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NYS Whistleblower Law Expands Protections

NYS Labor Law Section 740 (the “NY Labor Law Whistleblower Statute”) was recently amended to vastly expand the whistleblower protections it provides to employees, former employees and independent contractors who report violations. Below is a summary of the amended NY Labor Law Whistleblower Statute, which will take effect on January 26, 2022.

Who is a covered employer?	Any person, firm, partnership, institution, corporation, or association that employs one or more employees.
Who is a covered employee?	Any individual who performs services for and under the control and direction of an employer for wages or other remuneration, including <u>former employees</u> , or natural persons employed as <u>independent contractors</u> to carry out work in furtherance of an employer's business enterprise who are not themselves employers.
What is protected disclosure by an employee?	<p>An employer shall not take any retaliatory action against an employee who does any of the following:</p> <ul style="list-style-type: none"> • 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 is in violation of a “law, rule or regulation” or that the employee reasonably believes poses a substantial and specific danger to the public health or safety; • provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by such employer; or • objects to, or refuses to participate in any such activity, policy or practice. <p>A “law, rule or regulation” includes any federal, state or local law or executive order, and any judicial or administrative decision.</p>
What is prohibited “retaliatory action” by an employer?	Any adverse action taken by an employer to discharge, threaten, penalize, or in any other manner discriminate against any employee or former employee



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	<p>exercising his or her rights under the NY Labor Law Whistleblower Statute, including:</p> <ul style="list-style-type: none">• adverse employment actions or threats to take such adverse employment actions against an employee in the terms of conditions of employment including but not limited to discharge, suspension, or demotion;• actions or threats to take such actions that would adversely impact a former employee's current or future employment; or• 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 to a federal, state, or local agency. <p>An employer can defend such a claim by showing that the alleged retaliation was based on grounds other than the employee's exercise of rights under the NY Labor Law Whistleblower Statute.</p>
<p>Is an employee required to make a report to the employer prior to making a public disclosure?</p>	<p>To receive the protection against retaliation pertaining to disclosure to a public body, the employee must (a) make a good faith effort to notify the employer by bringing the activity, policy or practice to the attention of a supervisor of the employer and (b) give the employer a reasonable opportunity to correct the activity, policy or practice.</p> <p>However, such employer notification <u>is not required</u> where:</p> <ul style="list-style-type: none">• there is an imminent and serious danger to the 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; <p>or</p>



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	<ul style="list-style-type: none">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.
What notice is required to employees?	<p>Every employer must post a notice to inform employees of their protections, rights and obligations under the NY Labor Law Whistleblower Statute. The notice must be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment.</p> <p><i>As of the date of this Alert, the NYS DOL has not yet posted a notice that employers can use to meet this requirement.</i></p>
Are there penalties?	<p>An employee who has been subject to a retaliatory action may file a civil action in court within two years after the retaliatory action. The employee is entitled to a jury trial.</p> <p>The court may order the reinstatement of the employee to the same or equivalent position, or “front pay” instead; the reinstatement of full benefits and seniority; lost wages and benefits; and payment of the employee’s costs, including attorney’s fees.</p> <p>The court may also order a civil penalty up to \$10,000 and/or punitive damages if the violation was “willful, malicious or wanton”.</p>

It should be noted that for New York nonprofit organizations, the implementation of the amended NY Labor Law Whistleblower Statute is complicated by its inconsistent overlap with the whistleblower requirements under the NY Not-for-Profit Corporation Law (“NPCL”). Examples of such inconsistencies include:

- The NPCL requires whistleblower policies only for organizations with 20 or more employees and over \$1 million in annual revenue in the prior year. The NY Labor Law Whistleblower Statute applies to all employers having at least 1 employee.
- The NPCL covers directors, officers, key persons, employees and volunteers. In a significant expansion, the NY Labor Law Whistleblower Statute covers not only employees, but also independent contractors and former employees; but it does not cover non-employee directors, officers, key persons or volunteers.



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- The NPCL protects employees who make a good faith report of an employer's action that is "illegal, fraudulent or in violation of any adopted policy". NY Labor Law Whistleblower Statute protects a different scope of whistleblower reports, including reports of violations of ordinances, executive orders or judicial/administrative decisions. The employee need only "reasonably believe" there is a violation of a law, rule or regulation or a danger to the public health or safety.
- While not required under the NPCL, the NY Labor Law Whistleblower Statute requires the employee to make a "good faith effort" to notify the employer before making the disclosure to a public body. However, there are exceptions in which prior notice is not required.
- The NPCL allows three options for notice: distribution to directors, officers, key persons, employees and volunteers who provide substantial services, posting at the employer's office in a conspicuous location accessible to employers and volunteers, or posting on the employer's website. The NY Labor Law Whistleblower Statute provides only one notice options - the employer must notify employees of their rights by posting "conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment".

This alert is for general information purposes and should not be construed as legal advice. If you would like information about this alert, please contact one of the firm's attorneys:

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