New York Legislature Vastly Expands Whistleblower Rights Under New Amendments to Statute

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including neighboring New Jersey, to broaden the scope of New York's whistleblower statute that protects employees who report certain violations of law from employer retaliation. New York did so by amending New York Labor Law § 740 ("NYLL § 740"). The new law will become effective as of January 26, 2022 and has notification requirements for employers that should be strictly complied with.

The Current Whistleblower Law

NYLL § 740 has operated for many decades to provide only limited coverage for employees who reported a violation of the law that either "creates and presents a substantial and specific danger to the public health or safety, or...constitutes health care fraud." NYLL § 740(2). A 2002 parallel whistleblower statute was enacted that served to provide health care employees with additional protections. NYLL § 741.

These statutes provided somewhat limited relief and also gave employers defenses to claims of retaliation that could defeat those claims. For instance, protection under these statutes was limited for those who did not work in health care to situations where there was demonstrated harm to the public-at-large. An employee making a claim under the statute had to prove an actual violation of a safety statute or regulation creating a substantial and specific danger to the public health or safety, and that the harm that resulted from the violation affected the public-at-large. Also, significantly, the statute of limitations for a claim under § 740 was short—just one year. Furthermore, an employee who could prove retaliation under the statute was limited to the recovery of back pay and was not entitled to compensatory or punitive damages, and not entitled to a jury trial.

The New Frontier in New York

The new law is on par with the law of New Jersey in providing a broad array of protections for employees and even independent contractors, and significantly increases the risk of liability for employers who run afoul of its provisions.

First, the new law adds "former employees" and "independent contractors" to those who may bring whistleblower claims. Second, the new law eliminates the need to show an actual violation of law.

Rather, claimants can bring a claim where they can show that they "reasonably believe" that: (i) the employer is in violation of a "law, rule or regulation," including executive orders and judicial or administrative decisions, rulings, and orders; or (ii) the employer is undertaking activity that "poses a substantial and specific danger to the public health or safety." In short, the amended law now allows a new path to recovery (over and above the pre-existing "substantial and specific danger to the public health or safety prong) based upon an objectively reasonable belief that the employer has violated the law.

While the existing NYLL § 740, prior to amendment, required that employees first report any violations to the employer before disclosing violations to a public body (which gave the employer the ability to correct any violations), the amended law only requires a "good faith effort" to notify the employer. However, the exceptions provided in the law water-down the "good faith effort" to potentially allow a significantly potential that disclosures to the public body will be made before the employer has the opportunity to take corrective action. Like recently adopted laws in some other states, this new law provides an exception where: (i) there is imminent and serious danger to public health; (ii) the employee reasonably believes reporting of the violation to the employer would result in the destruction of evidence, concealment, or harm to the employee; or (iii) the employee reasonably believes that their supervisor is already aware of the violation and will not correct it.

Lastly, the new law greatly expands the remedies available to claimants who allege retaliation to include front pay (lost wages calculated in the future from the date of a final judgment), civil penalties not to exceed $10,000, and punitive damages (in addition to back pay). The statute of limitations is extended from one year to two years, and whistleblowers now have a right to a jury trial. Employers must notify employees of their rights under the whistleblower law by posting a notice in a conspicuous place.

Whistleblower suits proliferated in recent years. The potential for an even greater number of these claims has just broadened significantly by virtue of the amendment of the law. P&A's Labor and Employment Group stands ready to assist with these issues.

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