The legislation amends New York’s whistleblower protection statute (New York Labor Law § 740), which only applies to the private sector, to expand the categories of individuals covered by the law, protect disclosures made to additional types of public entities, and protect an

employee's "reasonable belief" that the employer has violated the law. Employers are subject to enhanced penalties for unlawful retaliation and must notify their workforces of these statutory protections.

Effective January 26, 2022, the legislation expands whistleblower protections by:

- / Covering "former employees" and "natural persons employed as independent contractors" as well as active employees
- / Including "executive orders" and "judicial or administrative decisions, rulings, or orders" as sources of law that the employee believes have been violated
- / Protecting employees who make a whistleblower report to "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 public bodies" in addition to any elected governmental body, a court, a governmental agency, or law enforcement
- / Expanding the definition of prohibited retaliation to include "actions or threats to take such actions that would adversely impact a former employee's current or further employment" and "threatening to contact or contacting United States immigration authorities or otherwise reporting or threatening to report an employee's suspected citizenship or immigration status"

Reasonable belief protected

A core provision of the new law is the expanded scope of protected conduct by the employee. Previously, an employee was protected under New York's whistleblower law only if they could show they were reporting an *actual* violation of law that "creates and presents a substantial and specific danger to the public health or safety," or which constitutes healthcare fraud. The amendments now protect any employee who reports conduct the employee "reasonably believes" violates the law or that the employee "reasonably believes" poses a "substantial and specific" danger to public health or safety. This is a significant expansion of legal protection, long sought by worker advocates. The previous language regarding "healthcare fraud" has been removed.

Employer notification not always required

Another notable amendment to the statute expands an employee's ability to notify only a public body of an employer's conduct and not the employer itself. Under the previous statutory framework, employees were required to notify the employer first of any alleged violation of law to give the employer a "reasonable opportunity" to correct the violation before blowing the whistle to a public body. The new amendments protect employees who have "made a good faith effort" to notify the employer. In certain circumstances, the employee is completely relieved of the obligation to inform the employer: an employee need not notify the employer at all if the employee "reasonably believes" notification will result in the destruction of evidence, endangerment of a minor, imminent danger, physical harm, or where the employee reasonably believes that the employer is already aware of the activity and will not correct such conduct.

Enhanced penalties

The amendments increase the statute of limitations from one year to two years for employees to sue for unlawful retaliation and provide a right to a jury trial for any employee claiming retaliation because of protected whistleblowing. Remedies have been expanded to include awards of front pay, punitive damages, and a \$10,000 civil penalty.

Employer posting obligations

Lastly, the amendments now impose an obligation on employers to inform employees of their protections, rights, and obligations under the whistleblower protection statute. Employers must conspicuously post such a notice in an easily accessible and well-lit place in the workplace.

The amendments to the whistleblower protection statute significantly expand the protections for those who blow the whistle in the workplace. Employers should update their workplace policies and practices and make sure they have a posting ready to go by January 2022.

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