New York Employers Must Prepare for Strengthened Whistleblower Protections

Insights
12.21.21

New York employees will soon have greater rights to assert claims of wrongdoing by their employers without retaliatory action. State lawmakers recently amended New York's whistleblower law protections for private sector employees. The amended law expands key definitions and significantly expands employee protections and limits employers' defenses. Most importantly, after decades of effort, members of the state legislature and advocates for the amendments lowered the standard for an employee to bring a claim of retaliation. Here is what employers need to know about the expanded protections that take effect January 26, 2022.

Pre-Existing Whistleblower Protections

Before the recent amendments, New York provided narrow whistleblower rights to employees. New York Labor Law Section 740, the state's whistleblower statute, only prohibited retaliation against employees who reported unlawful practices of their employer that create a "substantial and specific danger to the public health and safety." In order to receive whistleblower protections, the law required the employee to prove an actual violation of law by their employer. Employees who reported suspected violations of law that ultimately were unfounded were not protected from retaliatory action.

Lower Standard to State A Claim

As noted above, an employee previously needed to allege the following to bring a claim for retaliation under the state's whistleblower law: (1) an employer violated an actual violation of a law, rule or regulation (2) that presented a substantial and specific danger to the public health or safety.

Once the amended statute takes effect, this high standard no longer applies. Rather, employees (including former employees and independent contractors, as discussed below) will be protected from retaliatory action from their employer when they:

1. Disclose or threaten to disclose to a supervisor or public body an activity, policy, or practice of employer that employee reasonably believes:
    - is in violation of law, rule or regulation OR
    - poses a substantial and specific danger to the public health or safety;

2. Provide information to or testify before any public body conducting an investigation, hearing, or inquiry into any such activity, policy, or practice by such employer; OR
3. Object to or refuse to participate in any such activity policy or practice.

With the addition of the "reasonable belief" standard and severing of the connection between an actual violation and the danger such violation must have presented to public health or safety, the legislature has greatly expanded whistleblower protections for employees. Indeed, reporting on economic and financial activities that courts previously ruled were not encompassed by Section 740 because they did not create a substantial and specific danger to public health and safety now fall under its provisions.

Expanded Key Definitions

The amended law expands the definition of "employee" to include former employees and persons engaged as independent contractors. Also added under the "law, rule, or regulation" definition are executive orders and any judicial or administrative decisions, rulings, or orders.

Finally, the amendments expand the definition of prohibited retaliatory action to include discrimination and action, or threats of action, by an employer or the employer's agent, as well as threatening to contact or contacting U.S. immigration authorities or reporting (or threatening to report) a person or their family member's citizenship or immigration status.

Limits Employer Protections and Defenses and Increases Damages

The amendments also expand the statute of limitations to bring a claim under the statute. Employees will now have two years, instead of one year, to file a claim after an alleged retaliatory action. Further, with the inclusion of independent contractors in the definition of "employee," an individual's independent contractor status is no longer a viable defense to liability.

While employees are still required to notify an employer of the alleged violative activity before contacting a public body to provide the employer with an opportunity to correct the practice, that effort need only be made in "good faith." Indeed, several exceptions delineated in the amended statute actually render the notice requirement superfluous. Employees need not abide by this employer notification prerequisite where:

- There is an imminent or serious danger to public health or safety;
- The employee reasonably believes reporting to the supervisor would result in a destruction of evidence or other concealment of the activity;
- The activity could reasonably be expected to lead to endangering the welfare of a minor;
- The employee reasonably believes reporting to the supervisor would result in physical harm to employee or any other person; or

- The employee reasonably believes the supervisor is already aware of the activity and will not take corrective steps.

The amendments add a civil penalty of up to $10,000 for violation of the statute. Employers found to have violated the statute may also be liable for compensatory damages, including front pay, and uncapped punitive damages.

Employers Must Provide Employees with Notice of Their Rights

Employers must post notice of employee's protections, rights, and obligations under the statute in a conspicuous, easily accessible and well-lighted place customarily frequented by employees and applicants for employment. **[Ed. Note. The Department of Labor created a notice form that can be found here on its website.]**

What This Means For New York Employers

These amendments are expected to significantly increase whistleblower claims. Although the notice posting is the only affirmative obligation you must meet, you need to take a hard look at your policies and practices to protect your company from retaliation claims.

Fundamentally, you should strive to promote a culture of compliance, where employees are encouraged to raise concerns without fear of retribution for doing so. You should revisit your anti-retaliation policies to ensure you have strong language that the company will not retaliate against an employee for pointing out alleged wrongdoing. You should also consider training your managers, so they know how to respond to employee complaints.

Finally, you will need to tread carefully when taking any disciplinary action against an employee who has made a complaint. While employees who have made complaints are not insulated from disciplinary action for legitimate non-retaliatory reasons, you will need to be cautious before taking any action against such an employee. You will want to ensure that there are well-documented, objective, non-retaliatory reasons for any adverse employment action and consult with employment counsel when necessary.

We will monitor developments related to this law, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox. If you have questions about the whistleblower law and whether your policies comply with this law, contact your Fisher Phillips attorney or any attorney in our New York City office.

Related People

Melissa Camire
Partner
212.899.9965
Email

Amanda M. Blair
Associate
212.899.9989
Email

Service Focus

Litigation and Trials

Employment Discrimination and Harassment

Related Offices

New York