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Labor + Employment

# New York Whistleblower Statute Amended to Significantly Expand Worker Protections

## The Bottom Line

- Recent amendments to the New York Labor Law provide employees and independent contractors with significantly expanded whistleblower protections, and may lead to an increase in whistleblower retaliation claims.
- Employers must notify employees of their rights under the law by posting a notice that will be issued by the New York Department of Labor.
- Companies should also train managers on how to recognize and effectively respond to complaints alleging a violation of law or threat to public health and safety.

New York Governor Kathy Hochul signed Senate Bill S4394A on October 28, 2021, significantly expanding protections under New York's whistleblower statute, New York Labor Law Section 740.

Section 740 previously prohibited New York employers from retaliating against employees who disclosed or threatened to disclose to a supervisor or a public body any activity, policy or practice of the employer that constituted an *actual* violation of law, rule or regulation and either:

1. Presented a substantial and specific danger to public health or safety; or
2. Constituted health care fraud.

The amendments – which go into effect on **January 26, 2022** – not only extend protections to individuals who are not employees of the employer (such as independent contractors) but also make it easier for workers to bring claims under Section 740 and obtain monetary damages and other remedies.

Key requirements and features of Section 740 are noted below.

## Broader Definition of "Employee"

Amended Section 740 now protects not only current employees, but also former employees and independent contractors who are "natural persons" and do not have their own employees.

## A More Lenient Standard for Protected Activity

Unlike the prior version of the statute (which required that the employee point to an *actual* violation of law), amended Section 740 provides that an employee's mere "reasonable belief" that a violation of law or a threat to public health or safety exists is sufficient to establish protected activity.

Specifically, employers are now prohibited from taking retaliatory action against an employee who engages in any of the following conduct:

- Discloses, or threatens to disclose, to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes violates a law, rule or regulation, or that the employee reasonably believes poses a substantial and specific danger to public health or safety ("Potentially Unlawful Action");
- Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any Potentially Unlawful Action by the employer; or
- Objects to, or refuses to participate in, Potentially Unlawful Action.

This expanded definition of protected activity applies regardless of whether an employee's protected activity falls within the scope of their job duties.

An employee who discloses a Potentially Unlawful Action to a public body will be protected from retaliation as long as they have made a "good faith effort" to notify the employer of the Potentially Unlawful Action by bringing it to the attention of a supervisor and giving the employer a "reasonable opportunity" to take corrective action.

However, notification to the employer is *not* required to invoke the statute's anti-retaliation protections if:

- There is an imminent and serious danger to public health or safety;
- The employee reasonably believes that reporting the Potentially Unlawful Action to a supervisor would result in a destruction of evidence or other concealment;
- The Potentially Unlawful Action could reasonably be expected to result in endangerment of a minor;
- The employee reasonably believes that reporting the Potentially Unlawful Action to a supervisor would result in physical harm to the employee or another person; or
- The employee reasonably believes that the supervisor is already aware of the Potentially Unlawful Action and will not correct it.

## Expanded Definition of Retaliatory Action

The types of actions that constitute prohibited retaliation now go beyond just those negatively impacting an employee's terms and conditions of employment (*e.g.*, discharge, suspension, demotion); they also include any action taken to threaten, penalize or discriminate against an employee for exercising their rights under the statute, such as:

- Actions or threats to take actions that would adversely impact a former employee's current or future employment; or
- Threatening to report the suspected citizenship or immigration status of an employee or their family or household member.

## Extended Statute of Limitations

The statute of limitations for bringing a retaliation claim is now two years, as opposed to one year.

## Employee and Employer Remedies

Employees asserting a retaliation claim are now entitled to a jury trial. In addition, a successful plaintiff can potentially obtain injunctive relief, reinstatement to their former position, including any fringe benefits and/or seniority rights, front pay, compensation for lost wages, benefits and other remuneration, and attorneys' fees and costs. Punitive damages are also available if the violation is willful or malicious.

A civil penalty of up to $10,000 may also be assessed against the employer. However, if it is determined that an employee has filed a Section 740 claim that is "without basis in law or fact," the court may, in its discretion, award attorneys' fees and costs to the accused employer.

## Posting Requirement

Employers must notify employees of their rights by posting a notice in an easily accessible and well-lit location frequented by both employees and applicants. At this time, no sample notice has been published by the New York Department of Labor; however, it is anticipated that the notice and additional guidance will be published before the amendments go into effect on January 26, 2022.

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## For More Information

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

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