

## *Legal Developments Affecting the Workplace*

### New York Expands Whistleblower Protections

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FEBRUARY 14, 2022

**February 14, 2022 Update.** The New York State Department of Labor (“NYS DOL”) issued the form Notice of Employee Rights, Protections, and Obligations required under the [amendment](#) to Section 740 of the New York Labor Law (the “Amendment”), which took effect on January 26, 2022. The form is available [here](#).

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On October 28, 2021, New York Governor Kathy Hochul signed the Amendment to Section 740 of the New York Labor Law, which “enhances protection for private sector employees.” The Amendment, among other things, expands (1) the scope of protected individuals, (2) protected activities, (3) the types of employment-related actions that constitute retaliation, (4) the time frame within which to bring a timely action, and (5) the available remedies. The Amendment also includes a publication provision that requires employers to post notices setting forth employees’ “protections, rights and obligations” under the Section.

**Expands Scope of Protections.** The Amendment expands the scope of protected activity in three significant ways.

- **Definition of Prohibitions.** Prior to the Amendment, an employee was required to provide proof of an actual violation of a law, rule, or regulation to receive whistleblower protection. Under the Amendment, however, an employee need only prove that they “reasonably believe” that the employer’s activity, policy, or practice is in violation of a law, rule, or regulation or poses a substantial and specific danger to public health or safety.
- **Definition of Retaliatory Action.** Pre-Amendment, employers could not “discharge, suspend[d] or demote[e]” or take “other adverse employment action . . . against an employee in the terms and conditions of employment.” The Amendment now covers threats to take adverse actions, including against former employees. In particular, the Amendment prevents an employer from:
  - Adverse employment actions or threats to take such adverse employment actions against an employee in the terms and conditions of employment, including but not limited to

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discharge, suspension, or demotion;

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

- **Definition of Law, Rule, or Regulation.** The Amendment expands the definition of "[l]aw, rule or regulation" to include executive orders, any rule or regulation derived from any such executive order, and any judicial or administrative decision, ruling, or order.

**Expands Definition of Employee.** The Amendment also expands the definition of "Employee" to include current and former employees and independent contractors.

**Lengthens Statute of Limitations.** The Amendment increases the statute of limitations for filing a retaliation claim from one year to two years.

**Narrows Requirement of Notice to Employer.** Previously, the Section required an employee to bring the activity, policy, or practice to the attention of a supervisor at the employer and provide the employer with a reasonable opportunity to cure the allegedly improper activity, policy, or practice. The Amendment requires only that the employee make "a good faith effort to notify his or her employer." Additionally, the Amendment sets forth five scenarios where employer notification is not required, where:

- there is an imminent and serious danger to public health or safety;
- 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;
- such activity, policy, or practice could reasonably be expected to lead to endangering the welfare of a minor;
- the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
- 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.

**Additional Forms of Relief.** As amended, the Section entitles employees to a jury trial and expands the relief available to employees. Pre-amendment, an employee could seek (1) injunctive relief, (2) reinstatement to the same or an equivalent position, (3) reinstatement of the full fringe benefits and seniority rights, (4) compensation for lost wages and benefits, and (5) reasonable costs and attorneys' fees associated with bringing the action. The Amendment now allows employees to also seek (1) front pay in lieu of reinstatement, (2) a civil penalty of up to \$10,000, and (3) punitive damages where the employee can prove that the violation was willful, malicious, or wanton.

**Adds Employer Notice Requirement.** The Amendment requires employers to "inform employees of their protections, rights and obligations under this section, by posting a notice thereof," which "shall be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment."

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