

EMPLOYER ALERT: Amendments to the New York State Whistleblower Statute Dramatically Expands Potential Employer Liability

New York Governor Kathy Hochul recently signed into law an amendment to the New York State whistleblower statute (NY Labor Law § 740) which dramatically expands the law and broadens employee protections thereunder. These amendments, summarized below, are set to take effect on **January 26, 2022**.

The new whistleblower law prohibits employers from:

Taking a retaliatory action against an employee, former employee or independent contractor because that worker reasonably believes an activity, policy or practice of an employer is either a violation of a law, rule or regulation or poses a substantial and specific danger to public health or safety and:

1. Disclosed or threatened to disclose to a supervisor or public body that activity, policy or practice of an employer; or
2. provides information or testifies to a public body regarding that activity, policy or practice of the employer; or
3. objects to or refuses to participate in that activity, policy or practice of the employer.

The amendment further expands the definition of “law, rule or regulation” to cover not only any federal, state, local statute, ordinance, executive order and any rule or regulation related to those laws, but also, now covers violations of any judicial or administration decision, ruling or order as well. It is important for employers to also note that the law, rule or regulation that the employee reasonably believes was violated is no longer required to have any relation to public health, safety or health care fraud. This too is a significant expansion of the statute.

The most dramatic change in the new law is the expanded protection for an employee’s “reasonable belief.” In other words, it is no longer required that an employee complain about an actual violation of the law, only that the employee reasonably believes their complaint is about a violation of the law.

The new whistleblower law also broadens the definition of retaliatory action. Whereas the statute formerly only prohibited retaliatory personnel actions, meaning adverse employment actions such as termination, demotion or suspension, the amended statute now prohibits the following retaliatory action:

1. Adverse employment actions such as: terminating, suspending, or demoting an employee.
2. Threatening to terminate, suspend or demote an employee.
3. Actions or threats that would adversely impact a former employee’s current or future employment.
4. Threatening to contact or contacting the United States immigration authorities or otherwise threatening or reporting a worker or the worker’s family or household member’s suspected citizenship or immigration status.

The amendment to the statute also sets forth what is required if employees are making a complaint to a public body. Specifically, employees who complain to a public body are only protected by the statute if they make a good faith effort to notify their employer if they believe there has been a violation of law or there is a danger to public health or safety. However, there are exceptions to this condition precedent. Notably, employees who complain to a public body do not have to notify their employer if:

1. There is an imminent and serious danger to public health or safety.
2. The employee reasonably believes the employer will destroy evidence.
3. The activity, policy or practice endangers the welfare of a minor.
4. The employee reasonably believes that reporting the violation would cause them or another person physical harm.
5. The employee reasonably believes that their supervisor or employer is already aware of this unlawful practice and will not correct it.

Cost to Employer of Violating Whistleblower Law:

If an employee prevails in a lawsuit under the amended New York State Whistleblower Law, a court can order that an employer: be enjoined from continuing the unlawful practice; reinstate the employee or provide front pay to the employee; reinstate all benefits and seniority rights of the employee; pay lost wages, benefits and other remuneration the employee received during their employment; pay costs, disbursements and attorney's fees; pay an additional penalty of up to \$10,000; and/or pay punitive damages.

An employee may bring claims for violations of this law up to two years after the alleged retaliatory action occurred.

WHAT MUST NEW YORK EMPLOYERS DO?

In response to this new law, New York employers should:

1. Inform all employees of the new law and post notices regarding the law in conspicuous and well lighted locations.
2. Review, implement and/or update their whistleblower policies.
3. Consider training employees, especially management, on how to respond to a report of a possible violation of law, rule or regulation.

KD IS HERE TO HELP

The experienced Labor and Employment attorneys at Kaufman, Dolowich & Voluck are available to assist with any questions you may have regarding the New York Whistleblower Statute. If you need assistance updating your company's whistleblower policies or need to conduct a whistleblower training, please contact Keith Gutstein at kgutstein@kaufmandolowich.com or Saranicole Duaban at sduaban@kaufmandolowich.com.